Bench Book/ Criminal Charge Book.

Judicial College of Victoria

A Bench Book of model jury directions in criminal trials.
Contains explanatory commentary and jury checklists on criminal offences, and evidentiary and procedural issues in criminal trials.

1 Preliminary Directions

1.1 Introductory Remarks

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1. A number of studies into the jury system have suggested that it is highly beneficial for the judge to provide the jury with information at the beginning of a trial, to assist them in performing their role.[1]
2. It is suggested that "the process of being empanelled as a member of the jury can be a thoroughly confusing experience", and that the provision of basic information by the judge at the beginning of the trial can help jurors to "settle into their task".[2]
3. The following types of information have been seen to be of assistance to jurors:
    - Information about the importance of jury duty;
    - Information about the roles of the judge, jury and counsel;
    - Information about the nature of the trial process and about the characteristics of the adversary system;
    - Instructions concerning the onus and standard of proof and the right of each accused to separate consideration of his or her case;
    - An introduction to other common concepts that will be used throughout the trial, such as inferences;
    - Guidance about how to assess witnesses and evidence;
    - Information about matters such as note-taking and asking questions;
    - Procedural suggestions about matters such as electing a foreperson, arranging a discussion format and deliberation procedures;
    - Information about the secrecy and anonymity of jury deliberations;
    - Information about the court and about any local facilities available to jurors.
4. While the Juries Commissioner provides some of this information to jurors prior to the trial, it has been suggested that it is also advantageous for the judge to address these matters when jurors are beginning to focus more clearly on their jury service.[3]

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[1] See, e.g. Parliament of Victoria Law Reform Committee, *Jury Service in Victoria*, Final Report (1991); New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial* (Report No 48, March 1986); New Zealand Law Commission, *Juries in Criminal Trials* (Report No 69, 2001); Law Reform Commission of Canada, *The Jury* (Report No 16, 1982); Royal Commission on Criminal Justice, *Report* (1993); Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (Report, September 2001). See also *R v PZG* [2007] VSCA 54.

[2] Parliament of Victoria Law Reform Committee, *Jury Service in Victoria*, Final Report (1991).

[3] Lord Justice Auld, Review of the Criminal Courts of England and Wales (Report, September 2001).

5. Studies have shown that jurors who are given such information by the judge at the beginning of a trial are better able to follow the evidence presented in court, and to apply the law to the facts of the case during deliberations.[4]

6. This is supported by research in cognitive psychology, which has shown that the more information a person has, the better able that person is to frame the information that he or she is about to receive. This enhances recall and aids in the interpretation of ambiguous material. It also leads to greater levels of juror satisfaction.[5]

7. One study has even shown that a judge's instructions may *only* have an effect on the jury's decision when delivered at the commencement of the trial.[6] It is suggested that this is because jurors will usually have already assessed the evidence by the time the judge delivers his or her final charge, and will not be able to retrospectively evaluate and judge the evidence in accordance with instructions which are first given at that late stage.[7]

8. It is therefore desirable to provide the jury with information such as that outlined above at the outset of the trial, and again in summary form during the judge's final charge (see, e.g. *R v PZG* [2007] VSCA 54). Judges may also wish to give a charge welcoming potential jurors prior to empanelment. Part 1 of this Book contains a number of suggested directions for use at the beginning of a trial.

9. It is also desirable to give the jury a short break immediately after they have been empanelled and charged, to allow them to orient themselves as a group and familiarise themselves with their surroundings.

10. If a judge is concerned about addressing matters that may not arise during the trial, he or she should warn the jury that the preliminary instructions may touch on issues which are not essential to their decision. In the judge's final charge, he or she should deliver revised instructions, advising the jury of any changes that have occurred since giving the preliminary instructions.[8]

Last updated: 15 June 2007

1.2 Jury Empanelment

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Warning: Part 6 of the *Juries Act 2000* (Vic) establishes a set of steps that must be followed when empanelling a jury. Failure to follow the applicable steps will lead to the jury being unlawfully constituted, and will result in the trial being viewed as a nullity (*R v Panozzo; R v Iaria* (2003) 8 VR 548).

[4] Parliament of Victoria Law Reform Committee, *Jury Service in Victoria*, Final Report (1991).

[5] Ibid.

[6] SM Kassin and LS Wrightsman, 'On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts' (1979) 37(10) *Journal of Personality and Social Psychology* 1877.

[7] New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Discussion Paper 12 (1985).

[8] Ibid.

Information to Provide to Jurors

1. In all cases the jury panel should be informed about the following matters prior to empanelment:
   (a) The type of charge;
   (b) The name of the accused;
   (c) The names of the principal witnesses expected to be called;
   (d) The estimated length of the trial; and
   (e) Any other information the court thinks relevant (Juries Act 2000 s 32(1)).
2. It is generally desirable to read out the names of all witnesses, as well as any other people whose names may be mentioned during the trial, a knowledge of whom might cause a juror to be embarrassed. If there are many names to be read, it may be appropriate to provide a list to the jury (see, e.g. *R v Lewis* (2000) 1 VR 290).
3. In addition to telling the jurors the estimated length of the trial, it is helpful to advise them of the hours the court ordinarily sits, and of any proposed breaks in the trial (e.g. to accommodate Christmas).[9]
4. If the judge intends to provide the jury with "other information" (as allowed by the *Juries Act 2000* s 32(1)(e)), it is advisable to discuss the matter with counsel beforehand (see, e.g. *R v Knight* [2004] VSCA 48).
5. In a trial for murdering a security guard at an abortion clinic, it was held to be appropriate for the judge to ask the jury panel members whether they held strong views about abortion, such that it might affect their capacity to be impartial (*R v Knight* [2004] VSCA 48).

Excusing Jurors

6. After providing the jury panel with this information, the court must ask whether any people on the panel seek to be excused from jury service on the trial (*Juries Act 2000* s 32(2)). The court may excuse a potential juror if it is satisfied that the person:
   (a) Will not be able to consider the case impartially; or
   (b) Is unable to serve for any other reasons (*Juries Act 2000* s 32(3)).
7. Before the panel is assembled, the Juries Commissioner will have provided prospective jurors with information about the expected length of the trial and sitting hours, and invited applications to defer jury service on the basis of matter such as child care responsibilities, travel commitments, employment issues and health issues that may interfere with jury service.[10] Many of these applications are dealt with administratively by the Juries Commissioner, and so it is expected that judges will receive few applications to be excused on the basis of personal circumstances.
8. It is not necessary to excuse a person who has had a particular life experience (e.g. a victim of a sexual offence) from serving on a jury in a trial which concerns matters to which that experience is relevant (e.g. a sexual offence trial). It should not be assumed that such a person is any more likely to be prejudiced than other jurors (*R v Goodall* (2007) 15 VR 673, [3], [29]–[31]).

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[9] JH Phillips, 'Can the Jury Cope?' (1987) 61(9) *Australian Law Journal* 479.

[10] Ibid.

9. If it is anticipated that a number of documents will be provided to the jury during the trial, the judge may wish to inform jurors of this prior to seeking excuses. This will allow jurors who have difficulty reading to seek to be excused from jury service.
10. If it becomes apparent to a judge when taking a juror's oath or affirmation that there are particular difficulties that may restrict his or her capacity to serve as a juror (such as difficulties with English or certain physical conditions), the judge may wish to excuse the juror.
11. Jurors should be allowed to make their application for excusal in writing, as they might reasonably wish to keep the reasons for their application confidential. It is at the judge's discretion whether or not to allow the defence to see any written application provided by a juror (*R v Lewis* (2000) 1 VR 290).
12. There is no absolute right of an accused person to be told the ground on which a prospective member of the jury applies to be excused from serving or, if the application is refused, the ground of the refusal (*R v Lewis* (2000) 1 VR 290).
13. There is also no requirement for a judge to hear and determine applications for excusal in public. However, it is generally desirable to exercise the judge's power to excuse jurors in open court, to demonstrate publicly the seriousness with which the court regards a citizen's obligation to serve as a juror, and the trouble that the court takes in deciding whether a person summoned ought to be excused (*R v Lewis* (2000) 1 VR 290).

Last updated: 11 July 2018

1.2.1 Charge: Jury Empanelment

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Members of the jury panel, in a moment I am going to give you a final opportunity to apply to be excused from sitting on the jury for this trial. Please listen carefully to what I am about to say, so that you will know whether you should apply.

Possible prejudicial knowledge

It is essential that every member of the jury be completely open-minded about the case that they will hear, and not favour one side or the other. Sometimes a juror knows one of the people involved in the trial, or knows something about them, and so may not be able to be unbiased. Even if that juror feels capable of treating the people involved in the case fairly, to the outside world it may seem likely that they will favour one side or the other. This would undermine the interests of justice.

A similar problem arises if a juror has, or believes they have, information about the facts of the case.

I therefore need to give you some information about this case, and the people involved in it. You should listen to this information carefully, to see if you recognise any of the names, or have any other information or knowledge about the case. If you do, you should apply to be excused when my associate asks you in a moment.

The accused person's name is [*insert name*].

[He/she] has been charged with [*list and describe the offence*[*s*]*, mentioning the name*[*s*] *of any victim*[*s*]].

In the course of the trial, it is likely that the following people will be called as witnesses [*insert names of witnesses*]. You may also hear the following people mentioned [*insert names of people who may be mentioned during the trial, a knowledge of whom might cause a juror to be embarrassed*.]

[*Insert any other relevant information that may affect juror impartiality. This information should be discussed with counsel prior to raising it with the jury.*]

As I have said, if any of you know the accused, or any of the other people whose names I have mentioned, you should apply to be excused when my associate asks you.

Duration of the trial

This trial is expected to last until [*insert anticipated end date*]. During the trial, you will need to attend court [*specify sitting days and hours. Advise of any anticipated breaks in the trial*]. The Juries Commissioner has already given you several opportunities to apply to defer jury service because of the expected length of the trial, or because of personal circumstances, such as child care obligations or issues with your health. But you will have a further opportunity to apply to be excused if you wish to do so. If you think you have a valid reason for being excused because of the trial length or your personal circumstances, then you should apply to be excused when my associate asks you.

Other Reasons

Finally, there may also be some personal reason why you feel you cannot be a juror in this case. The law recognises that a person can be excused from being on a jury if they will be unable to consider the case impartially or if they are unable to serve for any other reason. Consider whether you will be able to decide the case fairly. In a case involving allegations of sexual offences, a potential juror once told the judge that it was "too close to home". That may have meant he or she could not treat the parties to the case fairly. However, other people in similar situations serve as jurors in sexual offence cases every day, and can put aside any personal experiences, or any bias or sympathy that may arise from the fact that the case involves an allegation of a sexual offence.

I urge you to think carefully before you apply to be excused because you cannot be impartial or for any other reason. Serving on a jury is one of the most important things that you can do as a member of the community, and our system of justice cannot operate unless people are prepared to perform this duty.

Applying to be excused

In a moment my associate will call each of your [numbers/names], and ask you to answer "present". If you want to apply to be excused, you should answer "excuse". Once everybody's [name/number] has been called, I will hear the applications to be excused. If your reason for wanting to be excused is personal, you may give it to me in writing. Paper will be provided to you upon request.

Last updated: 11 July 2018

1.3 Selecting a Foreperson

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1. It is necessary to choose a foreperson to communicate with the judge and to announce the verdict. Other than serving these roles, the foreperson has no higher status or different function than the other jurors (*Ng v R* (2003) 217 CLR 521 (Kirby J)).
2. Depending on the nature of the case, consideration should be given to delaying the appointment of the foreperson until the jurors have had time to become acquainted. Allowing the jurors to appoint the foreperson within a reasonable time after empanelment – rather than always requiring this to be done at the outset of the trial – will facilitate the appointment of the most appropriate person.
3. The jury may change the foreperson during the course of the trial. The process of selection and change is private to the jury. The reasons should remain unknown to the judge, the parties and the community (*Ng v R* (2003) 217 CLR 521 (Kirby J); *R v Lonsdale* [1915] VLR 269).
4. If more than 12 jurors have been empanelled and remain at the time at which the jury is required consider its verdict, and the foreperson is selected in the ballot to reduce the number of jurors to 12, that selection is to be disregarded and the foreperson is to remain on the jury (*Juries Act 2000* s 48(2)).

Last updated: 14 November 2006

1.3.1 Charge: Selecting a Foreperson

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My associate is about to ask you to select a foreperson.

The foreperson will speak on your behalf. He or she will be the person who asks me any questions you may have, and who tells me anything else that you want to say. At the end of the trial, it is the foreperson who will deliver your verdict.

Other than that, the foreperson is no different from any other juror. You are all equal judges of the facts in the case, and are all entitled to have your opinions considered equally. Just because a person is appointed as a spokesperson does not mean that his or her opinions about the case count more than those of anyone else, or should be given any greater respect.

Given the role played by the foreperson, the person you select should be someone who is not going to be shy about asking questions or interrupting proceedings. He or she should be a person who is willing to speak up when necessary, and who can communicate any questions or other matters to me.

Although the foreperson will ordinarily be the person who communicates with me, that does not prevent any of you from directly raising a matter with me if necessary. You also have the right to say if your position has been misstated in anything said here in the courtroom, by the foreperson or any other person.

Last updated: 14 November 2006

1.4 The Role of Judge and Jury

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Role of the Jury

1. The role of the jury is to determine the facts, apply relevant principles of law to those facts, and return a verdict (*R v Dao* (2005) 156 A Crim R 459; *R v Nguyen* [2006] VSCA 158; *Azzopardi v R* (2001) 205 CLR 50).
2. This requires the jury to:
    - Determine whether, and to what extent, the evidence is to be believed;
    - Decide whether to draw inferences from the evidence; and
    - Apply the law, as they are directed upon it, to the facts as they find them to be (*Director of Public Prosecutions v Stonehouse* [1978] AC 55. See also *Metropolitan Railway Co v Jackson* (1877) 3 App Cas 193; *Cofield v Waterloo Case Co Ltd* (1924) 34 CLR 363; *Bratty v AG for Northern Ireland* [1963] AC 386).
3. It is for the jury alone to decide the facts of a case. This must not be obscured by the performance of the judge's duties (*RPS v R* (2000) 199 CLR 620; *R v Melbourne* (1999) 198 CLR 1).
4. Similarly, it is the jury alone that determines the verdict. The judge must be careful to make this clear (*R v Johnson* (1986) 43 SASR 63).
5. Although the jury are the sole judges of the facts, they must accept and apply the judge's directions about the law (*Joshua v R* [1955] AC 121; *R v Beeby* (1911) 6 Cr App R 138; *R v Frampton* (1917) 12 Cr App R 202).
6. Jurors should not be drawn into the process of questioning witnesses (*Tootle v R* (2017) 94 NSWLR 430, [59]). See also 1.10 Trial Procedure regarding jurors questioning witnesses.

Role of the Judge

7. The judge must instruct the jury about so much of the law as they need to know in deciding the real issue or issues in the case (*Azzopardi v R* (2001) 205 CLR 50; *RPS v R* (2000) 199 CLR 620).

8. This requires the judge to:

   i) Instruct the jury about the elements of the offences and the onus and standard of proof;

   ii) Identify the issues in the case and to relate the law to those issues;

   iii) Put the defence case fairly; and

   iv) In some cases warn the jury about impermissible reasoning, or about particular care that must be shown before accepting certain kinds of evidence (*RPS v R* (2000) 199 CLR 620; *Azzopardi v R* (2001) 205 CLR 50).

9. The judge also has an obligation to summarise the respective cases of both the prosecution and the defence, and should remind the jury of the arguments of counsel (*RPS v R* (2000) 199 CLR 620; *R v Mogg* (2000) 112 A Crim R 417; *R v Conway* [2005] QCA 194).

10. The judge may remind the jury of the facts, and assist them to understand those facts (*Stingel v The Queen* (1990) 171 CLR 312; *Brownlee v R* (2001) 207 CLR 278).

11. However, the jury always remain the sole judges of the facts. A judge must therefore not direct the jury about how they may (as opposed to may not) reason towards a conclusion of guilt (*Azzopardi v R* (2001) 205 CLR 50).

12. The role of the judge also includes:

    - Determining the admissibility of evidence;
    - Determining whether there is evidence which, if it is believed, could establish the facts in issue (*Stingel v The Queen* (1990) 171 CLR 312);
    - Determining whether inferences can legitimately be drawn from the evidence (*Metropolitan Railway Co v Jackson* (1877) 3 App Cas 193; *Cofield v Waterloo Case Co Ltd* (1924) 34 CLR 363); and
    - Exercising proper control over the proceedings, in a way that does not infringe on the accused's right to a fair trial (*R v Boykovski and Atanasovski* (1991) A Crim R 436).

13. The judge has power to exclude the jury from the courtroom while hearing arguments on the admissibility of evidence or determining other applications. This power may be exercised whether or not the accused consents (*R v Hendry* (1989) 88 Cr App R 187; *Demirok v R* (1977) 137 CLR 20; *Peacock v R* (1911) 13 CLR 619).

14. The judge should not explain to the jury the specific reason for asking them to leave the room, nor the outcome of the matter heard in the jury's absence, as it is not relevant to any decisions the jury needs to make, and may wrongly influence them (*R v Williams* [1982] WAR 277; *R v Smith* (1986) 85 Cr App R 197; *Crosdale v R* [1995] 2 All ER 500. See also *Basto v R* (1954) 91 CLR 628; *R v Mitchell* [1998] AC 695; *Thompson v R* [1998] AC 811).

15. However, because there is a danger that the jury will think that material prejudicial to the accused is going to be disclosed in their absence, the jury should be told that they are being asked to leave the room because there is a matter of law that needs to be resolved in their absence (*R v Williams* [1982] WAR 277; *Crosdale v R* [1995] 2 All ER 500; *R v Anderson* (1929) 21 Cr App R 178).

16. The judge must perform all of their tasks in a fair and even-handed manner (*R v Dao* (2005) 156 A Crim R 459; *R v Nguyen* [2006] VSCA 158).

17. See 3.2 Overview of Final Directions and 3.9 Judge's Summing Up on Issues and Evidence for further information on the role of the judge.

Need for a Direction

18. The judge must always direct the jury about the roles of the judge and jury (*RPS v R* (2000) 199 CLR 620; *R v Sinclair* (1989) 44 A Crim R 449).

19. This direction should usually be given at the commencement of the trial, as well as after the completion of all the evidence and the presentation of argument by counsel (see, e.g. *R v Sinclair* (1989) 44 A Crim R 449).

20. This is because it is good practice to provide some assistance to a jury at the outset of the trial. However, comments which are made at a preliminary stage may not have their significance fully appreciated by the jury, which is unfamiliar with the issues which may arise in the trial (*R v Sinclair* (1989) 44 A Crim R 449).

Last updated: 2 October 2017

1.4.1 Charge: The Role of Judge and Jury

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Introduction

Serving on a jury may be a completely new experience for some, if not all, of you. To help you perform that role properly, I will now describe your duties as jurors and the procedures that we will follow during the trial. I will also explain to you some of the principles of law that apply in this case.

During and at the end of the trial, I will give you further instructions about the law that applies to this case. You must listen closely to all of these instructions and follow them carefully.

If at any time you have a question about anything I say, please feel free to ask me. You should do this by writing it down, and passing it to my tipstaff, [*insert name*], who will hand it to me.

Roles of Judge, Jury and Counsel

Members of the jury, you represent one of the most important institutions in our community – the institution of trial by jury. Our legal system guarantees any individual charged with a criminal offence the right to have the case presented against him or her determined by twelve independent and open-minded members of the community, in accordance with the law.

In this case, it is alleged by the prosecution that NOA has committed the offence[s] of [*insert offences*].[11] S/he has pleaded "not guilty", and so it is for you, and you alone, to decide whether s/he is guilty or not guilty of [this/these] crime[s].

I note that, when referring to the crime[s] that the accused has been charged with, I will sometimes use the words "offence" or "charge" – they all mean the same thing.

In all criminal trials of this type, the court consists of a judge and jury. We are going to be assisted in this case by counsel for the prosecution, [*insert prosecutor's name*], and defence counsel, [*insert defence counsel's name*].[12] Each of us has a different role to play.

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[11] This charge is drafted for use in cases involving one accused. If the case involves multiple accused, it will need to be modified accordingly.

[12] This sentence will need to be modified if the accused is unrepresented.

Role of the Jury

It is your role, as the jury, to decide what the facts are in this case. You are the only ones in this court who can make a decision about the facts. You make that decision from all of the evidence given during the trial.

It is also your task to apply the law to the facts that you have found, and by doing that decide whether the accused is guilty or not guilty of the offence[s] charged.

Role of the Judge

It is my role, as the judge, to ensure that this trial is fair and conducted in accordance with the law. I will also explain to you the principles of law that you must apply to make your decision. You must accept and follow all of those directions.

I want to emphasise that it is not my responsibility to decide this case. The verdict that you return has absolutely nothing to do with me. So while you must follow any directions I give you about the law, you are not bound by any comments I may make about the facts.

It is unlikely that I will make any comments about the evidence. If you disagree with any comments I make, you must disregard them. Do not give them any extra weight because I, as the judge, have made them. It is your view of the facts which matters, not mine. You are the judges of facts – you alone.

Role of Counsel

The role of counsel is to present the case for the side for which they appear. [*Insert name of prosecutor*] presents the charge[s] for the prosecution. [*Insert name of defence counsel*] appears for the accused, and will represent him/her throughout the trial.[13]

You do not need to accept any comments that counsel may make during their addresses. Of course, if you agree with an argument they present, you can adopt it – in effect, it becomes your own argument. But if you do not agree with their view, you must put it aside. As I have told you, you alone are the judges of the facts.

Similarly, you are not bound by what counsel says about the law. I am the judge of the law, and it is what I tell you about the law that matters. If counsel says something different from what I say about the law, you must ignore it and follow my directions.

Last updated: 17 May 2019

1.5 Decide Solely on the Evidence

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1. The jury must be directed to base their verdict solely on the evidence given before them in the trial. In reaching their verdict they must disregard any knowledge they may otherwise have acquired about the case (*Glennon v R* (1992) 173 CLR 592; *Murphy v R* (1989) 167 CLR 94; *R v VPH* 4/3/94 NSW CCA; *R v Vjestica* [2008] VSCA 47).
2. The jury should be told that the following matters constitute evidence:
    - The answers to questions asked in court;
    - Documents and exhibits admitted into evidence;

[13] This section will need to be modified if the accused is unrepresented.

- Formal Admissions.

3. The jury should also be directed that the following matters do *not* constitute evidence:
    - Questions asked of witnesses (unless the witness agrees with the proposition) (*R v Johnston* [2004] NSWCCA 58; *R v Lowe* (1997) 98 A Crim R 300; *Lander v R* (1989) 52 SASR 424; *R v Robinson* [1977] Qd R 387);
    - Counsels' addresses and arguments (*R v Parsons* [2004] VSCA 92; *R v Lowe* (1997) 98 A Crim R 300);[14]
    - The judge's addresses and comments (*R v Boykovski and Atanasovski* (1991) A Crim R 436. See 3.9 Judge's Summing Up on Evidence and Issues for further information).
4. The principle that questions asked of witnesses are not evidence must be approached with caution when applied to puttage by defence counsel to prosecution witnesses. It may unfairly undermine the defence case to say that if the witness rejected the puttage then there is no evidence to support that proposition. Such a direction would only be permissible if there is no other basis in the evidence which provides direct or inferential support for that proposition (*Mathieson v The Queen* [2021] VSCA 102, [31]).
5. It may be desirable to tell the jury that if they disbelieve the answer of a witness, that does not amount to positive evidence of the opposite of that answer. Disbelief of a denial generally provides no evidence of the fact denied. For a matter to be sufficiently proven, there needs to be independent, positive evidence (*Scott Fell v Lloyd* (1911) 13 CLR 230; *Edmunds v Edmunds* [1935] VLR 177; *Gauci v Cmr of Taxation (Cth)* (1975) 135 CLR 81; *Steinberg v FCT* (1975) 134 CLR 640; *R v Lowe* (1997) 98 A Crim R 300).
6. There may, however, be situations where disbelief of a witness allows the jury to draw a further inference, such as a conclusion that the truth would harm the witness, or that the witness is lying. For this reason, it can be dangerous to tell the jury to simply set aside any matter on which a witness is disbelieved, and give it no further consideration. Further, where there are only two possible states of fact, disbelief of one state of facts can support the conclusion that the other set of facts exists (see *Steinberg v FCT* (1975) 134 CLR 640; *Mathieson v The Queen* [2021] VSCA 102, [45]–[56]).
7. The judge should tell the jury that if they are aware of any publicity concerning the case or the accused, this must be placed out of their minds. They must focus only on the evidence led in court (*R v Skaf* (2004) 60 NSWLR 86; *R v Vjestica* [2008] VSCA 47. See "Pre-trial Publicity" below for further information concerning pre-trial publicity).
8. The judge should also tell the jury to disregard any feelings of prejudice or sympathy they may have in relation to the accused (*Glennon v R* (1992) 173 CLR 592).

External Communications

9. The jury should be told to avoid speaking to any people in the precincts of the court (*R v Skaf* (2004) 60 NSWLR 86).
10. The jury should also be told not to discuss the case with anyone other than their fellow jurors, and to do that only in the privacy of the jury room (*R v Skaf* (2004) 60 NSWLR 86).

[14] If the accused is self–represented, the jury should be told that his or her addresses and arguments are also not evidence.

11. This includes communicating about the case with court officials.[15] All questions about the case should be directed to the judge (*R v Stretton* [1982] VR 251; *R v Emmett* (1988) 14 NSWLR 327; *Jackson & Le Gros v R* [1995] 1 Qd R 547; *R v Briffa & Portillo* 21/4/96 Vic CCA; *R v GAE* (2000) 1 VR 198. See 1.10 Trial Procedure for further information about juror questions).

12. Jurors should be told not to bring mobile telephones or computers into the jury room (*R v Skaf* (2004) 60 NSWLR 86; *R v McCluskey* (1994) 98 Cr App R 216; *R v Evans* (1995) 79 A Crim R 66).

13. It is useful to explain to the jury that one of the reasons for the prohibition against discussing the case is that most people will want to make observations about the case. Such observations will be of no value, since these people will not have heard or seen the evidence, or received directions which are binding upon them, and they will not be subject to the same oath or affirmation as the jurors (*R v Skaf* (2004) 60 NSWLR 86).

Juror Enquiries

14. It is an offence for a juror to "make an enquiry" for the purpose of obtaining information about a party to the trial or any matter relevant to the trial, except in the proper exercise of his or her functions as a juror (*Juries Act 2000* (Vic) s 78A(1)).

15. "Making an enquiry" is defined to include:

    - Consulting with another person or requesting another person to make an enquiry;
    - Conducting research by any means (including using the internet) (see "Independent Research" below); or
    - Viewing or inspecting a place or object that is relevant to the trial, or conducting an experiment (see *Private Views and Experiments* below) (*Juries Act 2000* (Vic) s 78A(5)).

16. This offence applies to all jurors from the time they are selected or allocated as part of the jury panel, until they are either excused from jury service, returned to the jury pool or discharged by the trial judge (*Juries Act 2000* (Vic) s 78A(2)).

17. Jurors are not prohibited from making an enquiry of the court, or another member of the jury, in the proper exercise of their functions as a juror (*Juries Act 2000* (Vic) s 78A(3)).

18. Although the *Juries Act 2000* does not specify that judges must direct the jury about s 78A, this provision should be drawn to their attention (see, e.g. *Martin v R* (2010) 28 VR 579; *DPP v Dupas* [2010] VSC 409; *R v Rich (Ruling No 7)* [2008] VSC 437).

Independent Research

19. It is highly desirable for judges routinely to instruct the jury not to undertake any independent research (by internet or otherwise) concerning:

    - The parties to the trial;
    - Any other matter relevant to the trial; or
    - The law applicable to the case (*Martin v R* (2010) 28 VR 579; *R v K* (2003) 59 NSWLR 431. See also *Juries Act 2000* (Vic) s 78A; *Benbrika v R* (2010) 29 VR 593).

20. Judges should not avoid giving such a warning merely because they fear that it might place the idea in the mind of an inquisitive juror, and result in them conducting the kind of research the warning is intended to prevent (*R v K* (2003) 59 NSWLR 431).

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[15] Jurors may communicate with court officials about administrative or technical matters (such as setting up equipment) (*Dempster* (1980) 71 Cr App R 302; *R v Barnowski* [1969] SASR 386).

21. It is not sufficient merely to direct the jury that they must be true to their oath, to decide the case on the evidence and to identify the sanctions which apply to jurors who disobey the instructions. The judge must explain the reasons for the prohibition and how such conduct risks injustice and an unfair trial (*SD v R* (2013) 39 VR 487; *R v Skaf* (2004) 60 NSWLR 86; *R v K* (2003) 59 NSWLR 431).

22. The main reasons for the prohibition are that:

    - Independent research may involve acting on information that is not tested and may be wrong or inaccurate;
    - Independent research will involve acting on information which is unknown to the parties, which would be unfair. It is not for the jury to add to the evidence called by the parties;
    - Independent research may lead the jury to take into account legal principles that do not apply in the jurisdiction.

23. It is not inappropriate or improper for a jury to consult a dictionary about the meaning of an ordinary English word which they are told is a question for them (*Benbrika v R* (2010) 29 VR 593. See also *R v Chatzidimitriou* (2000) 1 VR 493 (Cummins AJA)).

Private Views and Experiments

24. The jury should be told they must not, either individually or as a group:

    - Make a private visit to the scene of the alleged offence;
    - Attempt any private experiment concerning any aspect of the case; or
    - Cause or request anyone else to do one of these things (*R v Skaf* (2004) 60 NSWLR 86. See also *Juries Act 2000* (Vic) s 78A).

25. The judge should tell the jury that to commit any of these acts would be to change their role from that of impartial jurors to investigators, and would lead them to take into account material that was not properly placed before them as evidence. Such material might require expertise in order to ensure that the inspection or experiment was properly conducted. In addition, the prosecution and the defence would be unaware of the material the jury were taking into account, and would be unable to test it (*R v Skaf* (2004) 60 NSWLR 86).

26. The jury should also be told that it is only views or experiments which occur in the presence of all jurors, counsel and the judge that are permitted. This allows safeguards to be taken to replicate the conditions which existed at the time of the relevant events. It also allows any relevant differences in the crime scene or in the circumstances of the experiment to be pointed out (*R v Skaf* (2004) 60 NSWLR 86).

27. See Views for further information concerning legitimate views, experiments, demonstrations and reconstructions.

Jury Room Experiments

28. As material objects produced in evidence and admitted as exhibits are part of the evidence in a trial, the jury are entitled to examine them and have regard to them in reaching their verdict. They may touch and handle them, and may engage in a limited amount of simple experimentation with them (*Kozul v R* (1981) 147 CLR 221).

29. In conducting such simple experiments, the jury are doing no more than using their own senses to assess the weight and value of the evidence. The results do not stand in place of the evidence – they consist of the juror's perceptions of the evidence itself (*Kozul v R* (1981) 147 CLR 221).

30. While the jury may conduct simple experiments in the jury room, they must not conduct experiments in the absence of the parties that go beyond the mere examination and testing of the evidence, and become a means of supplying new evidence (*Kozul v R* (1981) 147 CLR 221; *Hodge v Williams* (1947) 47 SR (NSW) 489; *Juries Act 2000* (Vic) s 78A).

31. So while the judge may encourage the jury to examine exhibits with a view to testing the evidence given, they should not encourage the jury to conduct experiments which will generate new evidence in the jury room (*Kozul v R* (1981) 147 CLR 221).

32. It may be necessary to warn the jury of the possible dangers of conducting even simple experiments in the jury room. For example, the present condition of the object experimented with may not be the same as its condition at the relevant time, or the fact to be observed may be such that a layperson might need to have their observation assisted by expert evidence (*Kozul v R* (1981) 147 CLR 221).

Irrelevance of Sentence

33. The judge should not tell the jury what the consequences of their verdict will be, unless required to do so by statute. This is because the question of sentence is the exclusive province of the trial judge, and is not relevant to the jury's determination (*Lucas v R* (1970) 120 CLR 171; *Kingswell v R* (1985) 159 CLR 264; *R v Costi* (1987) 48 SASR 269. See Mental Impairment for a statutory exception to this rule).

34. Counsel should also not refer to the penalty prescribed by law for the offence charged, or make any other reference to the consequences which will flow from the jury's verdict. If they do, the judge should intervene immediately in order to stop counsel, and instruct the jury that such matters are not their concern and are completely irrelevant to any issues they have to determine (*Attorney-General for South Australia v Brown* [1960] AC 432; *R v Costi* (1987) 48 SASR 269).

35. Counsel may, however, tell the jury that the accused faces an extremely serious charge, of which the law takes a serious view (*R v Neal* (1947) 53 ALR (CN) 616a).

36. Neither the judge nor counsel should mention the jury's right to add a rider to the verdict, or to make a recommendation for mercy (*Lucas v R* (1970) 120 CLR 171; *R v Black* [1963] 1 WLR 1311).

37. The judge must not tell the jury that the accused will not be prosecuted again on any other charge related to the matter in issue (*R v Morton* [2001] QCA 240).

Pre-trial Publicity

38. Where there has been pre-trial publicity about a case, or the people involved in a case, the judge has a responsibility to avoid unfairness to either party (*Glennon v R* (1992) 173 CLR 592; *R v Vjestica* [2008] VSCA 47; *R v Dupas* (2009) 28 VR 380).

39. In most cases, it will be possible to overcome any potential prejudice the accused might suffer due to pre-trial publicity by giving the jury appropriate and thorough directions designed to counteract such prejudice (*Dupas v R* (2010) 241 CLR 237; *Glennon v R* (1992) 173 CLR 592; *R v Vjestica* [2008] VSCA 47; *R v Dupas* (2009) 28 VR 380). See *Dupas v R* (2010) 241 CLR 237 for an example of such directions.

40. In determining whether such a direction will be sufficient to counter the effects of pre-trial publicity, jurors should not be regarded as exceptionally fragile and prone to prejudice. It should be assumed that they approach their task in accordance with the oath they take to listen to the directions that they are given, and to determine guilt only on the evidence before them (*Dupas v R* (2010) 241 CLR 237; *Glennon v R* (1992) 173 CLR 592; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344; *R v Vjestica* [2008] VSCA 47; *R v Dupas* (2009) 28 VR 380).

41. It is not necessary for a judge to be sure that any possible prejudice will be remediable by a warning, so long as they take all appropriate steps available to secure a fair trial (*Glennon v R* (1992) 173 CLR 592; *Murphy v R* (1989) 167 CLR 94).

42. If a judge determines that a warning alone will be insufficient to counter the effects of pre-trial publicity, they may conduct the trial in whatever manner is appropriate to counter those effects, within the ordinary procedural constraints. This includes adjourning the trial until the influence of prejudicial publicity subsides (*Glennon v R* (1992) 173 CLR 592; *R v Dupas* (2009) 28 VR 380. See also *DPP v Dupas* [2010] VSC 409).

43. The balancing of the legitimate interests of the accused and the prosecution will, in almost every case, mean that if the proceedings are to be stayed at all, they should only be stayed temporarily and for the minimum period necessary (*Glennon v R* (1992) 173 CLR 592; *R v VPH* 4/3/94 NSW CCA; *R v Dupas* (2009) 28 VR 380. See also *DPP v Dupas* [2010] VSC 409).

44. However, there may be extreme cases in which a permanent stay may be granted (*Dupas v R* (2010) 241 CLR 237; *Glennon v R* (1992) 173 CLR 592).

45. A permanent stay will only be necessary if there is a fundamental defect going to the root of the trial of such a nature that there is nothing the judge can do in the conduct of the trial to relieve against its unfair consequences (*Dupas v R* (2010) 241 CLR 237; *Glennon v R* (1992) 173 CLR 592).

46. A permanent stay should not be granted simply because there has been extensive adverse pre-trial publicity about the accused. Any unfair consequences of prejudice or prejudgment arising out of such publicity can be protected against by thorough and appropriate directions to the jury (*Dupas v R* (2010) 241 CLR 237).

47. In considering whether to grant a permanent stay, judges should take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial. Fairness to the accused is not the only consideration bearing on a court's decision as to whether a trial should proceed (*Dupas v R* (2010) 241 CLR 237).

Notifying the Judge About Irregularities

48. The jury should be directed that if it becomes apparent to any of them, in the course of the trial, that another juror has made an independent inquiry in relation to any aspect of the case, that should be brought immediately to the attention of the judge. This includes discovering that a juror has:

    - Made an inquiry about the accused or the background to the offence, or caused someone else to do so;
    - Made a private inspection of a relevant site, conducted a private experiment, or caused someone else to do one of these things; or
    - Discussed the case with anyone other than the remaining members of the jury (*R v Skaf* (2004) 60 NSWLR 86).

49. The jury should also be instructed that if it becomes apparent to any juror, in the course of the trial, that any matter which is not in evidence has found its way into the jury room, that should similarly be brought immediately to the attention of the trial judge (*R v Skaf* (2004) 60 NSWLR 86).

50. The jury should be told that the reason why it is necessary for such matters to be brought to the immediate attention of the judge is that, unless it is known before the end of the trial, it may not be possible to put matters right. This may either lead to an injustice occurring or a retrial becoming necessary (*R v Skaf* (2004) 60 NSWLR 86).

51. These directions should be expressed in specific terms, rather than simply instructing the jury to bring to the judge's attention any behaviour among the jurors that causes concern (cf. *R v Mirza* [2004] 1 WLR 665). Such a general direction may lead to matters being brought to the judge's attention which would involve inappropriate criticism of fellow jurors, or lead to the disclosure of jury deliberations (*R v Skaf* (2004) 60 NSWLR 86).

Last updated: 14 May 2021

1.5.1 – Charge: Decide Solely on the Evidence

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Introduction: What is Evidence?

I have told you that it is your task to determine the facts in this case, and that you should do this by considering all of the evidence presented in the courtroom. I now need to tell you what is and what is not evidence.

The first type of evidence is what the witnesses say.

It is the answers that you hear from the witnesses that are the evidence, and not the questions they are asked. This is important to understand, as sometimes counsel will confidently include an allegation of fact in a question they ask a witness. No matter how positively or confidently that allegation is presented, it will not form part of the evidence unless the witness agrees with it.

[Add the following shaded section if the judge believes it is necessary to further explain this point.]

Let me give you a simple example that has nothing to do with this case. Imagine counsel says to a witness "The car was blue, wasn't it?", and the witness replies "No, it wasn't". Given that answer, there is absolutely no evidence that the car was blue.

Even if you do not believe the witness, or think he or she is lying, there is no evidence that the car is blue. Disbelief of a witness's answer does not provide evidence of the opposite. To prove that the car was blue, there would need to be evidence from some other source, such as a photograph or the testimony of another witness.

Of course, if the witness had instead replied "yes, it was", there would be evidence that the car was blue. In such a case, the witness has adopted the suggestion made in the question. However, if the witness does not agree with that suggestion, the only evidence you have is that the car was not blue.

The second type of evidence is any document or other item that is received as an "exhibit". The exhibits will be pointed out to you when they are introduced into evidence. When you go to the jury room to decide this case, some of the exhibits will go with you for you to examine. Consider them along with the rest of the evidence and in exactly the same way.

[Add the following shaded section if any formal admissions are likely to be put before the jury.]

The third type of evidence is what is called an "admission". Admissions are facts that the prosecution and defence agree about. When that happens, no other evidence is required – the admissions are treated as established facts. I will tell you about any admissions that have been made in this case when relevant.

Nothing else is evidence in this case. This includes comments about the facts made by counsel.[16] The only evidence is the witnesses' testimony, [the admissions] and the exhibits.

No Sympathy or Prejudice

It is your duty to decide this case only on the basis of that evidence. You must ignore all other considerations.

In particular, you should dismiss any feelings of sympathy or prejudice you may have, whether it is sympathy for, or prejudice against, the accused or anyone else. No such emotion has any part to play in your decision.

[16] If the accused is unrepresented, the jury should be told that what s/he says in his/her addresses, or when questioning witnesses, is also not evidence.

You are the judges of the facts. That means that in relation to all of the issues in this case, you must act like judges. You must dispassionately weigh the evidence logically and with an open-mind, not according to your passion or feelings. Your duty is to consider the evidence using your intellect not your heart.

No Outside Information

When you retire to consider your verdict, you will have heard or received in court, or otherwise under my supervision, all the information that you need to make your decision.

Unless I tell you otherwise, you must not base your decision on any information you obtain outside this courtroom. For example, you must completely ignore anything that you have seen or heard in the media about this case or the people involved in it, or which you may see or hear. You must consider only the evidence presented to you here in court [*if a view may be conducted add: "or otherwise under my supervision"*].[17]

Most importantly, you must not make any investigations or enquiries, or conduct independent research, concerning any aspect of the case or any person connected with it. That includes research about the law that applies to the case. You must not use the internet to access legal databases, legal dictionaries, legal texts, earlier decisions of this or other courts, or other material of any kind relating to the matters in the trial. You must not search for information about the case on Google or conduct similar searches. You also must not discuss the case on Facebook, X or blogs, or look at such sites for more information about the case. If you believe you need more information, ask me. Part of my role is to ensure you understand the legal issues in the case.

You may ask yourself the question: what is wrong with looking for more information? Seeking out information, or discussing a matter with friends, may be a natural part of life for you when making an important decision. As conscientious jurors, you may think that conducting your own research will help you reach the right result. However, there are three important reasons why using outside information, or researching the case on the internet, would be wrong.

First, media reports, claims made outside court and information in legal databases you find may be wrong, inaccurate or not relevant. The prosecution and defence will not have a chance to test the information. Similarly, I will not know if you need any directions on how to use such material.

Second, deciding a case on outside information, which is not known to the parties, is unfair to both the prosecution and the defence. The trial is conducted according to well established legal principles and its not for you to go looking for other information or to add to the evidence or the directions I will give you.

Third, acting on outside information would be false to the oath or affirmation you took as jurors to give a true verdict according to the evidence. You would cease being a juror, that is, a judge of the facts, and have instead taken on the role of an investigator.

If one of your fellow jurors breaches these instructions, then the duty falls on the rest of you to inform me or a member of my staff, either in writing or otherwise, without delay. These rules are so important that you must report your fellow juror.

[*Add the following shaded section if there is a risk that a juror may visit the crime scene or attempt a private experiment*.]

[17] If there has been significant pre-trial publicity about the case or the parties involved, it may be necessary to give a more detailed warning. See 1.5 Decide Solely on the Evidence for further information.

For similar reasons, unless I tell you otherwise, you must not visit the scene of the alleged offence. You also must not attempt any private experiments concerning any aspect of the case. As I have explained, you are jurors assessing the evidence which is led in the case. You are not investigators, and must not take into account material that has not been properly presented to you as evidence.

Consequences of breaching instructions

You may have a question about what could happen if you acted on outside information or conducted your own research.

The immediate outcome is that the jury may need to be discharged and the trial may have to start again. This would cause stress and expense to the witnesses, the prosecution and the accused. It would also cause stress and inconvenience to the other jurors, who will have wasted their time sitting on a case which must be restarted.

Second, it is a criminal offence for a juror to discuss the case with others or to conduct research on the case. You could therefore be fined and receive a criminal conviction, which may affect your ability to travel to some countries. Jurors have even been sent to jail for discussing a case on Facebook.

More broadly, jurors conducting their own research undermines public confidence in the jury system. The jury system has been a fundamental feature of our criminal justice system for centuries.

For all these reasons, it is essential that you decide the case solely on the evidence presented in court, without feelings of sympathy or prejudice. You must not conduct your own research into the case or discuss the case with others who are not on the jury.

[*Judges may describe a specific example of the consequences of breaching instructions*]

Warnings About Discussing the Case

As judges of the facts, it is also important that you are careful to avoid any situations that could interfere with your ability to be impartial, or that could make you appear to be biased towards one side or the other.

You must therefore be careful not to get into conversation with anyone you do not know, who you might meet around or near the court building. Otherwise you may find yourself talking to someone who turns out to have a special interest in the case.

You must also avoid talking to anyone other than your fellow jurors about the case. This includes your family and friends. You must not discuss the case on social media sites, such as Facebook, X, Instagram, blogs or anything else like that. Of course, you can tell your family and friends that you are on a jury, and about general matters such as when the trial is expected to finish. But do not discuss the case itself or talk about the evidence. It is your judgment, not theirs, that is sought. You should not risk that judgment being influenced by their views – which will necessarily be uninformed, because they will not have seen the witnesses or heard the evidence.

[*If the judge considers it appropriate to warn against discussing the case with a doctor or psychologist, add the following shaded section*]

If you speak to a medical professional during the trial, such as a doctor or a regular psychologist that you see, you could tell them you are on a jury if that is relevant. But as with your family and friends, you must not talk to them about the evidence, the arguments, or the opinions of your fellow jurors. Those are confidential between you and your fellow jurors, and must not be disclosed even to a medical professional.

[*If the judge considers it appropriate to inform the jury of the Juror Support Program, add the following shaded section*]

At the end of the trial, you will have the option to access a Juror Support Program. A Juries Victoria staff member will give you more information about that in due course.

[*If the case is likely to involve distressing material, add the following shaded section instead of the shaded section directly above*]

As this case involves charges of [identify relevant charges], you may hear or see evidence that may be distressing. [If desired, give an example, such as crime scene photos or evidence from the complainant]. Everyone has a different response to the sorts of material that are part of a criminal trial.

At the end of the trial, you will have access to a Juror Support Program. A Juries Victoria staff member will give you more information about that in due course.

Some of you might have a regular doctor or psychologist you speak to about distressing experiences. But as a juror there are limits on what you can say during the trial, even to medical professionals. You can tell them you are on a jury. You can also tell them about what effect the trial and the evidence has on you. But you must not tell them what the evidence is, or what the arguments are, or what fellow jurors have said. All those matters are confidential. And like with your friends and family, you must not risk having your view of the case influenced by medical professionals.

You are free to discuss the case amongst yourselves as it continues, although you should only do this in the jury room. However, you should form no conclusive views about the case until you have heard all of the evidence, listened to counsel on both sides, and received my instructions about the law. Keep an open mind.

Consequences of breaching instructions revisited

You have already heard what can happen when jurors disregard the instruction not to conduct their own research. Similar consequences can follow if you discuss the case with others.

You must therefore also let me know if someone tries to discuss the case with you, or if you learn that one of your fellow jurors has been discussing the case with someone outside the jury.

Last updated: 4 March 2024

1.6 Assessing Witnesses

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1. It is for the jury, who have seen and heard the witnesses, to decide whether they accept their evidence. They are free to accept or reject the whole of a witness's evidence, or to accept some of the evidence and reject the rest (*Cubillo v Commonwealth* (2000) 174 ALR 97; *Flint v Lowe* (1995) 22 MVR 1; *S v M* (1984) 36 SASR 316).
2. It is therefore customary to direct a jury that they are not bound to believe the evidence of any witness, and that they are not bound to believe the whole of the evidence of any witness. They should be told that they may accept some parts of a witness's evidence, but not other parts (*Cubillo v Commonwealth* 174 ALR 97; *Dublin, Wicklow & Wexford Railway Co v Slattery* (1878) 3 App Cas 1155).
3. The jury should also be directed that it is their duty to keep an open mind about the truthfulness of any individual witness, and about the accuracy of that witness's recollection, until all the evidence has been presented. It is only once they have heard all of the evidence that it will be possible for them to assess to what extent, if any, that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses. Only then should they direct their minds to the question of whether the guilt of the accused has been proved beyond reasonable doubt (*Haw Tua Tau v Public Prosecutor* [1982] AC 136).

4. Where a witness was intoxicated at the time of the event about which he or she is giving evidence, it may be appropriate to direct the jury that the reliability of his or her evidence may be affected (see, e.g. *O'Leary v Daire* (1984) 13 A Crim R 404; *Bedi v R* (1993) 61 SASR 269; *R v Mathe* [2003] VSCA 165; *R v Baltensberger* (2004) 90 SASR 129; *R v MC* [2009] VSCA 122).[18]
5. The judge, prosecutor or defence counsel must not suggest in any way to the jury that an interest in the outcome of the trial is a factor to take into account in assessing the evidence of witnesses generally (*Jury Directions Act 2015* s 44H, as amended in 2017).
6. This is because the jury will likely conclude that the accused has the greatest interest, and so the direction may have the effect of undermining the presumption of innocence (*Robinson v R* (No 2) (1991) 180 CLR 531; *R v McMahon* (2004) 8 VR 101; *Hargraves & Stoten v R* (2011) 245 CLR 257; Criminal Law Review, Department of Justice and Regulation (Vic), Jury Directions: A Jury-Centric Approach Part 2 (Report, February 2017) 11–14).
7. Suggestions that a witness has a *particular* interest in the outcome of a trial are permitted. For information on directions about assessing the evidence of an accused, see 4.1 The Accused as a Witness.
8. It is undesirable to suggest that a conviction or acquittal will reflect favourably or unfavourably on the credit of a witness, or have some other effect on them (*R v Coulston* [1997] 2 VR 446).
9. The jury should not be told that witnesses must be presumed to be innocent. The presumption of innocence is only relevant to the accused (*Howe v R* (1980) 32 ALR 478).

Last updated: 2 October 2017

1.6.1 Charge: Assessing Witnesses

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In order to decide what the facts are in this case, you will need to assess the witnesses who give evidence. It is up to you to decide how much or how little of the testimony of any witness you will believe or rely on. You may believe all, some or none of a witness's evidence. It is also for you to decide what weight should be attached to any particular evidence – that is, the extent to which the evidence helps you to determine the relevant issues.

In assessing witnesses' evidence, matters which may concern you include their credibility and reliability. Credibility concerns honesty – is the witness telling you the truth? Reliability may be different. A witness may be honest, but have a poor memory or be mistaken.

It is for you to judge whether the witnesses are telling the truth, and whether they correctly recall the facts about which they are giving evidence. This is something you do all the time in your daily lives. There is no special skill involved – you just need to use your common sense.

In making your assessment, you should appreciate that giving evidence in a trial is not common, and may be a stressful experience. So you should not jump to conclusions based on how a witness gives evidence. Looks can be deceiving. People react and appear differently. Witnesses come from different backgrounds, and have different abilities, values and life experiences. There are too many variables to make the manner in which a witness gives evidence the only, or even the most important, factor in your decision.

You should keep an open mind about the truthfulness or accuracy of the witnesses until all of the evidence has been presented. This is because it is only once you have heard all of the evidence that it will be possible to assess to what extent, if any, the other evidence in the case confirms, explains or contradicts a particular witness's evidence.

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[18] See Common Law Intoxication for information about other directions that may be necessary in cases involving intoxication.

In making your decision, do not consider only the witnesses' testimony. Also take into account the exhibits [and admissions]. Consider all of the evidence in the case, use what you believe and reject what you disbelieve. Give each part of it the importance which you – as the judge of the facts – think it should be given, and then determine what, in your judgment, are the true facts.

Last updated: 19 December 2006

1.7 Onus and Standard of Proof

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Presumption of Innocence

1. At common law, a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law (*Woolmington v DPP* [1935] AC 462; *Howe v R* (1980) 32 ALR 478).
2. The presumption is not that the accused is not guilty. It is that the accused is innocent (*R v Palmer* (1992) 64 A Crim R 1).
3. The presumption of innocence has been enshrined in s 25(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
4. The presumption of innocence is only relevant to the accused. It is a misdirection to tell the jury that witnesses are presumed to be innocent (*Howe v R* (1980) 32 ALR 478).

Onus of Proof

Offences

5. Except for limited statutory exceptions, in criminal trials the onus of proving the accused's guilt always lies on the prosecution. Accused people do not need to prove their innocence (*Woolmington v DPP* [1935] AC 462; *He Kaw Teh v R* (1985) 157 CLR 523; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249).
6. If a statute is silent as to who bears the onus of proving an offence, it is presumed that it will be the prosecution (*Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249; *Stingel v R* (1990) 171 CLR 312; *Czerwinski v Hayes* (1987) 47 SASR 44).

Defences

7. Unless the onus is placed on the accused by statute, the prosecution will also bear the onus of disproving any defences that arise as issues in a trial (*R v Youssef* (1990) 59 A Crim R 1; *Zecevic v DPP* (1987) 162 CLR 645).
8. Where relevant, the prosecution must therefore prove that the accused's actions were not:
    - Accidental (*Woolmington v DPP* [1935] AC 462; *Griffiths v R* (1994) 125 ALR 545);
    - Involuntary as a result of a state of sane automatism (*Bratty v AG for Northern Ireland* [1963] AC 386; *Ryan v R* (1967) 121 CLR 205; *R v Falconer* (1990) 171 CLR 30);
    - A result of duress (*Crimes Act 1958* s 322O; *R v Bone* (1968) 52 Cr App R 546; *R v Gill* [1963] 1 WLR 841; *R v Lawrence* [1980] 1 NSWLR 122; *Van den Hoek v R* (1986) 161 CLR 158);
    - Formed without the required state of mind due to intoxication (*R v O'Connor* (1980) 146 CLR 64; *R v Coleman* (1990) 19 NSWLR 467);

- Provoked (*Stingel v R* (1990) 171 CLR 312; *Moffa v R* (1977) 138 CLR 601);[19]
- Committed in self-defence (*Crimes Act 1958* s 322K; *Viro v R* (1978) 141 CLR 88; *Zecevic v DPP* (1987) 162 CLR 645);
- Done in an honest and reasonable belief in the existence of a state of affairs which, had it existed, would have made the acts innocent (*He Kaw Teh v R* (1985) 157 CLR 523).

9. The prosecution only needs to disprove a defence if there is evidence, or other relevant material, which gives rise to that defence (*R v Lobell* [1957] 1 QB 547; *Bullard v R* [1957] AC 635; *R v Howe* (1958) 100 CLR 448; *Bratty v AG for Northern Ireland* [1963] AC 386; *Spautz v Williams* [1983] 2 NSWLR 506).
10. The prosecution will need to disprove a defence if there is evidence on which a reasonable jury could decide the issue favourably to the accused, no matter how weak or tenuous the judge considers that evidence to be (*R v Youssef* (1990) 50 A Crim R 1; *Zecevic v DPP* (1987) 162 CLR 645; *R v Kear* [1997] 2 VR 555).
11. The evidence that raises a defence need not have been given by the defence. It is possible for the prosecution evidence to disclose facts which might give rise to a defence (see, e.g. *R v Bonnick* (1977) 66 Cr App R 266; *R v McDonald* [1991] Crim LR 122).
12. If the evidence discloses the possibility of a defence, the judge must instruct the jury that the prosecution needs to disprove that defence, whether or not the defence was raised by the accused (*Zecevic v DPP* (1987) 162 CLR 645).

Exceptions and Provisos

13. Some statutory offences are stated to be subject to certain qualifications. Whether the onus is on the accused to prove facts that would bring his or her case within the scope of such a qualification, or on the prosecution to disprove the existence of such facts, will depend on how the provision is construed:
    - If the qualification is *part of the definition of the grounds of liability* (known as a "proviso"), the onus of proof will be on the prosecution to prove that the proviso does not apply.
    - If the qualification is a *new matter*, which does not form part of the primary grounds of liability, but is a special exception or condition defeating or answering liability that otherwise exists (known as an "exception"), the onus of proof will be on the party seeking to prove the exception (*Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635; *Barritt v Baker* (1948) VLR 491; *Dowling v Bowie* (1952) 86 CLR 136; *Vines v Djordjevitch* (1955) 91 CLR 512).
14. Although not determinative, the form of the provision is an important consideration in deciding whether an offence is subject to a "proviso" or an "exception", and who bears the onus of proof:
    - If the qualification exists in a single proposition with the definition of the grounds of liability, it is likely that it is a "proviso", and that the onus of proof will be on the prosecution;
    - If the qualification exists in a distinct provision from that which defines the grounds of the liability, it is likely that it is an "exception", and that the onus of proof will be on the accused (*Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635; *Dowling v Bowie* (1952) 86 CLR 136; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249).

[19] Provocation is no longer a partial defence to murder (*Crimes Act 1958* s 3B). This provision applies to offences committed on or after 23 November 2005.

15. However, while the form of the language may provide assistance, ultimately the question is to be determined upon considerations of substance rather than form (*Dowling v Bowie* (1952) 86 CLR 136; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249).

16. The question is whether it is possible to discern a legislative intention to impose upon the accused the ultimate burden of bringing his or her case within the scope of the qualification (*DPP v United Telecasters Sydney Ltd* (1990) 168 CLR 594; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249).

17. This intention may be discerned from express words or by implication (*Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249; *R v Edwards* [1975] QB 27; *R v Hunt* [1987] AC 352).

18. It may be possible to discern an intention to impose the onus on the accused if legislation prohibits an act from being done unless it is:

    - Committed in specified circumstances; or
    - Committed by people of a specified class or with specified qualifications; or
    - Committed with the licence or permission of specified authorities (*Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635; *R v Edwards* [1975] QB 27; *R v Hunt* [1987] AC 352; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249).

19. If the qualification relates to a matter that is peculiarly within the knowledge of the accused, that provides a strong indication that it is an exception which the accused will bear the onus of proving (*Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249; *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635; *DPP v United Telecasters Sydney Ltd* (1990) 168 CLR 594; *R v Douglas* [1985] VR 721).

Standard of Proof

20. If the onus of proof is on the prosecution, the court is not to find the prosecution case proved unless it is satisfied that it has been proved beyond reasonable doubt (*Evidence Act 2008* s 141(1)).

21. If the onus of proof is on the accused, the court is to find the case of an accused proved if it is satisfied that the case has been proved on the balance of probabilities (*Evidence Act 2008* s 141(2)).

22. Section 141 preserves the position at common law (see, e.g. *Woolmington v DPP* [1935] AC 462; *Thomas v R* (1960) 102 CLR 584; *La Fontaine v R* (1976) 136 CLR 625; *Chamberlain v R* (No 2) (1984) 153 CLR 521; *Hoch v R* (1988) 165 CLR 292; *R v Falconer* (1990) 171 CLR 30).

Proof Beyond Reasonable Doubt

23. The standard of "proof beyond reasonable doubt" can be compared with proof on the "balance of probabilities", which is the standard of proof that applies in:

    - Civil cases (*Miller v Minister of Pensions* [1947] 2 All ER 372; *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638);
    - Cases in which the onus is placed on the accused (*Evidence Act 2008* s 141(2); *Sodeman v R* (1936) 55 CLR 192); and
    - Determining the jurisdiction of the court (*Thompson v R* (1989) 169 CLR 1; *Ahern v R* (1988) 165 CLR 87).

24. As the High Court recognised in *R v Dookheea* (2017) 262 CLR 402, [41], judges are encouraged to compare the criminal standard with the civil standard. This is:

> an effective means of conveying to a jury that being satisfied of guilt beyond reasonable doubt does not simply mean concluding that the accused may have committed the offence charged or even that it is more likely than not that the accused committed the offence charged.

25. The prosecution must prove all of the elements of the offence beyond reasonable doubt (*Thomas v R* (1960) 102 CLR 584; *La Fontaine v R* (1976) 136 CLR 62; *Van Leeuwen v R* (1981) 55 ALJR 726; *Chamberlain v R* (No 2) (1984) 153 CLR 521; *Hoch v R* (1988) 165 CLR 292; *R v Falconer* (1990) 171 CLR 30).

26. The prosecution must also disprove beyond reasonable doubt any defences that are raised as issues in a trial (*R v Youssef* (1990) 59 A Crim R 1; *Zecevic v DPP* (1987) 162 CLR 645).

27. The jury does not need to be satisfied beyond reasonable doubt of the existence of each and every fact relied upon to prove an element, or disprove a defence, as long as they are satisfied that the accused's guilt has been proven beyond reasonable doubt (*Jury Directions Act 2015* s 61; *Shepherd v R* (1990) 170 CLR 573 (Dawson J)).

28. Despite any uncertainty about the scope of the word "matters" in *Jury Directions Act 2015* s 61, the Act is "emphatic in stipulating that it is only the elements of an offence (and disproof of any relevant defence), not some particular piece of evidence or intermediate fact, that must be proved beyond reasonable doubt" (*DPP v Roder* [2024] HCA 15, [17]).

29. At common law, a jury could not draw an inference of guilt from a fact unless, at the end of the trial, they were satisfied of the existence of that fact beyond reasonable doubt (*Shepherd v R* (1990) 170 CLR 573; *Chamberlain v R (No 2)* (1984) 153 CLR 521; *Knight v R* (1992) 175 CLR 495; *R v Schonewille* [1998] 2 VR 625). This rule has been abolished by *Jury Directions Act 2015* ss 61 and 62. See 3.6 Circumstantial Evidence and Inferences for further information.

30. In some cases, there will be critical evidence that would allow a jury to decide the case on that evidence alone. Types of evidence that might have this character include confessions, identification evidence and DNA evidence. In such cases, it may be appropriate for the judge to identify clearly for the jury the importance of that evidence to prove the element. Judges should discuss the issue with counsel and hear submissions on what additional directions or comments are appropriate. One option is to refer to the evidence and direct the jury that it must be satisfied that that evidence proves the element beyond reasonable doubt (*Jury Directions Act 2015* s 61, Example).

31. It is wrong for the jury to consider each item of evidence separately and eliminate it from consideration unless satisfied beyond reasonable doubt. The evidence must be considered together at the end of the trial. One piece of evidence may resolve the jury's doubts about another (*Chamberlain v R (No 2)* (1984) 153 CLR 521).

32. If, upon review of all the evidence, the jury are left in reasonable doubt about whether the prosecution case has been made out, or are satisfied that the accused's case has been made out, they must acquit (*Woolmington v DPP* [1935] AC 462).

Meaning of "Beyond Reasonable Doubt"

33. The following paragraphs summarise common law authorities on the meaning of beyond reasonable doubt. While the primary explanation of the meaning of beyond reasonable doubt is now found in *Jury Directions Act 2015* s 64 (see Charging the Jury, below), the following principles may be relevant if the jury asks further questions which suggest it is not assisted by the s 64 explanation.

34. "Beyond reasonable doubt" is a composite expression, not intended to be broken into its component parts or analysed. It is designed to convey an accurate impression of the high standard of proof that the prosecution must satisfy. It is not possible to define each of the three words separately, because the phrase means more than the mere sum of its parts (*R v Pahuja* (1987) 49 SASR 191 (Cox J); *R v Chatzidimitriou* (2000) 1 VR 493 (Callaway JA)).

35. The jury itself has the task of determining what a reasonable doubt is, according to standards which the jurors adopt (*R v Chatzidimitriou* (2000) 1 VR 493).

36. A reasonable doubt is one that a jury which is properly aware of its responsibilities (i.e. which heeds the judge's directions, carefully considers the evidence, and eschews fanciful or unreal possibilities) is prepared to entertain at the end of its deliberations. The jury has the task of determining what is reasonable in the circumstances (*Green v R* (1971) 126 CLR 28; *R v Pahuja* (1987) 49 SASR 191; *R v Neilan* [1992] 1 VR 57; *R v Chatzidimitriou* (2000) 1 VR 493).

37. In principle, the standard of reasonable doubt applies to the jury as a whole, and not to the subjective processes of individual jurors. However, in practice, each individual juror must apply the standard of "beyond reasonable doubt" in their own consideration of the evidence. A judge's directions on the test therefore are directed as much to individual jurors as to the jury as a whole (*R v Dookheea* (2017) 262 CLR 402, [35]).

38. Although in England the term "beyond reasonable doubt" is seen to be synonymous with the term "sure" (see, e.g. *R v Hepworth and Fearnley* [1955] 2 QB 600; *R v Onufrejczyk* [1955] 1 QB 388), this is not the case in Australia (*Thomas v R* (1960) 102 CLR 584; *Dawson v R* (1961) 106 CLR 1; *R v Punj* [2002] QCA 333; *R v Cavkic* (No 2) (2009) 28 VR 341; *Benbrika v R* (2010) 29 VR 593).

39. Proof "beyond reasonable doubt" cannot be expressed mathematically (e.g. as a 99% certainty). Such an approach incorrectly implies that the jury should disregard any doubts that exist once the arbitrarily fixed percentage or rate is reached (*R v Cavkic* (2005) 12 VR 136).

Charging the Jury

Requirements

40. In all criminal cases the judge is required to direct the jury, in clear language, that the onus of proof is on the prosecution (*Thomas v R* (1960) 102 CLR 584; *La Fontaine v R* (1976) 136 CLR 72; *Bartho v R* (1978) 19 ALR 418; *Van Leeuwen v R* (1981) 36 ALR 591; *R v Schonewille* [1998] 2 VR 625).

41. The judge must instruct the jury that the prosecution has to prove the accused's guilt beyond reasonable doubt, and that it is for the jury to determine whether this has been done (*R v Neilan* [1992] 1 VR 57; *R v Chatzidimitriou* (2000) 1 VR 493).

42. The judge should tell the jury that the way in which the prosecution must prove the accused's guilt beyond reasonable doubt is by establishing the elements of the offence to that standard. The accused is entitled to the benefit of any reasonable doubt in the juror's minds (*R v Reeves* (1992) 29 NSWLR 109; *R v McNamara* 1/12/1998 Qld CA).

43. The charge must not relieve the prosecution of the burden of proving every element of the offence beyond reasonable doubt. Even if there is no evidence concerning a particular element, and that element is not contested by the defence, the judge must not tell the jury that they do not need to consider that element. Every element must be proven beyond reasonable doubt (*Griffiths v R* (1994) 125 ALR 545).

44. If the accused's counsel identifies that a defence is in issue under *Jury Directions Act 2015* s 11, the judge must instruct the jury that the prosecution must also disprove that defence beyond reasonable doubt (*Jury Directions Act 2015* s 11; *Zecevic v DPP* (1987) 162 CLR 645). It is not sufficient simply to give a general direction about the onus and standard of proof at the beginning of the charge, and not relate it to any defences in issue (*R v Bone* (1968) 52 Cr App R 546; *R v Reeves* (1992) 29 NSWLR 109).

45. The judge must give the jury an explanation of the phrase "beyond reasonable doubt" unless there are good reasons for not doing so. This explanation must be given before any evidence is adduced in the trial unless there are good reasons for not doing so (*Jury Directions Act 2015* s 63(1), (2)). The judge must have regard to the submissions of the prosecution and defence in deciding whether either of these good reasons tests are met (*Jury Directions Act 2015* s 63(3)).

46. If the judge decides not to explain beyond reasonable doubt before any evidence is adduced, the judge must give the explanation at the earliest time the judge determines is appropriate (*Jury Directions Act 2015* s 63(4)).

47. The judge may also explain the meaning of beyond reasonable doubt if the jury asks a direct question about its meaning, or a question indirectly raises the meaning of the phrase (*Jury Directions Act 2015* s 63(5)).

48. The judge may repeat the explanation at any time in the trial. When repeating an explanation, the judge does not need to give the explanation in the exact same way they gave it the first time (*Jury Directions Act 2015* ss 63(6), (7)).

Explaining beyond reasonable doubt

49. When explaining the meaning of beyond reasonable doubt, the judge may:

    - Refer to the presumption of innocence and the prosecution's obligation to prove that the accused is guilty (*Jury Directions Act 2015* s 64(1)(a); see also *R v ALP* [2002] VSCA 210; *R v Henderson* [1999] VSCA 125; *R v Palmer* (1992) 64 A Crim R; *R v Reeves* (1992) 29 NSWLR 109);
    - Indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty (*Jury Directions Act 2015* s 64(1)(b); see also *R v Wanhalla* [2007] 2 NZLR 573 at 588 [49]);
    - Indicate that it is almost impossible to prove anything with absolute certainty when reconstructing past events and that the prosecution does not have to do so (*Jury Directions Act 2015* s 64(1)(c); see also *R v Wanhalla* [2007] 2 NZLR 573 at 588 [49]);
    - Indicate that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty (*Jury Directions Act 2015* s 64(1)(d));
    - Indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility (*Jury Directions Act 2015* s 64(1)(e); see also *R v Lifchus* [1997] 3 SCR 320 at 335, 337).

50. *Jury Directions Act 2015* ss 63 and 64 reverse the common law principle which restricted a judge's ability to explain the meaning of beyond reasonable doubt.

51. The nature of the directions to be given about the onus and standard of proof will depend upon the particular circumstances of the case, the evidence relied upon by the prosecution and defence, and the way in which that evidence is discussed and commented upon by the trial judge (*Miles v R* [2000] WASCA 364 (Murray J); *Salmon v R* [2001] WASCA 270).

52. Judges should instruct the jury that they must not search legal dictionaries or texts in an attempt to elaborate the meaning of this phrase (*Martin v R* (2010) 28 VR 579; *Juries Act 2000* (Vic) s 78A).[20]

Onus on the Accused

53. If the burden of proof lies with the accused, the jury must be told that the standard of proof is proof on the balance of probabilities (*Evidence Act 2008* s 141(2); *Sodeman v R* (1936) 55 CLR 192; *Taylor v Ellis* [1956] VLR 457; *R v Hunt* [1987] AC 352).

54. In any case where the onus is placed on the accused, the judge should direct the jury that:

    - It is for them to decide if the accused has proved the matter;

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[20] Although judges may not need to give this direction, in *Martin v R* (2010) 28 VR 579; [2010] VSCA 153 it was held that until the precise scope of *Juries Act 2000* s 78 has been determined, it would be "wise" to do so. See 1.5 Decide Solely on the Evidence for further information concerning *Juries Act 2000* (Vic) s 78A.

- The proof required is less than that required of the prosecution to prove the accused's guilt (i.e. proof beyond a reasonable doubt); and
- The onus may be discharged by evidence which satisfies them, on the balance of probabilities, of that which the accused must prove (*R v Carr-Briant* [1943] KB 607; *Murray v Murray* (1960) 33 ALJR 521; *Mizzi v R* (1960) 105 CLR 659; *R v Bradley (No 2)* (1986) 85 FLR 111).

55. The charge must enable the jury to clearly appreciate the difference between proof beyond reasonable doubt and proof on the balance of probabilities (*Mizzi v R* (1960) 105 CLR 659).

Prohibited Directions

56. The phrase "beyond reasonable doubt" should not be equated with terms such as "sure" or "certain". While this is permissible in England (see, e.g. *R v Hepworth and Fearnley* [1955] 2 QB 600; *R v Onufrejczyk* [1955] 1 QB 388), and was done in early Australian cases (see, e.g. *Brown v R* (1913) 17 CLR 570; *Hicks v R* (1920) 28 CLR 36), it is prohibited by current Australian law (*R v Cavkic (No 2)* (2009) 28 VR 341).

57. It is a juror's task to decide whether, at the end of the day, he or she entertains a doubt which he or she considers reasonable. It is the judge's task to direct the jury to that effect without, at the same time, inviting jurors to analyse their mental processes too carefully (*R v Chatzidimitriou* (2000) 1 VR 493).

58. Jurors must therefore not be told to subject their doubts to a process of analysis, to determine whether they are reasonable (*Green v R* (1971) 126 CLR 28; *R v Wilson* (1986) 42 SASR 203; *R v Pahuja* (1987) 49 SASR 191; *R v Lancefield* [1999] VSCA 176; *R v Chatzidimitriou* (2000) 1 VR 493).

59. The common law prohibition on inviting the jury to subject their doubts to a process of analysis does not mean that jurors do not need to determine if their doubts are reasonable. They must still be satisfied that the accused's guilt has been proved beyond reasonable doubt, which may involve discounting unreasonable doubts, even if done unconsciously. The prohibition is against requiring jurors to undertake such an analysis (*R v Pahuja* (1987) 49 SASR 191 (Cox J (dissenting)), cited with approval in *R v Neilan* [1992] 1 VR 57; *R v Chatzidimitriou* (2000) 1 VR 493).

Deciding Between Guilt and Innocence

60. The jury's function is not to determine the guilt or innocence of the accused, but to determine whether the accused is guilty beyond reasonable doubt. An accused should be acquitted even if the jury are satisfied that he or she is probably guilty (i.e. probably not innocent), but are not satisfied beyond reasonable doubt that he or she is guilty (*Bartho v R* (1978) 19 ALR 418).

61. As guilty/not guilty is not synonymous with guilty/innocent, it is wrong to tell the jury that their duty is to decide between guilt and innocence. This may suggest that they should convict unless the evidence establishes that the accused was innocent (*Bartho v R* (1978) 19 ALR 418; *R v Weetra* (1996) 187 LSJS 317; *DPP v Shannon* [1975] AC 717).

A Contest of Adversaries

62. It is wrong to suggest that it is for the jury to choose between the prosecution's version of events and the accused's version. The issue is not which version of events the jury accepts, but whether the prosecution has negatived the accused's version as a reasonable possibility (*Murray v R* (2002) 211 CLR 193).

63. Judges should therefore avoid making any statements which suggests the trial is a contest of adversaries – the prosecution and its witnesses against the defence and its witnesses. Criminal trials are accusatory, and it must be made clear that throughout the trial that the prosecution must prove its accusation (*R v Yildrimtekin* 17/8/1994 NSW CCA).

64. When a case turns on a conflict between the evidence of several witnesses, the judge is permitted to ask the jury to consider who is to be believed. However, if that is done, the judge must give clear and unequivocal directions about the onus and standard of proof, so that there is no risk that the jury will treat the making of a 'choice' between the witnesses as the real question, or as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving (*R v KDY* [2008] VSCA 104; *R v SAB* (2008) 20 VR 55; *De Silva v The Queen* (2019) 268 CLR 57, [9]).

65. In cases where the judge considers there is a risk that the jury will be left with an impression that the evidence favourable to the accused must be believed to give rise to a reasonable doubt, the jury may be told that:

    - if they believe the evidence that favours the accused, they must acquit;
    - if they do not accept the evidence that favours the accused, but think that it might be true, they must acquit – because they will have a reasonable doubt about the prosecution's case; and
    - if they do not believe the evidence that favours the accused, they should put that evidence to one side, and determine, upon the basis of the evidence they do accept, whether the prosecution has proved the accused's guilt beyond reasonable doubt (*R v RP Anderson* [2001] NSWCCA 488; *De Silva v The Queen* (2019) 268 CLR 57, [12]; *Liberato v R* (1985) 159 CLR 507 (Brennan and Deane JJ)).

66. The judge should not tell the jury that this direction (known as a "*Liberato* direction") is a 'comment' which they are free to disregard. The *Liberato* direction is a direction of law which the jury is bound to follow (*R v BDX* (2009) 24 VR 288; *R v Morrow* (2009) 26 VR 526).

67. While the *Liberato* direction is an elaboration on the onus and standard of proof, the High Court has indicated that the *Jury Directions Act 2015* may limit the circumstances in which a *Liberato* direction should be given (see *De Silva v The Queen* (2019) 268 CLR 57, [10]). Judges will need to consider whether a *Liberato* direction is a "general direction" within the meaning of *Jury Directions Act 2015* s 3 such that the request provisions do not apply, or whether it is a direction that is contingent on a request (compare *Jury Directions Act 2015* ss 10, 14–16).

68. It is appropriate to give a *Liberato* direction if there is a reasonable likelihood that the jury will otherwise obtain the impression that they must believe the evidence on which the accused relies to be true before that evidence can give rise to a reasonable doubt about his or her guilt (*R v Niass* [2005] NSWCCA 120; *R v KDY* [2008] VSCA 104; *R v SAB* (2008) 20 VR 55; *R v BDX* (2009) 24 VR 288; *R v Cordell* [2009] VSCA 128).

69. So if, for example, the jury is told that the evidence of the accused and prosecution witnesses cannot both be right, or have been asked whether or not they accept the accused's evidence, it may be appropriate to give a *Liberato* direction to guard against the possibility that they may be misled about the onus (*R v Nguyen* [2006] VSCA 158).

70. Similarly, a Liberato direction may be appropriate when the accused gives evidence which conflicts with evidence from witnesses called by the prosecution (*Salmon v R* [2001] WASCA 270; *R v Chen, Siregar & Isman* (2002) 130 A Crim R 300).

71. For this purpose, the accused's evidence may consist of answers given in a record of interview. The need for a *Liberato* direction is not limited to cases where there is sworn evidence from the accused, though the risk of the jury thinking they must choose between the witnesses is likely highest when the accused does give or call evidence (*De Silva v The Queen* (2019) 268 CLR 57, [11]).

72. A *Liberato* direction should be given when the judge compares the relevant evidence, or at some other convenient proximate place in the charge (rather than at the start of the charge) (*R v SAB* (2008) 20 VR 55).

Sample Misdirections (Things that Should Not Be Said)

Onus of Proof

73. It is a misdirection to refer to the "task of the defence in trying to satisfy you that the accused did not intend" to commit the crime (*Thomas v R* (1960) 102 CLR 584).

74. It is wrong to direct the jury that they must acquit the accused if they are satisfied that the prosecution has not made out its case. Such a direction implies that the jury can convict the accused if they are in doubt about whether the prosecution has made out its case, which is contrary to the onus of proof (*Van Leeuwen v R* (1981) 36 ALR 591).

75. It is a misdirection to tell the jury that they must be satisfied, beyond reasonable doubt, that their verdict is the correct one. This might suggest that the jury needs to be satisfied that a verdict of not guilty is correct, when they only need to be satisfied that the prosecution has not established its case beyond reasonable doubt (*Van Leeuwen v R* (1981) 36 ALR 591).

76. It is dangerous to invite the jury to focus on the account of the accused, and to ask themselves how credible they find his or her account, and whether they accept everything he or she has said or have reservations about some parts of his or her evidence. Such an invitation may wrongly suggest to the jury that if they do not unreservedly accept the account given by the accused, the matter will have been proved beyond reasonable doubt. It also tends to suggest that the accused has some obligation to exculpate himself or herself from the allegations made against him or her, implicitly reversing the onus of proof (*R v Schonewille* [1998] 2 VR 625).

77. For similar reasons, the jury should not be told to ask themselves whether they think it is a reasonable possibility that what the accused says is correct (*R v Holman* [1997] 1 Qd R 373).

78. Judges should not ask a question such as "who else but the accused would have committed this crime?", as this may undermine the presumption of innocence (*R v Russo* (2004) 11 VR 1).

79. Judges should avoid saying that the onus of proof requires the prosecution to establish that the accused is "not innocent" (*R v Maksimovic* [2007] VSCA 248).

80. In giving a *Liberato* direction, a judge must not say that if the jury rejects the accused's evidence and puts it aside, then it does not raise a reasonable doubt and they will be satisfied of guilt (*Platt v The Queen* [2020] VSCA 130, [19]–[26]).

81. It is wrong to say "If on the evidence that you do accept, you are of the view that there is a reasonable explanation or hypothesis which has been put which you consider the Crown has not disproved, then you would have a reasonable doubt about that aspect". A reasonable doubt about guilt does not require the jury to positively accept any particular evidence. Further, it does not require the hypothesis consistent with innocence to have been put by the defence. Finally, reasonable doubt about an element is a reasonable doubt about the offence, and should not be confined to being a doubt on 'that aspect' (*Mathieson v The Queen* [2021] VSCA 102, [43]).

Standard of Proof

82. It is a misdirection to tell the jury to consider the words "beyond", "reasonable" and "doubt" separately, and to consider their own understanding of the word "reasonable" (*R v Reeves* (1992) 29 NSWLR 109).

83. It is undesirable to suggest to a jury that they may have doubts as to minor matters and nonetheless convict the accused. To say this is to weaken the force of the standard of proof (*R v May* [1962] Qd R 456).

84. Judges should not direct the jury that the prosecution has "merely" to prove a matter beyond reasonable doubt. The word "merely" is unnecessary and misplaced (*R v Williams* [1998] 4 VR 301).

85. Judges should not imply that there is a temporal aspect to the standard of proof – that jurors should disregard doubts that they "would entertain for only a second before discarding them as having no substance or being purely theoretical" or doubts that they were only "dallying with for a moment" (*R v McNamara* 1/12/1998 Qld CA).

86. It is a misdirection to tell the jury that they may determine whether the accused is guilty in the same way as they decide serious matters out of court (*Thomas v R* (1960) 102 CLR 584).

87. Judges should not lead the jury to think they must disregard possibilities that do not exceed the level of a "mere" possibility. If jurors have any possibilities in mind which cause them to retain doubt about the accused's guilt, they should acquit (*R v Lancefield* [1999] VSCA 176).

88. It is wrong to tell the jury to look at the evidence and then "apply the law to whatever you are satisfied took place". This incorrectly suggests that evidence of an event or circumstance cannot raise a reasonable doubt in the juror's minds unless they are satisfied that the event or circumstance occurred (*Van Leeuwen v R* (1981) 36 ALR 591).

89. Judges should not refer to community standards when describing the standard of proof (*R v Kidd* [2002] QCA 433; *R v Irlam; Ex-parte A–G* [2002] QCA 235).

90. The following definitions of "proof beyond reasonable doubt" have been held to be misdirections:

- Feeling "sure" or "really sure" (*R v Punj* [2002] QCA 333);
- Coming to a feeling of "comfortable satisfaction" that the accused is guilty (*Thomas v R* (1960) 102 CLR 584; *Green v R* (1971) 126 CLR 28);
- Satisfied "to a point of reasonable certainty" (*R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143);
- Satisfied "beyond any skerrick of doubt" (*R v Chedzey* (1987) 30 A Crim R 451).

91. The following definitions of "reasonable doubt" have been held to be misdirections:

- A "rational doubt" or a "doubt founded on reason" (*Green v R* (1971) 126 CLR 28; *La Fontaine v R* (1976) 136 CLR 625; *R v Lancefield* [1999] VSCA 176);
- A "substantial doubt" (*R v Thompson* [1992] VR 523; *Burrows v R* (1937) 58 CLR 249; *R v Chatzidimitriou* (2000) 1 VR 493);
- A "real" doubt (*R v Pahuja* (1987) 49 SASR 191);
- A "doubt which might affect you in the conduct of your everyday affairs" (*R v Ching* [1976] Crim LR 687)
- The following definitions of what is not a "reasonable doubt" have been held to be misdirections:
- A doubt "having no substance or being purely theoretical" (*R v McNamara* 1/12/1998 Qld CA);
- A "doubt beyond reason" (*R v Wilson* (1986) 42 SASR 203).

Juror Questions

92. In responding to a jury question regarding the meaning of "beyond reasonable doubt", a trial judge is not bound to choose between the options set out in *Jury Directions Act 2015* s 64(1), but may combine multiple options. The answer given, however, needs to disabuse a jury of any erroneous belief regarding the meaning of the phrase "beyond reasonable doubt".

93. The statutory power for a trial judge to explain the meaning of the phrase "beyond reasonable doubt" does not limit any other power, whether at common law or otherwise, a trial judge has to explain the phrase (*Jury Directions Act 2015* s 63(2)).

94. Where the jury seeks further assistance with the concept of reasonable doubt, judges must exercise their discretion as to how to explain the matter to the particular jury (*R v Ching* [1976] Crim LR 687).

95. The trial judge may adapt their explanation so that it responds to the question that the jury asked (*Jury Directions Act 2015* s 64(2)).

96. Amplification of the onus and standard of proof may also be required if a jury question indicates that the jury has not properly understood these matters (*R v Wickramarane* [1998] Crim LR 565; *R v Collins* 23/2/1999 Qld CA; *R v WG* [2010] VSCA 34).

97. For example, if a jury asks a question which indicates that it is confused about the difference between a matter being "probable" or proved beyond "reasonable doubt", it is necessary to give a clear direction explaining the difference (*R v Collins* 23/2/1999 Qld CA).

98. Similarly, if the question suggests that the jury may believe that standard will be satisfied if they find the complainant's evidence to be "plausible", the judge should make it clear that it is not enough for the complainant's evidence to appear truthful, or even for its truth to be more likely than not. In order to convict, the jury must be satisfied of the elements of the offence charged beyond reasonable doubt (*R v WG* [2010] VSCA 34).

99. It is important that the trial judge does not expand or qualify the direction in such a way as to distract the jury from its task of determining the accused's guilt beyond reasonable doubt (*R v Lancefield* [1999] VSCA 176).

100. The appropriate way in which to explain the onus or standard of proof will depend on the question asked. It is vital that judges directly address the question, because if not properly resolved, the accused may be convicted on a lesser standard of proof, which would be a serious miscarriage of justice (*R v Cavkic* (2005) 12 VR 136).

101. For example, if the jury asks the judge to tell it what reasonable doubt is as a ratio (e.g. 70% or 80% certain), that is a question which indirectly raises the meaning of the phrase "beyond reasonable doubt". The judge will need to address the issue of percentages, to ensure that the jury properly understands that it should not approach the matter in that way. The judge may also give the explanations provided in *Jury Directions Act 2015* s 64. It will be a miscarriage of justice if the judge simply restates his or her previous directions about the onus and standard of proof without directly responding to the jury's question (*R v Cavkic* (2005) 12 VR 136; see also *Jury Directions Act 2015* s 63(1)).

102. If the jury asks what "reasonable" means, a judge may reply that a reasonable doubt is a doubt which the jury considers reasonable (*R v Neilan* [1992] 1 VR 57), and may also explain that a doubt which is imaginary or fanciful, or an unrealistic possibility, is not a "reasonable" doubt and remind the jury that it is almost impossible to prove anything with absolute certainty when reconstructing past events and that the prosecution does not have to do so (*Jury Directions Act 2015* ss 64(1)(d) and (e)).

103. If the jury asks whether "reasonable doubt" has an independent definition or is to be determined by jurors, it is desirable to tell it that it is the individual opinions of jurors about what level of "doubt" is "reasonable" that should be applied. Each individual juror must form his or her own view of the matter (*R v Southammavong; R v Sihavong* [2003] NSWCCA 312; compare *R v Dookheea* (2017) 262 CLR 402, [35]).

104. While it is not a misdirection to provide a dictionary to a jury that has requested a definition of "beyond reasonable doubt", it is undesirable to do so (*R v Chatzidimitriou* (2000) 1 VR 493 (Phillips JA and Cummins AJA, Callaway JA dissenting)).

Counsel's Influence

105. Historically, it was sometimes thought necessary to amplify the directions about onus and standard of proof because of counsel's arguments during the trial (*Green v R* (1971) 126 CLR 28; *Thomas v R* (1960) 102 CLR 584; *R v Wilson* (1986) 42 SASR 203; *R v Lancefield* [1999] VSCA 176).

106. For example, if counsel has laboured the emphasis on the onus of proof to such a degree as to suggest that fantastic or completely unreal possibilities ought to be regarded by the jury as affording a reason for doubt, it will be proper and necessary for a judge to restore the balance (*Green v R* (1971) 126 CLR 28; *R v Hettiarachchi* [2009] VSCA 270; *R v Boyle* (2009) 26 VR 219).

107. The need for this rebalancing is likely reduced, due to the obligation and power to explain the meaning of beyond reasonable doubt in *Jury Directions Act 2015* ss 63 and 64, which include a statement that fanciful doubts or unrealistic possibilities are not reasonable doubts.

108. At common law, another way of restoring the balance was to remind the jury of the capacity of the human mind to conjure up fanciful, nervous or unreasonable misgivings about matters which are not in reality in doubt, and to warn them against doing so (*Green v R* (1971) 126 CLR 28; *R v Wilson* (1986) 42 SASR 203; *R v Lancefield* [1999] VSCA 176).

Last updated: 14 May 2024

1.7.1 Charge: Onus and Standard of Proof

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It is a critical part of our justice system that people are presumed to be innocent, unless and until they are proved guilty. So before you may return a verdict of guilty, the prosecution must satisfy you that [each of] the accused is guilty of the charge[s] in question.

As the prosecution brings the charge[s] against the accused, it is for the prosecution to prove that/those charge[s]. The accused does/do not have to prove anything. That never changes from start to finish. It is not for the accused to demonstrate his/her/their innocence, but for the prosecution to prove the charge[s] they have brought against him/her/them.

The prosecution must do this by proving [each of] the accused's guilt of the charge[s] beyond reasonable doubt. You have probably heard these words before, and they mean exactly what they say – proof beyond reasonable doubt.

This is the highest standard of proof that our law demands. It is not enough for the prosecution to prove that the accused is probably guilty, or very likely to be guilty. That would be enough in a civil case, such as where one person sues another for breach of contract. In that situation, matters only need to be proved on what is called the "balance of probabilities". That is, they need to be shown to be more likely than not.

By comparison, in a criminal trial the prosecution must prove the accused's guilt beyond reasonable doubt. This means you cannot be satisfied the accused is guilty if you have a reasonable doubt about whether the accused is guilty.

In deciding whether the prosecution has proved its case beyond reasonable doubt, you should remember that it is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so. A reasonable doubt is not an imaginary or fanciful doubt, or an unrealistic possibility.

The prosecution does not need to prove every fact that they allege to this standard. It is the essential ingredients or "elements" of the charge[s] that they must prove to this standard. In this case, that means that the prosecution must prove, beyond reasonable doubt, that [*list elements of the primary offence. Repeat for any other offences*].

I will explain these elements to you in detail, and relate them to the evidence in this case, after you have heard all of the evidence.

However, for now you should know that it is only if you find that the prosecution has proven all of the elements of a charge beyond reasonable doubt that you may find the accused guilty of that charge. If you are not satisfied that the prosecution has done this, your verdict in relation to that charge must be "Not Guilty".

Your verdict of guilty or not guilty must be unanimous. That is, whatever decision you make, you must all agree on it.

Last updated: 14 May 2024

1.8 Separate Consideration

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Multiple Accused

1. If two or more accused stand trial together, the judge must direct the jury that they are to consider the case against each accused separately (*R v Harbach* (1973) 6 SASR 427; *R v Nessel* (1980) 5 A Crim R 374; *R v Minuzzo and Williams* [1984] VR 417; *R v Mitchell* 5/4/95 NSW CCA; *Nicoletti v R* 4/11/97 WA CCA).
2. If evidence is given which is not admissible against each accused,[21] the judge must also instruct the jury:
    - That evidence led in support of a count involving one accused does not provide proof of a count involving another accused; and
    - That they must decide the case against each accused solely on the evidence that is admissible in relation to that accused (*R v Minuzzo and Williams* [1984] VR 417; *R v Taouk* 17/12/92 NSW CCA; *R v Mitchell* 5/4/95 NSW CCA; *T v R* (1996) 86 A Crim R 293).
3. The judge should usually tell the jury that a certain item of evidence is inadmissible against a particular accused at the time that evidence is tendered. However, whether or not such a direction is given at that stage, it must always be given in the judge's summing up (*R v Nessel* (1980) 5 A Crim R 374; *R v Towle* (1955) 72 WN (NSW) 338).
4. In the judge's summing up, he or she must specify which evidence the jury may consider in relation to each accused, and which evidence is inadmissible against each accused. It is insufficient simply to rely on a direction that the jury are to consider the case against each accused separately (*R v Towle* (1955) 72 WN (NSW) 338; *R v Minuzzo and Williams* [1984] VR 417; *R v Mitchell* 5/4/95 NSW CCA; *Nicoletti v R* 4/11/97 WA CCA. See 3.9 Judge's Summing Up on Evidence and Issues for further information).

Multiple Counts

5. If the presentment contains multiple counts, the judge must direct the jury that they have to consider each of the counts separately (*R v PMT* (2003) 8 VR 50; *MFA v R* (2002) 213 CLR 606; *KRM v R* (2001) 206 CLR 221; *R v TJB* [1998] 4 VR 621; *R v Robertson* [1998] 4 VR 30; *R v J (No 2)* [1998] 3 VR 602).
6. Such a direction should be given even if all of the evidence is admissible in relation to each count,[22] because a jury still needs to reach separate verdicts on the counts even if, in reaching those verdicts, it considers the totality of the evidence (*R v Mitchell* 5/4/95 NSW CCA).
7. If evidence is given which is not admissible in relation to each count,[23] the judge must also instruct the jury:

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[21] If the evidence against one accused is not admissible against a second accused, and this creates a risk that the second accused will be impermissibly prejudiced, the judge may need to consider ordering separate trials (see, e.g. *R v Hauser* (1982) 6 A Crim R 68; *Webb v R* (1994) 181 CLR 41).

[22] If evidence which is admissible in relation to one count is admissible in relation to another count as "similar fact evidence", an appropriate direction as to the permissible and impermissible uses of such evidence will be needed (see 4.17 Tendency Evidence and 4.18 Coincidence Evidence).

[23] If evidence which is admissible in relation to one count is not admissible in relation to another count, and in consequence there is a real risk of impermissible prejudice to the accused, the judge may need to consider ordering separate trials (see, e.g. *R v TJB* [1998] 4 VR 621. See also *Crimes Act 1958* s 372).

- That evidence led in support of one count does not provide proof of any other count; and
- That they must decide each count solely on the evidence that is admissible in relation to that count (*R v PMT* (2003) 8 VR 50; *MFA v R* (2002) 213 CLR 606; *KRM v R* (2001) 206 CLR 221; *R v TJB* [1998] 4 VR 621; *R v Robertson* [1998] 4 VR 30; *R v J (No 2)* [1998] 3 VR 602).

8. It is also customary to instruct the jury that:
    - Combining more than one count in the presentment is a procedure of convenience, but that such convenience should not be permitted to usurp a just outcome, which entitles the parties to have each count considered by reference only to the evidence which applies to that count; and
    - If they decide to convict or acquit the accused on one count, it is wrong to reason that he or she is therefore guilty or not guilty (as the case may be) of the other counts. Proof of guilt upon one count is irrelevant to the question of guilt upon any other counts, and jurors should put any decisions they have made in relation to one count out of their minds when considering other counts (*R v Robertson* [1998] 4 VR 30. See also *R v FJB* [1999] 2 VR 425; *T v R* (1996) 86 A Crim R 293; *BRS v R* (1997) 191 CLR 275; *R v TJB* [1998] 4 VR 621; *R v J (No 2)* [1998] 3 VR 602; *R v Appleby* (1996) 88 A Crim R 456).
9. These directions will often be accompanied by a specific instruction that the evidence of a witness may be accepted in whole or in part (*MFA v R* (2002) 213 CLR 606).
10. The jury should not be told that each count "must be given the same ultimate determination because you will ultimately be asked… your verdict in regard to each count". Such a direction is likely to be confusing to a jury (*R v Robertson* [1998] 4 VR 30; *R v Ev Costa* 2/4/96 Vic CA).
11. In the judge's summing up, he or she must carefully explain which evidence relates to which count, and which evidence is inadmissible on each count. It is insufficient simply to rely on a direction that the jury are to consider each count separately (*T v R* (1996) 86 A Crim R 293; *R v Mooseek* (1991) 56 A Crim R 36. See 3.9 Judge's Summing Up on Issues and Evidence for further information).
12. Judges must not *direct* the jury that if they doubt the truthfulness or reliability of the complainant's[24] evidence in relation to one charge, then that doubt must be taken into account in their assessment of the truthfulness or reliability of the complainant's evidence generally or in relation to other charges. This does not limit the ability of a party to make such an argument, or the obligation of the judge to refer to how the parties put their case (*Jury Directions Act 2015* ss 44F–44G, as amended in 2017; see also *R v PMT* (2003) 8 VR 50; contra *R v Markuleski* (2001) 52 NSWLR 82).
13. Section 44F also does not require or permit a judge to direct a jury that if it has a doubt about one aspect of a witness' evidence, then the jury should put that aspect to one side. A conclusion that a witness has lied on one matter may provide a basis for doubting the witness' truthfulness on other matters (*Mathieson v The Queen* [2021] VSCA 102, [51]–[55]).

Related Matters

Tendency Warning

14. At common law, it was considered prudent to warn the jury against "tendency reasoning" in cases involving multiple counts, as well as the "separate consideration" direction (see *R v J (No.2)* [1998] 3 VR 602; *R v TJB* [1998] 4 VR 621).

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[24] *Jury Directions Act 2015* s 44F uses 'victim' instead of 'complainant'. We have retained 'complainant' to maintain consistency across the Charge Book.

15. Under the *Jury Directions Act 2015*, evidence relevant only to other counts, or admissible on a limited, contextual, basis, will usually fall within paragraph (c) of the definition of "other misconduct evidence" (see *Jury Directions Act 2015* s 26).

16. Where evidence of other counts is "other misconduct evidence", the judge does not need to give a warning against tendency reasoning, unless the direction is requested (see *Jury Directions Act 2015* ss 15, 29, 30). See 4.17 Tendency Evidence.

Last updated: 21 July 2021

1.8.1 Charge: Separate Consideration Multiple Accused

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In this trial there are [*insert number*] accused. The prosecution says each of them is guilty. Each of them says they are not guilty. So there are really [*insert number*] trials [all] being heard together.

It would be inconvenient and a great waste of time and money to hold separate trials of each accused on different occasions in different courts on this same matter. So for convenience they are all tried together.

But you must be careful not to allow convenience to override justice. The parties are entitled to have the case against each accused considered separately.

You must consider the case against each accused separately, in light only of the evidence which applies to that accused. You must ask yourselves, in relation to each accused, whether the evidence relating to that accused has satisfied you, beyond reasonable doubt, that s/he is guilty of the offence s/he has been charged with. If the answer is yes, then you should find him/her guilty. If the answer is no, then you should find him/her not guilty.

Last updated: 19 December 2006

1.8.2 Charge: Separate Consideration Multiple Charges

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In this trial, the prosecution has brought [*insert number*] charges against the accused. While these are separate matters, they are [all] being dealt with in the one trial. This is done for convenience, as it would be expensive and time-consuming to hold a separate trial before a different judge and jury for each charge.

However, you must be careful not to allow convenience to override justice. Both the prosecution and the accused are entitled to have each charge considered separately.

It would therefore be wrong to say that simply because you find the accused guilty or not guilty of one charge, that s/he must be guilty or not guilty, as the case may be, of another.

Each charge must be considered separately, in light only of the evidence which applies to it. You must ask yourselves, in relation to each charge, whether the evidence relating to that charge has satisfied you, beyond reasonable doubt, that the accused is guilty of that particular crime. If the answer is yes, then you should find the accused guilty of that charge. If the answer is no, then you should find the accused not guilty of it.

Last updated: 17 May 2019

1.9 Alternative Charges

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1. The prosecution is entitled to include charges in an indictment that are presented in the alternative. Where this occurs, the jury cannot return a verdict on an alternative charge until it returns a verdict on the principal charge (*LLW v R* (2012) 35 VR 372; [2012] VSCA 54; *Medici v R* (2013) 39 VR 350; [2013] VSCA 111).
2. The judge must ensure that the jury understands this rule. If the jury cannot agree on the principal charge, any agreement on an alternative charge would involve impermissible compromise (*LLW v R* (2012) 35 VR 372; [2012] VSCA 54; *Medici v R* (2013) 39 VR 350; [2013] VSCA 111).
3. Where there are alternative charges on the indictment, the judge, at the start of the trial, should inform the jury that:
    - The indictment contains charges in the alternative;
    - The alternative charges all relate to the same factual allegations, but will require the jury to consider different legal tests;
    - At the end of the trial, the judge will need to take verdicts on each charge sequentially.
4. For information on the obligation to leave alternative charges, see 3.10 Alternative Verdicts.
5. For information on taking verdicts to alternative charges, see 3.12 Taking Verdicts.

Last updated: 11 July 2018

1.9.1 Charge: Alternative Charges

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This charge should be given as part of the preliminary directions where the indictment contains alternatives. This model charge assumes that there is only one incident which involves alternatives. Where there are multiple incidents involving alternatives, this charge will need to be modified.

Members of the jury, my tipstaff is now going to hand you a document called an "indictment". This document lists the crimes that NOA is charged with. I will tell you more about what each crime involves at the end of the trial. However, there is one matter I want to draw to your attention now.

Charges [*identify relevant alternatives*] are given to you as alternatives. The prosecution does not say that the accused should be convicted of [both/all] of these charges, but of one or the other. This is because they [both/all] relate to the same incident.

At the end of the trial, when you are delivering your verdict[s], you will first be asked for your verdict on [*insert principal offence*], which is the more serious charge. If you reach a verdict of guilty in relation to that charge, you will not be asked for a verdict on [*insert alternative charge*].

It is only if you unanimously reach a verdict of not guilty on [*insert principal offence*] that you will be asked to deliver a verdict on [*insert alternative charge*]. This is because the prosecution is entitled to your verdict on the most serious charge. It would be wrong to compromise and say "we cannot agree on a verdict on charge one, but we agree that the accused is at least guilty of charge two".

So when you are listening to the evidence, bear in mind that while there are [*insert number of charges*] charges on the indictment, there are actually only [*insert number*] of allegations that relate to different events because the other [*insert number*] charges are alternatives.

Last updated: 11 July 2018

1.10 Trial Procedure

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Order of Proceedings

1. To help set the jury at ease, and provide a framework for understanding the nature of the trial, it may be desirable to outline the way in which the trial is likely to proceed.
2. Unless the court otherwise directs, the prosecution must serve on the defence and file in court a summary of the prosecution opening at least 28 days before the trial is due to commence (*Criminal Procedure Act 2009* s 182).
3. Once the prosecution has served its summary of the prosecution opening on the defence, the defence response must serve its response on the prosecution and file the response in court at least 14 days before the trial is listed to commence (*Criminal Procedure Act 2009* s 183).
4. After the jury has been empanelled and the judge has given any preliminary directions, the prosecution will open their case (*Criminal Procedure Act 2009* s 224).
5. Immediately after the prosecution opening, if the accused is represented by a legal practitioner, the defence must present their response to the jury (*Criminal Procedure Act 2009* s 225). However, if the accused is not represented by a legal practitioner, the accused may choose not to present a response.
6. The prosecution opening and the defence response must be restricted to the matters set out in the documents served and filed under *Criminal Procedure Act 2009* ss 182 and 183 (see also *Duong v R* [2017] VSCA 78, [39]–[41]).
7. If there is more than one accused, in the absence of agreement amongst counsel, they must make their addresses in the order in which their names appear on the presentment (*R v Webb* (1992) 64 A Crim R 38).
8. At any time during the trial, the judge may address the jury about the issues in the trial, the relevance of any admissions made, directions given or matters determined prior to the commencement of the trial or any other matters relevant to the jury's function (*Criminal Procedure Act 2009* s 222).
9. It may be appropriate for the judge to refer to any other preliminary or practical matters which have not yet been addressed by counsel, such as the nature of the trial process and the hours of sitting. See 1.1 Introductory Remarks for further information about matters which may be addressed at this time.
10. The prosecution will then call their witnesses. At the close of the prosecution case, the defence must choose whether to make a submission that there is no case to answer, to choose to give evidence or call other witnesses, or not give evidence or call witnesses (*Criminal Procedure Act 2009* s 226). It is at the judge's discretion whether this should be done in the presence or absence of the jury. However, it may be advisable to do so in the absence of the jury in joint trials or in trials in which a no-case submission may be anticipated (*R v Aiton* (1993) 68 A Crim R 578).
11. If there are 2 or more accused, all accused who wish to do so must make a submission that there is no case to answer before any accused indicates whether he or she wishes to give evidence or call witnesses. All submissions of no case to answer must first be resolved and if there are then 2 or more accused remaining, the judge must ask the first accused whether he or she wishes to give evidence or call witnesses. Each accused named subsequently on the indictment is not required to inform the judge of this decision until the close of the case for the previous accused (*Criminal Procedure Act 2009* s 229).
12. If the accused intends to call witnesses, the accused must indicate, when called on by the judge to do so, the names of those witnesses other than the accused and the order in which the witnesses will be called (*Criminal Procedure Act 2009* s 230).
13. The defence may give an opening address before calling the accused or a witness other than the accused (*Criminal Procedure Act 2009* s 231).

14. After the close of all evidence, the prosecution may make a closing address, summing up the evidence (*Criminal Procedure Act 2009* s 234).[25]

15. After the close of the evidence and after the prosecution closing address, the defence may give a closing address summing up the evidence (*Criminal Procedure Act 2009* s 235).

16. If the accused, in his or her closing address, asserts facts which are not supported by evidence, the judge may allow the prosecution to make a supplementary address which is confined to replying to those assertions (*Criminal Procedure Act 2009* s 236).

17. The power to allow the prosecution to make a supplementary submission under s 236 is limited to cases in which the defence asserts facts which are unsupported by evidence. It does not extend to cases in which the defence makes illogical, extravagant or dishonest defence arguments. It is for the judge to deal with such arguments in his or her charge in a way that restores the balance without engaging in impermissible advocacy for the prosecution (*R v Glusheski* (1986) 33 A Crim R 193; *R v O'Donoghue* (1988) 34 A Crim R 397; *Kamalasanan & Sam v The Queen* [2019] VSCA 180, [97]–[101]; *Mareangareu v The Queen* [2019] VSCA 101, [67]–[99]).

Juror Questions

Clarifying Law and Evidence

18. Jurors may question a judge about the evidence presented in a case, or about the relevant law. Judges are under a duty to ensure that jurors receive all of the assistance they require to discharge their task properly (*R v Southammavong; R v Sihavong* [2003] NSWCCA 312; *R v Leggatt* [1971] VR 705).

19. If a communication from the jury indicates that they require assistance on a material aspect of the case, the judge has a duty to ascertain the specifics of the assistance required (*R v Ion* (1950) 34 Cr App R 152; *R v Berry* (1992) 96 Cr App R 77).

20. If the jury asks a second question before the first is answered, the judge should not assume the jury no longer wants an answer to the first question. S/he must ask them whether they still want a response to the original question (*R v De Simone* [2008] VSCA 216).

21. If the jury's question indicates that they may be speculating or drawing inferences going beyond the evidence, they should be reminded of the extent of the evidence (*R v Adair* (1958) 42 Cr App R 227).

22. When answering the jury's question, the judge must be careful not to introduce a basis for liability which has not previously been addressed. This may disadvantage the accused, who will have had no opportunity to meet the new case (*R v Falcone* [2008] VSCA 225. See 3.9 Judge's Summing Up on Issues and Evidence for further information).

23. After answering the jury's question, the judge should enquire whether the answer covers their concerns. The judge is entitled to accept the foreperson's affirmative response, if given without dissent (*R v Leggatt* [1971] VR 705; *R v Coombes* 16/4/1999 CA Vic).

Questioning Witnesses

24. There is no rule of law prohibiting jurors from questioning witnesses (*R v Lo Presti* [1992] 1 VR 696; *R v Cvijic* 21/2/1986 Vic CCA; *R v Boland* [1974] VR 849).

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[25] This provision overrides the practice of the prosecution not addressing the jury a second time when the accused was unrepresented (see, e.g. *R v Ginies* [1972] VR 494). The prosecution may now determine whether or not to give a closing address if the accused is unrepresented (*R v Marijancevic* [1982] VR 936; *R v Trotter* (1982) 7 A Crim R 8; *R v Zorad* (1990) 19 NSWLR 91).

25. In *R v Lo Presti* [1992] 1 VR 696, the Court of Appeal laid down the following guidelines in relation to such questions:

> 1. Juries should not be told of any right possessed by them to question a witness.
> 2. A juror who wishes to put, or have put, a question to a witness has a right for that to be done provided that the question or questions is or are limited to the clarification of evidence given or the explanation of some matter about which confusion exists.
> 3. It is not essential that the question asked be formulated by the foreman.
> 4. It is highly desirable that the question sought to be asked first be submitted to the judge so that he may consider its relevance and admissibility.
> 5. If the judge allows the question it is immaterial whether it is actually asked by the juror or the judge. However, if the judge puts the question there will be removed the risk that exists when a layman is the questioner of the generation of a spontaneous exchange of questions and answers in the course of which improper material may emerge.

26. The points above are guidelines only. Judges have discretion to determine what course is best in the circumstances to ensure justice between the parties and the avoidance of unacceptable prejudice to the accused. They have the right and obligation to control the proceedings in their court in a manner that will enable the ends of justice to be met (*R v Lo Presti* [1992] 1 VR 696. See also *McKinnin v The Queen* [2019] VSCA 114).

27. Judges should not encourage jurors to ask questions or give the jury time to formulate questions at the end of a witness' evidence. Doing so risks a fundamental departure from the jury's proper role as impartial arbiters and invites the jury to form views about the state of the evidence before the end of the trial (*Tootle v R* (2017) 94 NSWLR 430. See also *McKinnin v The Queen* [2019] VSCA 114).

28. Jurors are often told that the parties can be trusted to ask all relevant questions and, if a question is not asked, there is often a very good reason (*Tootle v R* (2017) 94 NSWLR 430, [60]).

Communicating with Jurors

29. Jurors should not ask court officers questions concerning the case, or channel questions to the judge through a court officer.[26] Questions should be asked by the foreperson in open court, or preferable put in writing by the foreperson and delivered directly to the judge. (*R v Cavkic (No 2)* (2009) 28 VR 341. See also *R v Stretton* [1982] VR 251; *R v Emmett* (1988) 14 NSWLR 327; *Jackson & Le Gros v R* [1995] 1 Qd R 547; *R v Briffa & Portillo* 21/4/96 Vic CCA; *R v GAE* (2000) 1 VR 198; *R v Edwards* [2002] 1 Qd R 203).

30. Juror questions should be asked (or read aloud) in open court, in the presence of the accused, their counsel and the jury – unless the communication is on a matter which does not touch upon the case in any relevant way. There should be no private communication between the judge and jury if the communication is material or may affect the jury's consideration of the case (*R v Cavkic (No 2)* (2009) 28 VR 341; *Sonnet v R* (2010) 30 VR 519; *R v Yuill* (1994) 34 NSWLR 179; *Smith v R* (1985) 159 CLR 532; *R v Boland* [1974] VR 849; *R v Kerr (No 2)* [1951] VLR 239).

31. A judge should not, upon receiving a note from the jury, send them an answer without communicating with the accused or defence counsel. That would infringe the fundamental principle that the accused is entitled to hear and see all that takes place during a trial (*R v Black* (2007) 15 VR 551; *R v GAE* (2000) 1 VR 198; *Rabey v R* [1980] WAR 84; *R v Fitzgerald* (1889) 15 VLR 40).

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[26] Jurors may communicate with court officials about administrative or technical matters (such as setting up equipment) (*Dempster* (1980) 71 Cr App R 302; *R v Barnowski* [1969] SASR 386).

32. In most cases, a judge must inform the parties of the precise terms of the questions asked. It is not sufficient to identify the subject matter of the question in general terms (*R v Black* (2007) 15 VR 551; [2007] VSCA 61).

33. A judge must inform the parties of the terms of a question, even if that question indicates matters that are in the jurors' minds during their deliberations. This is especially important if the communication relates to matters in issue in the trial. In such circumstances, the parties are entitled to know the content of the communication and, if appropriate, to make submissions as to the appropriate response (*R v Black* (2007) 15 VR 551; *Sonnet v R* (2010) 30 VR 519).

34. However, if a communication reveals information which the jury should not have imparted (such as voting figures), the judge should not disclose that information to the parties. He or she should, however, announce the fact of the communication, and disclose any information that is unexceptionable (*R v Black* (2007) 15 VR 551; *Sonnet v R* (2010) 30 VR 519; *R v Gorman* [1987] 2 All ER 435).

35. If the judge needs a jury communication clarified, he or she should not question the foreperson about it on oath in isolation from the rest of the jury. It is instead preferable to suggest that the jury reformulate the communication in private (*R v Foster* (1995) 78 A Crim R 517).

36. If any answer to a communication from the jury would amount to a material irregularity, the judge should not answer the question nor disclose the contents of the communication until an appropriate stage of the proceedings (*R v Oduro* (1982) 76 Cr App R 38).

37. The trial judge should ensure that an adequate record appears in the transcript of proceedings of all communications which it is permissible to disclose, and that any written communications, of whatever nature, are preserved (*R v Masters* (1992) 26 NSWLR 450; *Shepherd (No 4)* (1989) 41 A Crim R 420).

Note-taking

38. Jurors are allowed to take notes during the trial if they choose, and should be provided with appropriate materials. Practices vary as to whether such note-taking is to be encouraged or discouraged.

39. Any notes made by a discharged juror should not be left with the remaining jurors (*Derbas v R* (1993) 66 A Crim R 327).

40. Notes and other documents left in the jury room after deliberations have ended must be collected and destroyed after the verdict has been delivered (*R v Smart* [1983] VR 265).

Last updated: 28 August 2019

1.10.1 Charge: Trial Procedure

Click here to download a Word version of this charge

Order of Proceedings

I will now describe the procedure that we will follow during the trial, and some general administrative matters.

In a moment we will hear the opening address from the prosecutor, and the reply from counsel for the accused.[27] Then we will proceed to hear the evidence. After that, there will be closing addresses from counsel. I will then instruct you about the law, the issues and the evidence. You will then go to the jury room to discuss your verdict[s].

Transcripts and Note-taking

All of the evidence in this case is going to be tape recorded and transcribed. This means that you will be able to check on any part of the evidence you later cannot remember.

However, you should always listen carefully to the evidence as it is given, because it is not only what the witnesses say, but also how they say it that is important to your assessment of their evidence.

When you are listening to the evidence from the witnesses, you may take notes if you wish, but you do not have to. It is completely up to you. If you do take notes, you should not allow it to distract you from listening to the evidence and assessing the witnesses. You may always ask to hear a tape of a witness's testimony or have some evidence read back to you, but you only have one chance to observe the appearance and behaviour of the witnesses when they give the evidence.

Sitting times and breaks

Our hours here in court are [*insert starting time*] until [*insert lunch time*] and then [*insert starting time after lunch*] until [*insert finishing time*].

If something comes up which means that you may not able to attend court when we would normally be sitting, please let me know as soon as possible, so that we can try to resolve the issue.

Jury Guide

[*If the judge is providing the jury with a jury guide, add the following shaded section.*]

To help you remember the directions I have just given you, my tipstaff will now give you a jury guide. You can write on it if you wish. The Guide, like all documents we will give you during the trial, must not be taken home. You may bring it to the courtroom, but you must leave it in the jury room at the end of each day. If you bring the Guide to the courtroom, do not allow it to distract you. Do not try to read it while I am giving you directions, or when counsel are addressing you, or while a witness is giving evidence.

The Guide is a simplified reminder of some of the directions I have given you. It is a publication designed for general use by jurors in criminal trials and is not specific to this case. It does not cover all of the directions I have given word for word and it will not cover directions I will give you during the trial and at the end of the trial which will be specific to this trial. If you think there is anything in the Guide which is different to what I have instructed you, then you must follow what I tell you in court and ignore what is in the guide. If you are confused or unsure about whether there is a difference between the Guide and my directions, you should ask me to clarify.

Opening Address

We will now hear the opening address from the prosecution, who will tell you what the case is about.

[*After opening and reply, briefly state the issues.*]

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[27] This will need to be modified if the judge's remarks are made after the opening address and reply.

Last updated: 14 August 2023

1.11 Consolidated Preliminary Directions

Click here for a downloadable version of this charge.

Note: This document replicates the directions in 1.4–1.10 in a single, consolidated document.

Introduction

Serving on a jury may be a completely new experience for some, if not all, of you. To help you perform that role properly, I will now describe your duties as jurors and the procedures that we will follow during the trial. I will also explain to you some of the principles of law that apply in this case.

During and at the end of the trial, I will give you further instructions about the law that applies to this case. You must listen closely to all of these instructions and follow them carefully.

If at any time you have a question about anything I say, please feel free to ask me. You should do this by writing it down, and passing it to my tipstaff, [*insert name*], who will hand it to me.

Roles of Judge, Jury and Counsel

Members of the jury, you represent one of the most important institutions in our community – the institution of trial by jury. Our legal system guarantees any individual charged with a criminal offence the right to have the case presented against him or her determined by twelve independent and open-minded members of the community, in accordance with the law.

In this case, it is alleged by the prosecution that NOA has committed the offence[s] of [*insert offences*].[28] S/he has pleaded "not guilty", and so it is for you, and you alone, to decide whether s/he is guilty or not guilty of [this/these] crime[s].

I note that, when referring to the crime[s] that the accused has been charged with, I will sometimes use the words "offence" or "charge" – they all mean the same thing.

In all criminal trials of this type, the court consists of a judge and jury. We are going to be assisted in this case by counsel for the prosecution, [*insert prosecutor's name*], and defence counsel, [*insert defence counsel's name*]. Each of us has a different role to play.[29]

Role of the Jury

It is your role, as the jury, to decide what the facts are in this case. You are the only ones in this court who can make a decision about the facts. You make that decision from all of the evidence given during the trial.

It is also your task to apply the law to the facts that you have found, and by doing that decide whether the accused is guilty or not guilty of the offence[s] charged.

[28] This charge is drafted for use in cases involving one accused. If the case involves multiple accused, it will need to be modified accordingly.

[29] This sentence will need to be modified if the accused is unrepresented.

Role of the Judge

It is my role, as the judge, to ensure that this trial is fair and conducted in accordance with the law. I will also explain to you the principles of law that you must apply to make your decision. You must accept and follow all of those directions.

I want to emphasise that it is not my responsibility to decide this case. The verdict that you return has absolutely nothing to do with me. So while you must follow any directions I give you about the law, you are not bound by any comments I may make about the facts.

It is unlikely that I will make any comments about the evidence. If you disagree with any comments I make, you must disregard them. Do not give them any extra weight because I, as the judge, have made them. It is your view of the facts which matters, not mine. You are the judges of facts – you alone.

Role of Counsel

The role of counsel is to present the case for the side for which they appear. [*Insert name of prosecutor*] presents the charge[s] for the prosecution. [*Insert name of defence counsel*] appears for the accused, and will represent him/her throughout the trial.[30]

You do not need to accept any comments that counsel may make during their addresses. Of course, if you agree with an argument they present, you can adopt it – in effect, it becomes your own argument. But if you do not agree with their view, you must put it aside. As I have told you, you alone are the judges of the facts.

Similarly, you are not bound by what counsel says about the law. I am the judge of the law, and it is what I tell you about the law that matters. If counsel says something different from what I say about the law, you must ignore it and follow my directions.

What is Evidence?

I have told you that it is your task to determine the facts in this case, and that you should do this by considering all of the evidence presented in the courtroom. I now need to tell you what is and what is not evidence.

The first type of evidence is what the witnesses say.

It is the answers that you hear from the witnesses that are the evidence, and not the questions they are asked. This is important to understand, as sometimes counsel will confidently include an allegation of fact in a question they ask a witness. No matter how positively or confidently that allegation is presented, it will not form part of the evidence unless the witness agrees with it.

[*Add the following shaded section if the judge believes it is necessary to further explain this point*.]

Let me give you a simple example that has nothing to do with this case. Imagine counsel says to a witness "The car was blue, wasn't it?", and the witness replies "No, it wasn't". Given that answer, there is absolutely no evidence that the car was blue.

Even if you do not believe the witness, or think he or she is lying, there is no evidence that the car is blue. Disbelief of a witness's answer does not provide evidence of the opposite. To prove that the car was blue, there would need to be evidence from some other source, such as a photograph or the testimony of another witness.

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[30] This section will need to be modified if the accused is unrepresented.

Of course, if the witness had instead replied "yes, it was", there would be evidence that the car was blue. In such a case, the witness has adopted the suggestion made in the question. However, if the witness does not agree with that suggestion, the only evidence you have is that the car was not blue.

The second type of evidence is any document or other item that is received as an "exhibit". The exhibits will be pointed out to you when they are introduced into evidence. When you go to the jury room to decide this case, some of the exhibits will go with you for you to examine. Consider them along with the rest of the evidence and in exactly the same way.

[*Add the following shaded section if any formal admissions are likely to be put before the jury.*]

The third type of evidence is what is called an "admission". Admissions are facts that the prosecution and defence agree about. When that happens, no other evidence is required – the admissions are treated as established facts. I will tell you about any admissions that have been made in this case when relevant.

Nothing else is evidence in this case. This includes comments about the facts made by counsel.[31] The only evidence is the witnesses' testimony, [the admissions] and the exhibits.

No Sympathy or Prejudice

It is your duty to decide this case only on the basis of that evidence. You must ignore all other considerations.

In particular, you should dismiss any feelings of sympathy or prejudice you may have, whether it is sympathy for, or prejudice against, the accused or anyone else. No such emotion has any part to play in your decision.

You are the judges of the facts. That means that in relation to all of the issues in this case, you must act like judges. You must dispassionately weigh the evidence logically and with an open mind, not according to your passion or feelings. Your duty is to consider the evidence using your intellect not your heart.

No Outside Information

When you retire to consider your verdict, you will have heard or received in court, or otherwise under my supervision, all the information that you need to make your decision.

Unless I tell you otherwise, you must not base your decision on any information you obtain outside this courtroom. For example, you must completely ignore anything that you have seen or heard in the media about this case or the people involved in it, or which you may see or hear. You must consider only the evidence presented to you here in court [*if a view may be conducted add:* "or otherwise under my supervision"].[32]

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[31] If the accused is unrepresented, the jury should be told that what s/he says in his/her addresses, or when questioning witnesses, is also not evidence.

[32] If there has been significant pre-trial publicity about the case or the parties involved, it may be necessary to give a more detailed warning. See Decide Solely on the Evidence for further information.

Most importantly, you must not make any investigations or enquiries, or conduct independent research, concerning any aspect of the case or any person connected with it. That includes research about the law that applies to the case. You must not use the internet to access legal databases, legal dictionaries, legal texts, earlier decisions of this or other courts, or other material of any kind relating to the matters in the trial. You must not search for information about the case on Google or conduct similar searches. You also must not discuss the case on Facebook, Twitter or blogs, or look at such sites for more information about the case.

You may ask yourself the question: what is wrong with looking for more information? Seeking out information, or discussing a matter with friends, may be a natural part of life for you when making an important decision. As conscientious jurors, you may think that conducting your own research will help you reach the right result. However, there are three important reasons why using outside information, or researching the case on the internet, would be wrong.

First, media reports, or claims made outside court may be wrong or inaccurate. The prosecution and defence will not have a chance to test the information. Similarly, I will not know if you need any directions on how to use such material.

Second, deciding a case on outside information, which is not known to the parties, is unfair to both the prosecution and the defence. The trial is conducted according to well established legal principles and its not for you to go looking for other information or to add to the evidence.

Third, acting on outside information would be false to the oath or affirmation you took as jurors to give a true verdict according to the evidence. You would cease being a juror, that is, a judge of the facts, and have instead taken on the role of an investigator.

If one of your fellow jurors breaches these instructions, then the duty falls on the rest of you to inform me or a member of my staff, either in writing or otherwise, without delay. These rules are so important that you must report your fellow juror.

[*Add the following shaded section if there is a risk that a juror may visit the crime scene or attempt a private experiment*.]

For similar reasons, unless I tell you otherwise, you must not visit the scene of the alleged offence. You also must not attempt any private experiments concerning any aspect of the case. As I have explained, you are jurors assessing the evidence which is led in the case. You are not investigators, and must not take into account material that has not been properly presented to you as evidence.

Consequences of breaching instructions

You may have a question about what could happen if you acted on outside information or conducted your own research.

The immediate outcome is that the jury may need to be discharged and the trial may have to start again. This would cause stress and expense to the witnesses, the prosecution and the accused. It would also cause stress and inconvenience to the other jurors, who will have wasted their time sitting on a case which must be restarted.

Second, it is a criminal offence for a juror to discuss the case with others or to conduct research on the case. You could therefore be fined and receive a criminal conviction, which may affect your ability to travel to some countries. Jurors have even been sent to jail for discussing a case on Facebook.

More broadly, jurors conducting their own research undermines public confidence in the jury system. The jury system has been a fundamental feature of our criminal justice system for centuries.

For all these reasons, it is essential that you decide the case solely on the evidence presented in court, without feelings of sympathy or prejudice. You must not conduct your own research into the case or discuss the case with others who are not on the jury.

[*Judges may describe a specific example of the consequences of breaching instructions.*]

Warnings About Discussing the Case

As judges of the facts, it is also important that you are careful to avoid any situations that could interfere with your ability to be impartial, or that could make you appear to be biased towards one side or the other.

You must therefore be careful not to get into conversation with anyone you do not know, who you might meet around or near the court building. Otherwise you may find yourself talking to someone who turns out to have a special interest in the case.

You must also avoid talking to anyone other than your fellow jurors about the case. This includes your family and friends. You must not discuss the case on social media sites, such as Facebook, Myspace, Twitter, blogs or anything else like that. Of course, you can tell your family and friends that you are on a jury, and about general matters such as when the trial is expected to finish. But do not discuss the case itself. It is your judgment, not theirs, that is sought. You should not risk that judgment being influenced by their views – which will necessarily be uninformed, because they will not have seen the witnesses or heard the evidence.

You are free to discuss the case amongst yourselves as it continues, although you should only do this in the jury room. However, you should form no conclusive views about the case until you have heard all of the evidence, listened to counsel on both sides, and received my instructions about the law. Keep an open mind.

Consequences of breaching instructions revisited

You have already heard what can happen when jurors disregard the instruction not to conduct their own research. Similar consequences can follow if you discuss the case with others.

You must therefore also let me know if someone tries to discuss the case with you, or if you learn that one of your fellow jurors has been discussing the case with someone outside the jury.

Assessing Witnesses

In order to decide what the facts are in this case, you will need to assess the witnesses who give evidence. It is up to you to decide how much or how little of the testimony of any witness you will believe or rely on. You may believe all, some or none of a witness's evidence. It is also for you to decide what weight should be attached to any particular evidence – that is, the extent to which the evidence helps you to determine the relevant issues.

In assessing witnesses' evidence, matters which may concern you include their credibility and reliability. Credibility concerns honesty – is the witness telling you the truth? Reliability may be different. A witness may be honest, but have a poor memory or be mistaken.

It is for you to judge whether the witnesses are telling the truth, and whether they correctly recall the facts about which they are giving evidence. This is something you do all the time in your daily lives. There is no special skill involved – you just need to use your common sense.

In making your assessment, you should appreciate that giving evidence in a trial is not common, and may be a stressful experience. So you should not jump to conclusions based on how a witness gives evidence. Looks can be deceiving. People react and appear differently. Witnesses come from different backgrounds, and have different abilities, values and life experiences. There are too many variables to make the manner in which a witness gives evidence the only, or even the most important, factor in your decision.

You should keep an open mind about the truthfulness or accuracy of the witnesses until all of the evidence has been presented. This is because it is only once you have heard all of the evidence that it will be possible to assess to what extent, if any, the other evidence in the case confirms, explains or contradicts a particular witness's evidence.

In making your decision, do not consider only the witnesses' testimony. Also take into account the exhibits [and admissions]. Consider all of the evidence in the case, use what you believe and reject what you disbelieve. Give each part of it the importance which you – as the judge of the facts – think it should be given, and then determine what, in your judgment, are the true facts.

Onus and Standard of Proof

It is a critical part of our justice system that people are presumed to be innocent, unless and until they are proved guilty. So before you may return a verdict of guilty, the prosecution must satisfy you that [each of] the accused is guilty of the charge[s] in question.

As the prosecution brings the charge[s] against the accused, it is for the prosecution to prove that/those charge[s]. The accused does/do not have to prove anything. That never changes from start to finish. It is not for the accused to demonstrate his/her/their innocence, but for the prosecution to prove the charge[s] they have brought against him/her/them.

The prosecution must do this by proving [each of] the accused's guilt of the charge[s] beyond reasonable doubt. You have probably heard these words before, and they mean exactly what they say – proof beyond reasonable doubt.

This is the highest standard of proof that our law demands. It is not enough for the prosecution to prove that the accused is probably guilty, or very likely to be guilty. That would be enough in a civil case, such as where one person sues another for breach of contract. In that situation, matters only need to be proved on what is called the "balance of probabilities". That is, they need to be shown to be more likely than not.

By comparison, in a criminal trial the prosecution must prove the accused's guilt beyond reasonable doubt. This means you cannot be satisfied the accused is guilty if you have a reasonable doubt about whether the accused is guilty.

In deciding whether the prosecution has proved its case beyond reasonable doubt, you should remember that it is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so. A reasonable doubt is not an imaginary or fanciful doubt, or an unrealistic possibility.

Unless I tell you otherwise, when I say that the prosecution must "prove" or "establish" a matter, or that you must be "satisfied" about a matter, I mean the prosecution must prove or establish a matter, or you must be satisfied of that matter, beyond reasonable doubt.

The prosecution does not need to prove every fact that they allege to this standard. It is the essential ingredients or "elements" of the charge[s] that they must prove to this standard. In this case, that means that the prosecution must prove, beyond reasonable doubt, that [*list elements of the primary offence. Repeat for any other offences*].

I will explain these elements to you in detail, and relate them to the evidence in this case, after you have heard all of the evidence.

However, for now you should know that it is only if you find that the prosecution has proven all of the elements of a charge beyond reasonable doubt that you may find the accused guilty of that charge. If you are not satisfied that the prosecution has done this, your verdict in relation to that charge must be "Not Guilty".

Your verdict of guilty or not guilty must be unanimous. That is, whatever decision you make, you must all agree on it.

Separate Consideration – Multiple Accused

[*If the case involves multiple accused, add the following shaded section*.]

In this trial there are [*insert number*] accused. The prosecution says each of them is guilty. Each of them says they are not guilty. So there are really [*insert number*] trials [all] being heard together.

It would be inconvenient and a great waste of time and money to hold separate trials of each accused on different occasions in different courts on this same matter. So for convenience they are all tried together.

But you must be careful not to allow convenience to override justice. The parties are entitled to have the case against each accused considered separately.

You must consider the case against each accused separately, in light only of the evidence which applies to that accused. You must ask yourselves, in relation to each accused, whether the evidence relating to that accused has satisfied you, beyond reasonable doubt, that s/he is guilty of the offence s/he has been charged with. If the answer is yes, then you should find him/her guilty. If the answer is no, then you should find him/her not guilty.

Separate Consideration – Multiple Charges

[*If the case involves multiple charges, add the following shaded section.*]

In this trial, the prosecution has brought [*insert number*] charges against the accused. While these are separate matters, they are [all] being dealt with in the one trial. This is done for convenience, as it would be expensive and time-consuming to hold a separate trial before a different judge and jury for each charge.

However, you must be careful not to allow convenience to override justice. Both the prosecution and the accused are entitled to have each charge considered separately.

It would therefore be wrong to say that simply because you find the accused guilty or not guilty of one charge, that s/he must be guilty or not guilty, as the case may be, of another.

Each charge must be considered separately, in light only of the evidence which applies to it. You must ask yourselves, in relation to each charge, whether the evidence relating to that charge has satisfied you, beyond reasonable doubt, that the accused is guilty of that particular crime. If the answer is yes, then you should find the accused guilty of that charge. If the answer is no, then you should find the accused not guilty of it.

Alternative Verdicts

[*Where there is* one incident *which involves alternatives, add the following shaded section. If there are* multiple incidents *involving alternatives, this charge will need to be modified.*]

Members of the jury, my tipstaff is now going to hand you a document called an "indictment". This document lists the crimes that NOA is charged with. I will tell you more about what each crime involves at the end of the trial. However, there is one matter I want to draw to your attention now.

Charges [*identify relevant alternatives*] are given to you as alternatives. The prosecution does not say that the accused should be convicted of [both/all] of these charges, but of one or the other. This is because they [both/all] relate to the same incident.

At the end of the trial, when you are delivering your verdict[s], you will first be asked for your verdict on [*insert principal offence*], which is the more serious charge. If you reach a verdict of guilty in relation to that charge, you will not be asked for a verdict on [*insert alternative charge*].

It is only if you unanimously reach a verdict of not guilty on [*insert principal offence*] that you will be asked to deliver a verdict on [*insert alternative charge*]. This is because the prosecution is entitled to your verdict on the most serious charge. It would be wrong to compromise and say "we cannot agree on a verdict on charge one, but we agree that the accused is at least guilty of charge two".

So when you are listening to the evidence, bear in mind that while there are [*insert number of charges'*]

charges on the indictment, there are actually only [*insert number*] of allegations that relate to different events because the other [*insert number*] charges are alternatives.

Trial Procedure

Order of Proceedings

I will now describe the procedure that we will follow during the trial, and some general administrative matters.

In a moment we will hear the opening address from the prosecutor, and the reply from counsel for the accused.[33] Then we will proceed to hear the evidence. After that, there will be closing addresses from counsel. I will then instruct you about the law, the issues and the evidence. You will then go to the jury room to discuss your verdict[s].

Transcripts and Note-taking

All of the evidence in this case is going to be tape recorded and transcribed. This means that you will be able to check on any part of the evidence you later cannot remember.

However, you should always listen carefully to the evidence as it is given, because it is not only what the witnesses say, but also how they say it that is important to your assessment of their evidence.

When you are listening to the evidence from the witnesses, you may take notes if you wish, but you do not have to. It is completely up to you. If you do take notes, you should not allow it to distract you from listening to the evidence and assessing the witnesses. You may always ask to hear a tape of a witness's testimony or have some evidence read back to you, but you only have one chance to observe the appearance and behaviour of the witnesses when they give the evidence.

Sitting times and breaks

Our hours here in court are [*insert starting time*] until [*insert lunch time*] and then [*insert starting time after lunch*] until [*insert finishing time*].

If something comes up which means that you may not able to attend court when we would normally be sitting, please let me know as soon as possible, so that we can try to resolve the issue.

Jury Guide

[*If the judge is providing the jury with a jury guide, add the following shaded section.*]

To help you remember the directions I have just given you, my tipstaff will now give you a jury guide. You can write on it if you wish. The Guide, like all documents we will give you during the trial, must not be taken home. You may bring it to the courtroom, but you must leave it in the jury room at the end of each day. If you bring the Guide to the courtroom, do not allow it to distract you. Do not try to read it while I am giving you directions, or when counsel are addressing you, or while a witness is giving evidence.

The Guide is a simplified reminder of some of the directions I have given you. It is a publication designed for general use by jurors in criminal trials and is not specific to this case. It does not cover all of the directions I have given word for word and it will not cover directions I will give you during the trial and at the end of the trial which will be specific to this trial. If you think there is anything in the

[33] This will need to be modified if the judge's remarks are made after the opening address and reply.

Guide which is different to what I have instructed you, then you must follow what I tell you in court and ignore what is in the guide. If you are confused or unsure about whether there is a difference between the Guide and my directions, you should ask me to clarify.

Opening Address

We will now hear the opening address from the prosecution, who will tell you what the case is about.

[*After opening and reply, briefly state the issues*.]

Last updated: 14 August 2023

2 Directions in Running

2.1 Views

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What is a view?

1. Under s 53 of the *Evidence Act 2008,* the court may order a "demonstration, experiment or inspection" (collectively, a "view").[34]
2. These terms are not defined in the *Evidence Act 2008*. Based on the common law and the conventional meaning of the terms:
    - An *inspection* involves the court travelling to view a location or an object that could not be brought into the courtroom;
    - A *demonstration* builds on an inspection by allowing a witness to explain the incident in question, demonstrate the operation of a machine or other object, or attempt to recreate an event;
    - An *experiment* involves the jury watching a person carry out a test or trial for the purpose of discovering something or testing a principle or hypothesis (*Evans v R* (2007) 235 CLR 521).
3. Views take place outside the courtroom. Section 53 therefore does not apply to the examination of exhibits inside the courtroom, or courtroom demonstrations of the size or position of objects (*Evans v R* (2007) 235 CLR 521. See also *Evidence Act 2008* s 53(5)).
4. The "experiments" referred to in s 53 are limited to those conducted as part of the trial in front of the jury, and do not include those conducted before the trial and described by witnesses at the trial (*Evans v R* (2007) 235 CLR 521; *DPP v Farquharson (No.2) (Ruling No. 4)* [2010] VSC 210).

When May a View Be Ordered

5. A judge may order a view on the application of a party (*Evidence Act 2008* s 53).
6. Before ordering a view, the judge must be satisfied that:
    - The parties will be given a reasonable opportunity to be present; and

[34] While the heading of s 53 is "views", that term is not used in the provision. It has been held that it was Parliament's intention to use the word "view" as a general word to encompass demonstrations, experiments and inspections. This differs from the common law, where a view was an inspection and did not encompass a demonstration or experiment (*Hughes v Janrule* [2010] ACTSC 5).

- The judge and jury will be present (*Evidence Act 2008* s 53).

7. While the presence of the judge and jury at a view is mandatory, a party may choose not to be present (*R v Milat* NSWSC 12/4/96).
8. In some cases, counsel have sought to be excused from being present during a view. As a matter of principle, juries should not receive evidence in the absence of counsel for each party and there are significant limits on when a judge can communicate with a jury without the knowledge of counsel. Given that a view can be used as evidence and the jury can ask questions during a view, it will rarely be appropriate for a judge to excuse counsel for attending the view.
9. It is at the trial judge's discretion whether to hold a view in a particular case (*R v Delon* (1992) 29 NSWLR 29).
10. In deciding how to exercise the discretion, a judge must consider:
    - Whether the parties will be present;
    - Whether the view will assist the court to resolve issues of fact or understand the evidence;
    - The danger that the view might be unfairly prejudicial, might be misleading or confusing, or might cause or result in undue waste of time;
    - In the case of a demonstration, the extent to which it will properly reproduce the conduct or event to be demonstrated;
    - In the case of an inspection, the extent to which the place or thing being inspected has been materially altered (*Evidence Act 2008* s 53).
11. Unlike at common law (see, e.g. *R v Alexander* [1979] VR 615), the circumstances to be demonstrated do not need to be identical to the circumstances that existed at the time of the event in question. Similarity of circumstances is merely one factor that a judge must consider (*Evidence Act 2008* s 53).
12. A view may take place at any time during the trial. While this can even extend to conducting a view after the jury commences deliberations, the judge must have special regard for the prohibition on the prosecution splitting its case and the risk of prejudice to the accused when additional evidence is introduced after closing addresses (*R v Delon* (1992) 29 NSWLR 29).
13. As the *Evidence Act 2008* substantially changed the law in this area, common law cases on the availability of a view must be read with considerable caution.

For What Purposes May a View be Used?

14. The jury may use a view as a source of evidence in the case, and may draw any reasonable inferences from what it sees, hears or otherwise notices during a view (*Evidence Act 2008* s 54).
15. A view may also allow the jury to better understand the evidence given in court and to assess the credibility or value of that evidence (see, e.g. *R v Alexander* [1979] VR 615; *Scott v Numurkah Corporation* (1954) 91 CLR 300).

Conduct of a View

16. A view may be facilitated by a sworn 'shower' who points out what are said to be relevant features on the view. The 'shower' is usually a member of court staff, who has previously received a 'dry run' of the view with the assistance of the informant. It is only in an exceptional case that the informant should be sworn as the 'shower' (*Aston v The Queen* [2019] VSCA 225, [90]–[93]).
17. Those responsible for transporting the jury to a view, including both jury keepers and any bus drivers, should be made aware that they must not discuss anything related to the case in the presence of the jury (*Aston v The Queen* [2019] VSCA 225, [82]).

Directions on Views

18. The judge should instruct the jury that inspections and experiments are only allowed under the strict control of the court. Jurors must not conduct their own inspections or experiments during deliberations. Such conduct is a criminal offence (*R v Skaf* (2004) 60 NSWLR 86; *Evidence Act 2008* s 53(4); *Juries Act 2000* s 78A. See 1.5 Decide Solely on the Evidence for further information).
19. Before conducting a view, the judge should explain its purpose and how the jury may use the view in the circumstances of the case.
20. The judge should tell the jury not to talk to any accompanying witnesses, police officers or legal representatives during the view. (*Evans v R* (2007) 235 CLR 521; *R v Ashton* (1944) 61 WN (NSW) 134; *R v Neilan* [1992] 1 VR 57).[35]

Placing the View on the Record

21. Historically, one argument against using views as evidence was that there was no way for the results of the view to be transmitted to an appellate court. To overcome this problem, upon returning to court, judges should sum up (in the presence of the jury) what transpired, so that there is an accurate record of what occurred on the transcript (*Ha v R* (2014) 44 VR 319; *R v FD* (2006) 160 A Crim R 392).
22. This is an important tool to allow an appellate court to know what occurred on a view and so assess what inferences may have been open to a jury as a result of the view (*Ha v R* (2014) 44 VR 319).
23. A summary may be compiled through:
    - Recording a video of the view (provided it does not disclose the identity of the jurors). If a view is recorded, the judge should ensure that any questions from the jury are also recorded by reading the question out himself or herself;
    - A shorthand writer keeping a summary of the view while it takes place;
    - The judge making a summary on the return to court. Some judges invite counsel to prepare an agreed summary, which the judge will then settle (see *Ha v R* (2014) 44 VR 319).
24. The summary should identify where the jury were taken, what they observed and from what vantage points. It need not draw conclusions about what was observable from those vantage points (*Ha v R* (2014) 44 VR 319).
25. The summary of the view should include a note of any questions the jury asked in the course of the view (*Ha v R* (2014) 44 VR 319).

Last updated: 23 October 2019

2.1.1 Charge: Views

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This charge should be given before going on a view. Upon returning to court, it is advisable to sum-up, in the presence of the jury, what transpired and summarise these directions.

You will shortly be taken to [an inspection/see a demonstration/see an experiment] at [*insert location*]. You will be accompanied by [*identify all those who will attend the view, such as the judge, counsel for the parties, the accused, and any jury keepers*].

[35] Witnesses should not accompany the jury unless conducting a demonstration or experiment.

The purpose of this [inspection/demonstration/experiment] is to assist you to better understand the evidence of the witnesses. You may also use your observations as evidence in the case and as part of your discussions. You are entitled to draw any reasonable inferences from what you see, hear or otherwise notice during the [inspection/demonstration/experiment]. Later in the trial I will give you directions about the need for care when drawing inferences from evidence.[36]

During the [inspection/demonstration/experiment], you must not discuss the case in any circumstances where you can be overheard by anyone other than your fellow jurors. Remember that all jury discussions must take place in the privacy of the jury room.

Do not speak to anyone other than a fellow juror or a court officer, and do not let anyone other than these people speak to you. If you have a question concerning the [inspection/demonstration/experiment], you should write it down and give it to my tipstaff, who will pass it to me.

At the start of the trial, I told you that you must not make any private investigations or enquiries about this case, and that it is a criminal offence to do so. You are jurors and not investigators. That direction still applies, and means that you must not visit the [*describe view location*] a second time. All [inspections/demonstrations/experiments] must be conducted under court supervision.

Last updated: 30 November 2015

2.2 Providing Documents to the Jury

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What Documents Can Be Given to the Jury?

1. Section 223(1) of the *Criminal Procedure Act 2009* allows the judge to provide copies of the following documents to the jury (in any form that he or she considers appropriate) if he or she thinks it will assist the jury to understand the issues in the trial:

[36] If the judge has already directed the jury about drawing inferences, this paragraph must be modified accordingly.

(a) the indictment;

(b) the summary of the prosecution opening;

(c) the response of the accused to the summary of the prosecution opening and the response of the accused to the notice of pre-trial admissions of the prosecution;

(d) any document admitted as evidence;

(e) any statement of facts;

(f) the opening and closing addresses of the prosecution and the accused;

(g) any address of the trial judge to the jury under section 222;

(h) any schedules, chronologies, charts, diagrams, summaries or other explanatory material;

(ha) the transcript of the evidence in the trial;

(i) transcripts of evidence or audio or audiovisual recordings of evidence;

(j) transcripts of any audio or audiovisual recordings;

(k) the trial judge's directions to the jury under section 238;

(ka) a jury guide

(l) any other document that the trial judge considers appropriate.

2. The term "document" is not defined in the *Criminal Procedure Act 2009*. For the purposes of section 223, it should be given the definition contained in section 38 of the *Interpretation of Legislation Act 1984* (*R v BAH* (2002) 5 VR 517).
3. Although a judge may have a discretion to allow a VARE to be provided to the jury to view in the jury room during their deliberations (*Criminal Procedure Act 2009* s 223), it should only be exercised in exceptional circumstances. Any unrestricted access should be accompanied by strong warnings (*R v Lyne* [2003] VSCA 118; *R v BAH* (2002) 5 VR 517; *R v H* [1999] 2 Qd R 283; *R v Lewis* (2002) 137 A Crim R 85. See 2.3.3 Pre-recorded Evidence for further information).

When May a Document Be Given to the Jury?

4. A document may be provided to the jury on the application of a party, or on the judge's own motion (*Criminal Procedure Act 2009* s 337; *R v Benbrika and Ors (Ruling No. 11)* [2007] VSC 580).
5. The judge must think that the document will assist the jury to understand the issues in the trial or the evidence (*Criminal Procedure Act 2009* s 223; *R v Benbrika and Ors (Ruling No. 11)* [2007] VSC 580. See also *Alucraft Pty Ltd (in liq) v Grocon Ltd (No 1)* [1996] 2 VR 377).
6. While the philosophy behind s 223 should be embraced (as it is in both the jury's interests and the interests of efficiency generally), it must always be subject to the overriding responsibility of the court to ensure that the accused's right to a fair trial according to law is not infringed. A document should not be given to the jury if it would create a material risk of unfairness to the accused that cannot be overcome by a direction or warning (*R v Benbrika and Ors (Ruling No. 11)* [2007] VSC 580).

Marking Jury Documents as Exhibits

7. Documents which the judge gives the jury, such as written directions, should be tendered by the court and marked as exhibits. This ensures that the documents are recorded in the same way as other exhibits and are preserved for any future proceedings.

Types of Documents that May be Given to the Jury

Written Directions

8. Under the *Criminal Procedure Act 2009* s 223, a judge may give the jury written directions summarising relevant matters of law, setting out the questions it may be pertinent for them to consider, or describing the possible verdicts at which they may properly arrive.

9. Written directions may be particularly helpful where the law is complicated, or where there are a number of alternative verdicts to be considered (*R v Dunn* (2006) 94 SASR 177; *R v Bourke* [2003] QCA 113; *R v Youssef* (1990) 59 A Crim R 1; *R v Radford* (1986) 133 LSJS 110; *R v Wilson* (1980) 17 A Crim R 359; *R v Hughes* (1980) 7 A Crim R 51; *R v Petroff* (1980) 2 A Crim R 101. See *R v Thompson* (2008) 21 VR 135 (Neave JA) for a discussion of the usefulness of written directions).

10. In cases involving numerous, detailed and complex legal issues, it may be an imposition on the jury *not* to assist them by providing them with written directions. It may be unrealistic to believe that they will be able to retain the key structure and content of the summing-up in their minds without the assistance of such a document (*R v Radford* (1986) 133 LSJS 110).

11. Written directions should not be used as a substitute for directions of law or references to how the parties have put their case. Instead, written directions may be used in conjunction with and to supplement oral directions (see *Jury Directions Act 2015* ss 65, 66).

12. The oral directions must explain the written directions to the jury, and explain how they are to be used (*R v Thompson* (2008) 21 VR 135; [2008] VSCA 144 (Hansen AJA)).

13. The contents of written directions are a matter for the judge and counsel to consider in light of the evidence given at the trial. It is desirable to show them to counsel prior to providing them to the jury. This should be done before the judge's charge has commenced, to provide counsel with adequate opportunity to comment on the proposed directions, and correct any errors or omissions. While counsels' views should be taken into account, their consent is not required (*R v Dunn* (2006) 94 SASR 177; *R v Radford* (1986) 133 LSJS 110; *R v Petroff* (1980) 2 A Crim R 101; *R v Abebe* (2000) 1 VR 429).

14. The judge should refrain from giving the jury copies of legislative provisions (*R v Phillips* [1971] ALR 740).

15. Judges should carefully consider the best time to provide written directions to the jury. They must make sure that the jury is not distracted by any document provided. It may be desirable to give the jury time to read the document before proceeding with oral directions (*R v Petroff* (1980) 2 A Crim R 101).

16. It will be an error merely to provide a written document to the jury without explaining its contents and the use which may be made of it (*R v Dunn* (2006) 94 SASR 177).

17. A judge may, however, provide a jury with a transcript of directions given in running and state that those directions continue to apply, without reiterating each of those directions as part of the judge's final directions, or specifically instructing the jury that they must read those previously given directions. This is most likely appropriate where it is done with the consent of the parties (*Nguyen v The Queen* [2015] VSCA 76, [43]–[50]).

18. The judge should be careful not to overemphasise the use of the written directions (*R v Petroff* (1980) 2 A Crim R 101).

19. Care must be taken to ensure that the provision of selective written material does not disturb the essential balance in the oral charge between the prosecution and defence case (*R v Thompson* (2008) 21 VR 135; [2008] VSCA 144 (Redlich JA)).

Explanatory Materials (Charts, Schedules and Chronologies)

20. Judges may allow evidence to be given in the form of charts, summaries or other explanatory materials (*Evidence Act 2008* ss 29(4), 50), and may provide schedules, chronologies, charts, diagrams, summaries or other explanatory materials to the jury (*Criminal Procedure Act 2009* s 223(h)).

21. The use of charts, schedules and chronologies to assist the jury in complicated cases is encouraged. The jury is entitled to expect that all reasonable steps will be taken towards simplifying their task and facilitating their deliberations, and such explanatory materials provide an important and desirable method for doing this (*Collins v R* (1986) 44 SASR 214; *Smith v R* (1970) 121 CLR 572; *R v Mitchell* [1971] VR 46; *Alucraft Pty Ltd (in liq) v Grocon Ltd (No 1)* [1996] 2 VR 377).

22. In some complex cases, the *only* way that the interests of justice can be served is by presenting an overall picture to the jury with the aid of explanatory materials (*R v Simmonds* [1969] 1 QB 685; *Collins v R* (1986) 44 SASR 214).

23. In determining whether to admit a chart into evidence, a judge should consider whether it will assist in the fact-finding task without disadvantaging the accused (*Alucraft Pty Ltd (in liq) v Grocon Ltd (No 1)* [1996] 2 VR 377).

24. If a chart contains expressions of opinion, the person who prepared the chart must be qualified to express those opinions (*Butera v DPP (Vic)* (1987) 164 CLR 180 (Gaudron J)*; Alucraft Pty Ltd (in liq) v Grocon Ltd (No 1)* [1996] 2 VR 377).

25. Care must be taken to ensure that any explanatory materials sent into the jury room are not inherently prejudicial to the accused, either by virtue of their form or because they might tend to give undue emphasis to a particular aspect of some evidence to the exclusion of other evidence (*Collins v R* (1986) 44 SASR 214); *R v Benbrika and Ors (Ruling No. 11)* [2007] VSC 580).

26. Consideration should be given to the language used in a summary. It should not implicitly express conclusions about the conversations summarised (e.g. through the use of conclusionary past participles such as "complained" or "confirmed"), where those conclusions are in dispute (*R v Benbrika and Ors (Ruling No. 11)* [2007] VSC 580).

27. If a chart purports to summarise all of a witness's evidence on a particular topic, it should do so fully. A judge should not allow a chart to be provided to the jury if it only selectively summarises that witness's evidence on that topic or contains errors (*R v Van Beelen* (1973) 4 SASR 353; *Collins v R* (1986) 44 SASR 214; *Alucraft Pty Ltd (in liq) v Grocon Ltd (No 1)* [1996] 2 VR 377; *R v Benbrika and Ors (Ruling No. 11)* [2007] VSC 580).

28. Explanatory materials should not introduce new evidence, or give rise to inferences or conclusions that cannot be drawn from the oral and documentary evidence that has already been disclosed or will be disclosed. Such materials should merely provide a convenient summary of the evidence that has been, or will be, given (*Collins v R* (1986) 44 SASR 214; *Butera v DPP (Vic)* (1987) 164 CLR 180 (Gaudron J); *Alucraft Pty Ltd (in liq) v Grocon Ltd (No 1)* [1996] 2 VR 377).

29. If explanatory materials are used, a judge should usually remind the jury that they are not a substitute for the oral or documentary evidence, point to any errors disclosed in the documents, and deal with the danger of drawing inferences from these materials which go beyond the evidence given (*R v Van Beelen* (1973) 4 SASR 353).

30. However, it is at judges' discretion whether to give such a direction. They may not want to do so if it has already been covered by counsel, and they wish to avoid giving the chart added significance in the eyes of the jury (see, e.g. *Collins v R* (1986) 44 SASR 214).

Transcripts

Transcripts of Evidence

31. A judge may provide the jury with a transcript of some or all of the oral evidence, including audio or audiovisual recordings of evidence, given in a trial if he or she thinks it will help them to understand the issues or the evidence (*Criminal Procedure Act 2009* s 223(ha), (i)).

32. Prior to the enactment of this provision, views varied about when the jury should be allowed to take a transcript of evidence into the jury room. Some cases held that a transcript should not be provided to the jury without good reason, as:

    - The transcript may be given disproportionate weight or credibility by the jury;
    - If only part of the transcript is provided to the jury, or read by the jurors, it may give an unbalanced or incorrect impression of the evidence given. For example, a witness may have contradicted, qualified or corrected something said earlier in another (unread) part of his or her evidence, or a different witness may have given conflicting evidence; and
    - Jurors should focus on the oral evidence given rather than written documents (*Butera v DPP (Vic)* (1987) 164 CLR 180; *R v Lowe* (1997) 98 A Crim R 300; *R v Fowler* [2000] NSWCCA 142; *Driscoll v R* (1977) 137 CLR 517).

33. Other cases held that, if requested, a transcript generally should be provided to the jury. It was argued that:

    - As jurors are usually allowed to take notes of the evidence, a member of the jury may already make a full note of what was said and read it to other members of the jury. It is preferable to provide them with a transcript, which carries the additional quality of guaranteed accuracy (*R v Taousanis* (1999) 146 A Crim R 303);
    - A trial is not a memory test, and it is prudent for the jury to check their recollection against a transcript (*R v Bartle* (2003) 181 FLR 1);
    - Denying the jury the benefit of reading the evidence they have heard "put[s] the law into an ill-fitting straitjacket". Instead, the jury should be assisted to deliberate effectively and rationally on the evidence. The provision of the transcript will assist them to do this, by compensating for any lack of reliability in juror's notes, and saving time in their deliberations (*R v Williams* [1982] Tas R 266; *R v Taousanis* (1999) 146 A Crim R 303);
    - The risk of a transcript being given disproportionate weight or credibility, or of the jury receiving an unbalanced or incorrect impression of the evidence, can be eliminated by giving an adequate caution (*R v Taousanis* (1999) 146 A Crim R 303).

34. While these cases should now be approached with some caution (due to the provisions of the *Criminal Procedure Act 2009*), the considerations identified may still be of assistance in determining when to exercise the discretion provided by s 223(ha) and (i).

35. If a judge chooses to provide the jury with a transcript, he or she must instruct the jury in unambiguous terms that the transcript is not evidence, and is made available only for their convenience. The jury should be reminded that the evidence is what they saw and heard in court, not what they are about to read. This instruction should be given before the transcript is made available (*Butera v DPP (Vic)* (1987) 164 CLR 180 (Gaudron J); *R v Morgan* [2009] VSCA 225; *R v MG* (2010) 29 VR 305).

36. As criminal trials are essentially oral in nature, care must be taken to avoid the risk that undue weight will be given to a written record of a conversation as compared to the conversation itself heard in oral form (*Gately v R* (2007) 232 CLR 208; *Butera v DPP (Vic)* (1987) 164 CLR 180; *R v Morgan* [2009] VSCA 225).

37. Where a part of the transcript is provided in relation to a certain issue, as a matter of fairness it may be necessary to also provide a transcript of any other evidence contradicting, weakening or qualifying that evidence. Such evidence should usually be provided even if the jury does not request it. If this is not done, the judge must adequately instruct the jury about any matters which detract from the probative force of the evidence in the transcript (*R v Lowe* (1997) 98 A Crim R 300; *Butera v DPP (Vic)* (1987) 164 CLR 180 (Gaudron J)).

38. Where time has not been taken to address inaccuracies in the transcript, a direction may be necessary concerning its accuracy (*R v Thompson* (2008) 21 VR 135; [2008] VSCA 144).

39. If there is a dispute about whether the transcript is accurate, the problem should be presented to the jury, to be resolved by them with the greatest assistance that the court and counsel can provide. The jury should be told of the possibility of error, and that they must not hold any words against the accused unless they are sure that those words were used. The jury should be told that in the end they must rely upon their own recollection of what was said, rather than relying on the transcript which could be inaccurate (*R v JWM* (1999) 107 A Crim R 267).

40. If a judge provides a transcript, any arguments made in the absence of the jury should be expunged (see, e.g. *R v Nikolaidis* [2003] VSCA 191; *R v Fowler* [2000] NSWCCA 142).

41. See 2.3.3 Pre-recorded Evidence for information concerning transcripts of a VARE.

Transcripts of Addresses and the Judge's Charge

42. A judge has the power to allow transcripts of his or her summing-up, and any other addresses he or she has made, to be taken into the jury room. Transcripts of counsels' addresses may also be provided (*Criminal Procedure Act 2009* ss 223(b), (c), (f), (g), (k)).

43. A judge may, upon request, provide a transcript of the whole summing-up to go to the jury, or arrange for a recording of it to be replayed to them (*R v Sukkar* [2005] NSWCCA 54).

44. Such transcripts may be of great assistance to jurors, as they may accurately and comprehensively remind them of what was said during the trial (*R v Taousanis* (1999) 146 A Crim R 303).

45. In addition, transcripts of the defence closing will remind the jury of the details of the defence accurately and comprehensively, and of the material which might give rise to a reasonable doubt. It may also help them to understand how the various strands of evidence might be drawn together, and remind them of the explanations for any pieces of potentially adverse evidence (*R v Bartle* (2003) 181 FLR 1).

46. Moreover, all of the reasons in favour of providing transcripts of evidence to the jury (see 'Transcripts of Evidence' above) equally apply to transcripts of counsels' addresses and the judge's charge (*R v Taousanis* (1999) 146 A Crim R 303).

47. If the jury requests a transcript of counsels' closing addresses, it may be a miscarriage of justice not to provide it. For example, in *R v Bartle* (2003) 181 FLR 1, a new trial was ordered because the judge declined, in a long and complex trial, to make such a transcript available. The Court pointed out that the jury could not be expected to remember all of the points made in the long, detailed and closely reasoned speeches. They could not even be expected to remember which matters they wanted to obtain more information about (and so could not request a part of the evidence be read back). It was noted that the jury were best placed to know what further assistance they needed, but did not receive it.

48. If the jury requests a transcript of counsels' addresses, it may not be sufficient to provide them with a transcript of the judge's summing-up instead. While the summing-up provides an outline of the respective cases, counsels' addresses may cover important factual material not contained in the judge's charge, and should generally be supplied upon request (*R v Bartle* (2003) 181 FLR 1).

49. If the jury requests a copy of the judge's charge, it may be sufficient to provide them with a summary of the elements of the offence instead (if the jury considers that such a summary answers whatever questions they have) (see, e.g. *R v Coombes* 16/4/1999 Vic CA).

Transcripts of Taped Evidence

Transcripts of Tapes in English

50. A tape recording may be admitted into evidence to prove that what is recorded took place in the circumstances and among the participants alleged by the prosecution, as well as to prove the content of any recorded conversation (*Butera v DPP (Vic)* (1987) 164 CLR 180).

51. It is the sound produced by playing the tape which is the evidence, not the tape itself. The tape cannot prove anything without being played (*Butera v DPP (Vic)* (1987) 164 CLR 180).

52. If the tape is available to play in court, a transcript of its contents should not be admitted as proof of those contents. The tape should be played to the jury, as that will provide the best evidence of what was recorded (*Butera v DPP (Vic)* (1987) 164 CLR 180).

53. However, a transcript of a tape recording may be given to the jury to help them to understand the words spoken on the tape. This is often done, but is particularly helpful if the contents are difficult to hear or understand, or if the recording is lengthy (*Criminal Procedure Act 2009* s 223(j); *Butera v DPP (Vic)* (1987) 164 CLR 180; *R v JWM* (1999) 107 A Crim R 267; *R v Menzies* [1982] 1 NZLR 40).

54. Providing jurors with a transcript in such circumstances may help to limit the number of times a tape needs to be replayed before their ears become attuned to the words or other sounds recorded (*Butera v DPP (Vic)* (1987) 164 CLR 180).

55. Immediately before giving a transcript to the jury, they should be told that the purpose of giving it to them is not to provide independent evidence of the contents of the tape, but to help them to understand what is recorded on the tape. It is their understanding of the tape recording that is important, and the transcript is not to replace that understanding. Jurors must not rely on the transcript if they are not satisfied that it correctly sets out what they heard on the tape (*Butera v DPP (Vic)* (1987) 164 CLR 180; *R v Miladinovic* (1992) 107 FLR 241; *R v Giovannone* [2002] NSWCCA 323; *Eastman v R* (1997) 76 FCR 9).

56. A judge may allow the transcript to be taken into the jury room as a "transcript of any audio or audiovisual recordings" (*Criminal Procedure Act 2009* s 223).

57. See 2.3.3 Pre-recorded Evidence for information concerning transcripts of a VARE.

Transcripts of Tapes in Languages Other than English

58. Written translations of tapes recorded in languages other than English are different from transcripts of recordings in English. Such translations are not admissible as an aid to the jury's understanding of the sounds recorded on the tape, because the jury will not understand those sounds (*Butera v DPP (Vic)* (1987) 164 CLR 180).

59. While it will probably be necessary for a translator to make written notes about the content of that tape for their own purposes, they should usually give oral evidence about the contents of that translation. Their situation is no different from that of any other witness giving evidence (*Butera v DPP (Vic)* (1987) 164 CLR 180).

60. However, the practice of requiring witnesses to give their evidence orally is not immutable. A judge has discretion to allow a transcript of a translator's evidence to be provided to the jury, just as he or she may allow a written transcript of any other witness's evidence to be provided to the jury (see "Transcripts of Evidence" above). This may be done where the judge thinks it would be of assistance to the jury. (*Butera v DPP (Vic)* (1987) 164 CLR 180; *Alucraft Pty Ltd (in liq) v Grocon Ltd (No 1)* [1996] 2 VR 377).

61. As such translations may be provided to the jury for the same reasons as any other transcript of evidence, the procedure for determining whether to allow this to occur, what documents to provide, and the directions to give will be the same as those outlined in "Transcripts of Evidence" above. For example, as a matter of fairness it may be desirable to also provide the jury with a written transcript of the cross-examination of the translator, to supplement and modify the written transcript which represents their evidence in chief (*Butera v DPP (Vic)* (1987) 164 CLR 180).

Jury Guide

62. The judge may provide the jury with a "jury guide", which may contain:
    (a) a list of questions to assist the jury in reaching a verdict, including a written form of any factual question directions or integrated directions;
    (b) evidentiary directions;
    (c) references to how the parties have put their cases;
    (d) references to evidence which the judge considers necessary to assist the jury to determine the issues in the trial;
    (e) any other information (Criminal Procedure Act 2009 s 223).
63. When providing this kind of guide, judges should be careful in the terminology they use to describe the guide, or components of the guide, and should not describe a jury document as a "question trail" unless it is an integrated direction in accordance with *Jury Directions Act 2015* s 67 (*McKinnin v The Queen* [2019] VSCA 114, [78]).
64. A judge may also provide the jury with a "general jury guide" which may contain:
    (a) general information about criminal trials, including the role of the judge, jury and parties and the order of events in a trial;
    (b) general information about relevant legal concepts, including the presumption of innocence and the requirement of proof beyond reasonable doubt;
    (c) general information about jury deliberations, including what to do if a juror has a question, appointing a foreperson and how the jury may wish to organise its deliberations;
    (d) any other general information (Criminal Procedure Act 2009 s 223A).

Last updated: 28 August 2019

2.2.1 Charge: Explanatory Materials (Charts, Schedules and Chronologies)

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[*Insert name of witness*] has just used a [*insert type of explanatory material*] to help to explain his/her evidence. This was used for convenience, and is not evidence in the case.

You must therefore not base your decisions in this case on the [*insert type of explanatory material*]. Your decision must be based solely on the evidence that has been given in court.

Last updated: 14 December 2006

2.2.2 Charge: Transcripts of Evidence and Addresses

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You are about to be given a transcript of [*insert description*]. I am giving this to you in order to help you remember the evidence that was given in court. The transcript itself is not evidence.

[*If parts of the transcript have been removed, add the following shaded section:*]

You may note that some of the pages are [missing/blank]. Those pages contain a transcript of legal matters discussed in your absence. You do not need to concern yourselves about those matters, as I explained to you earlier.

Do not regard the transcript as infallible. Sometimes the transcribers make mistakes or cannot hear what the witness has said. Counsel and I have checked the transcript for mistakes, but we can be mistaken too. The evidence is what you say it is – not the transcriber or counsel or me. If you see something in the transcript which you regard as wrong, then it is your recollection of what the witness said that is decisive, not the written words on the transcript.

It is important that you consider not only what was said, but how it was said. Your assessment of the witnesses themselves, and not just the words they said, may be of assistance in determining the facts in this case.

The transcript should be kept in the jury room when you are not in court. At the end of the trial you will need to return it to my tipstaff.

Last updated: 14 December 2006

2.2.3 Charge: Transcripts of Taped Evidence

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You are about to be given a transcript of the [tape/video] you are about to [hear/see]. I am giving this to you to help you follow the [tape/video] as it is played. The [tape/video] is the only evidence. The transcript is just an aid. It is not evidence.

If what you read in the transcript differs from what you [hear/see] on the [tape/video], you are to use what you [hear/see] on the [tape/video] not what is in the transcript. So if the words you hear are different from those you read in the transcript, or if the speakers you [hear/see] are different from those identified in the transcript, it is for you to decide who was speaking and what was said.

In considering the tape evidence, it is important that you consider not only what is said, but how it is said. Listen carefully to the way the witnesses speak. Your assessment of the witnesses themselves, and not just the words they say, may be of assistance in determining the facts in this case.

Last updated: 14 December 2006

2.3 Other Procedures for Taking Evidence

Overview

1. This chapter address the following areas, each of which involve taking evidence from witnesses in certain circumstances:
    - 2.3.1 Alternative Arrangements. These are procedures designed to reduce the stress of giving evidence on particular witnesses in certain types of proceedings (*Criminal Procedure Act 2009* Part 8.2, Division 4);
    - 2.3.2 Protected Witnesses. These are procedures designed to prevent the accused from personally cross-examining certain witnesses (*Criminal Procedure Act 2009* Part 8.2, Division 3);
    - 2.3.3 Pre-recorded Evidence. These are procedures which allow evidence that has been pre-recorded to be used in certain legal proceedings (*Criminal Procedure Act 2009* Part 8.2, Divisions 5 and 6)
    - 2.3.4 Witness Support Dog. This discusses the availability of a witness support dog, and a direction that may be given to explain the presence of the support dog to the jury.
2. When interpreting and applying these procedures, the court must have regard to the guiding principles outlined in *Criminal Procedure Act 2009* s 338.

2.3.1 Alternative Arrangements

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When Can Alternative Arrangements Be Made?

1. While ordinarily witnesses must give evidence in the courtroom in accordance with normal court procedures, the *Criminal Procedure Act 2009* provides that alternative arrangements can be made if the proceedings relate (wholly or partly) to:
    - A "sexual offence"; or
    - An offence where the conduct constituting the offence consists of "family violence" within the meaning of the *Family Violence Protection Act 2008*;
    - An offence against section 17(1) or 19 of the *Summary Offences Act 1966* (*Criminal Procedure Act 2009* ss 359, 360).
2. A direction requiring the use of alternative arrangements may be made on the application of a party or on the court's own motion (*Criminal Procedure Act 2009* s 337(1)).

What is a "Sexual Offence"?

3. A "sexual offence" is defined as:

(a) an offence against–

(i) a provision of Subdivision (8A), (8B), (8C), (8D), (8E), (8F) or (8FA) of Division 1 of Part I of the *Crimes Act 1958*; or

(ii) section 327(2) (failure to disclose a sexual offence committed against a child under the age of 16 years) of the *Crimes Act 1958*; or

(iii) section 5(1), 6(1), 7(1), 8(1), 9(1) or 11(1) of the *Sex Work Act 1994*;

(b) an offence an element of which involves-

(i) any person engaging in sexual activity; or

(ii) any person taking part in a sexual act; or

(iii) commercial sexual services; or

(iv) a sexual performance involving a child;

(c) an offence an element of which involves-

(i) an intention that any of the conduct referred to in paragraph (b) is to occur; or

(ii) soliciting, procuring, enabling or threatening any of the conduct referred to in paragraph (b); or

(iii) inducing or knowingly allowing a child to enter or remain on premises so that any of the conduct referred to in paragraph (b) may occur;

(d) an offence an element of which involves child abuse material;

(e) an offence an element of which involves indecency;

(f) an offence of attempting to commit, or of incitement or conspiracy to commit, an offence referred to in paragraph (a), (b), (c), (d) or (e);

(g) an offence against section 49C(2) (failure by person in authority to protect child from sexual offence) of the Crimes Act 1958 as in force before the commencement of section 16 of the *Crimes Amendment (Sexual Offences) Act 2016* (*Criminal Procedure Act 2009* s 4).

4. An offence against the *Sex Work Act 1994* that is not listed in section 4(1)(a)(iiii) is not a sexual offence for the purpose of the *Criminal Procedure Act 2009*.

What is a "Family Violence" Offence?

5. Under the *Family Violence Protection Act 2008*, "family violence" is defined as:

- Behaviour towards a "family member"[37] that:
    - Is physically or sexually abusive;
    - Is emotionally or psychologically abusive;[38]
    - Is economically abusive;[39]
    - Is threatening;
    - Is coercive;
    - In any other way controls or dominates the family member and causes the family member to fear for the safety or wellbeing of the family member or another person; or
- Behaviour that causes a child to hear or witness, or otherwise be exposed to the effects of, the abovementioned behaviour (*Family Violence Protection Act 2008* s 5(1)).

6. The definition of "family violence" explicitly includes the following kinds of behaviour:
    - Assaulting or causing personal injury to a family member, or threatening to do so;
    - Sexually assaulting a family member or engaging in other forms of sexually coercive behaviour, or threatening to do so;
    - Intentionally damaging a family member's property, or threatening to do so;
    - Unlawfully depriving a family member of his or her liberty, or threatening to do so;
    - Causing or threatening to cause the death of, or injury to, an animal so as to control, dominate or coerce the family member (*Family Violence Protection Act 2008* s 5(2)).
7. Behaviour may constitute family violence even if it would not constitute a criminal offence (*Family Violence Protection Act 2008* s 5(3)).

Types of Alternative Arrangements

8. *Criminal Procedure Act 2009* s 360 provides a non-exhaustive list of alternative arrangements that may be made in relation to any witness (including the complainant) who gives evidence in a proceeding that relates (wholly or partly) to a sexual offence or a family violence offence. These include:
    - Permitting the evidence to be given from a place other than the courtroom by means of technology such as closed-circuit television;
    - Using screens to remove the accused from the witness's direct line of vision;
    - Permitting a person chosen by the witness and approved by the court to be beside the witness while he or she is giving evidence, for the purpose of providing emotional support ("emotional support person");

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[37] The definition of a "family member" under the *Family Violence Protection Act 2008* is broad, and includes current and former partners and their children, other relatives and former relatives, and people who are reasonably regarded as being like a family member, having regard to the circumstances of the relationship. See *Family Violence Protection Act 2008* ss 8–10 for further information.

[38] See *Family Violence Protection Act 2008* s 7 for the meaning of "emotional or psychological abuse".

[39] See *Family Violence Protection Act 2008* s 6 for the meaning of "economic abuse".

- Allowing only specified people to be present when the witness is giving evidence;
- Requiring legal practitioners not to robe;
- Requiring legal practitioners to be seated while examining or cross-examining the witness.

9. If evidence is given from a place other than the courtroom, the court must direct that the evidence be recorded (*Criminal Procedure Act 2009* s 362).

Requirement to Use Alternative Arrangements for Complainants

10. In proceedings that relate (wholly or partly) to a sexual offence or a family violence offence, the court must direct that the complainant's evidence be given from a place other than the courtroom, unless:
    - The prosecution applies for the complainant to give evidence in the courtroom;
    - The court is satisfied that the complainant is aware of his or her right to give evidence from another place; and
    - The court is satisfied that the complainant is able and wishes to give evidence in the courtroom (*Criminal Procedure Act 2009* s 363).
11. If the court allows the complainant to give evidence in the courtroom, it must direct that a screen be used to remove the accused from the complainant's direct line of vision, unless it is satisfied that the complainant is aware of the right to use a screen and does not wish to do so (*Criminal Procedure Act 2009* s 364).
12. Regardless of the location from which the complainant gives evidence, the court must direct that he or she be permitted to have an emotional support person beside him or her when giving evidence, unless it is satisfied that the complainant is aware of the right to have an emotional support person with him or her, and he or she does not want such a person to be present (*Criminal Procedure Act 2009* s 365).
13. Where the complainant is a child or has a cognitive impairment, his or her evidence must be pre-recorded at a special hearing, unless the court directs otherwise (*Criminal Procedure Act 2009* ss 369–370).[40] The alternative arrangement provisions continue to apply to such complainants to the extent that they are relevant.

Jury Directions

14. Following the commencement of the *Jury Directions and Other Acts Amendment Act 2017* on 1 October 2017, the *Criminal Procedure Act 2009* no longer specifies any jury directions that are necessary when alternative arrangements are used.
15. The statutory jury directions in relation to alternative arrangements were repealed on the basis that mandatory directions were unnecessary because the special hearing procedure was commonplace, and to reduce the risk that a direction about the need to treat special hearing evidence the same way as other evidence would operate perversely by prompting jurors to treat special hearing evidence as unusual (Jury Directions and Other Acts Amendment Bill 2017 Explanatory Memorandum, clause 13).

Last updated: 19 March 2018

[40] See 2.3.3 Pre-recorded Evidence for further information concerning the special hearing procedure.

2.3.1.1 Charge: Alternative Arrangements

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This charge may be given the first time an alternative arrangement is made. For subsequent witnesses, 2.3.1.2 Charge: Alternative Arrangement (Short Charge) may be used instead.

Before the next witness, NOW, gives evidence, there is a matter I must mention to you. [*Describe alternative arrangements, e.g.* "NOW will give evidence from a different location, using closed-circuit television" or "A screen has been put in place".]

These arrangements are made routinely in cases like this. As a matter of law, you must not draw any inference adverse to the accused from the fact that these arrangements have been made, and you must not give NOW's evidence any greater or lesser weight because of the use of these arrangements. You must treat his/her evidence in exactly the same way that you treat the evidence of any other witness in these proceedings.

Last updated: 8 May 2018

2.3.1.2 Charge: Alternative Arrangements (Short Charge)

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This charge may be used if the judge has previously directed the jury about alternative arrangements. When alternative arrangements are made for the first time, 2.3.1.1 Charge: Alternative Arrangements should be used instead.

Certain alternative arrangements have been made for the next witness. You will remember the directions I have previously given you in relation to such arrangements. I remind you that they are a routine practice and you must not draw any inference adverse to the accused or give NOW's evidence any greater or lesser weight because of the use of these arrangements.

Last updated: 13 April 2010

2.3.2 Protected Witnesses

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Who is a "Protected Witness"?

1. The "protected witness" provisions of the *Criminal Procedure Act 2009* apply to proceedings that relate (wholly or partly) to a charge for:
    - A "sexual offence"; [41] or
    - An offence where the conduct constituting the offence consists of "family violence" within the meaning of the *Family Violence Protection Act 2008* (*Criminal Procedure Act 2009* s 353).[42]
2. In such proceedings, the following people are "protected witnesses":
    - The complainant;

[41] See 2.3.1 Alternative Arrangements for the definition of a "sexual offence" charge.

[42] See 2.3.1 Alternative Arrangements for the definition of a "family violence" offence.

- A family member[43] of either the complainant or the accused; or
- Any other witness whom the court declares under s 355 to be a protected witness (*Criminal Procedure Act 2009* s 354).

Cross-Examination of Protected Witnesses

3. A protected witness must not be personally cross-examined by the accused (*Criminal Procedure Act 2009* s 356).
4. Where a protected witness gives evidence, and the accused is not legally represented, the court must inform the jury that the accused is not permitted to personally cross-examine the witness (*Criminal Procedure Act 2009* s 357(1)(a)).
5. If an unrepresented accused obtains, or is provided with, legal representation for the purpose of cross-examining a protected witness, the judge must warn the jury:
    - That this is routine practice;
    - That no adverse inference may be drawn against the accused as a result of the cross-examination not being conducted by the accused in person; and
    - That the evidence given under cross-examination is not to be given any greater or lesser weight as a result of the cross-examination not being conducted by the accused personally (*Criminal Procedure Act 2009* s 358).
6. These directions under sections 357 or 358 do not depend on a party making a request (compare *Jury Directions Act 2015* Part 3).
7. As a matter of prudence, the accused should not be offered representation in the presence of the jury. Such matters should be resolved prior to the commencement of the trial.

Last updated: 29 June 2015

2.3.2.1 Charge: Protected Witnesses

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As you are aware, throughout this trial NOA has elected to conduct his/her own defence. While the law allows him/her to do this, it places some limits on what s/he may do. In particular, it does not permit him/her to personally cross-examine certain witnesses, including the next witness.

This does not mean this witness may not be cross-examined. It simply means that if NOA wishes to cross-examine this witnesses, the cross-examination must be conducted by defence counsel chosen by the accused or provided by the court.

[*If the accused has obtained or been provided with defence counsel, add the following shaded section:*]

In this case, [*insert name of defence counsel*] will be conducting NOW's cross-examination on NOA's behalf. This is routine practice in cases such as this.

As a matter of law, you must not draw any inference adverse to the accused from the fact that NOA is not conducting the cross-examination personally, and you must not give NOW's evidence any greater or lesser weight. You must treat his/her evidence in exactly the same way that you treat the

[43] See *Criminal Procedure Act 2009* s 354 for the definition of a "family member" in this context. This definition differs from the definition of "family member" used in relation to the family violence provisions of the *Family Violence Protection Act 2008*.

evidence of any other witness in these proceedings.

[*If the accused has not obtained or been provided with defence counsel, add the following shaded section:*]

In this case, NOA has elected not to have NOW cross-examined by defence counsel, so you will only be hearing his/her evidence-in-chief.

Last updated: 28 February 2008

2.3.3 Pre-Recorded Evidence

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Overview

1. While ordinarily witnesses must give their evidence at the time of the relevant legal proceeding, the *Criminal Procedure Act 2009* specifies three circumstances in which pre-recorded evidence may be used:

   i) Division 5 of Part 8.2 allows the evidence-in-chief of certain witnesses to be given in the form of an audio or audiovisual recording of the witness answering questions put to him or her by a prescribed person (the "VARE procedure");

   ii) Division 6 of Part 8.2 allows the examination-in-chief, cross-examination and re-examination of certain witnesses to be given in the form of an audiovisual recording made at a special hearing (the "special hearing procedure").

   iii) Division 7 of Part 8.2 allows a court in proceedings for a sexual offence to use a recording of the complainant's evidence in a new trial, appeal or another proceeding (the "previous trial evidence procedure").

   These procedures are addressed in turn below.

The VARE Procedure

2. The VARE procedure may be used in criminal proceedings other than committal proceedings, that relate (wholly or partly) to a charge for:

   (a) A sexual offence;[44] or

   (b) An indictable offence which involves assault, injury or threat of injury (*Criminal Procedure Act 2009* s 366(1). See also *R v Davis* [2007] VSCA 276);

   (d) Offences against sections 23 or 24 of the *Summary Offences Act 1966* if those offences are related to an offence specified in paragraph (a), or (b) above.

3. In such proceedings, a prosecution witness's evidence-in-chief may be given by way of an audio or audiovisual recording which consists of the witness answering questions put to him or her by a prescribed person (a "VARE") in the following circumstances:

   - If the witness was under 18 when the recording was made; or
   - If the witness suffered from a cognitive impairment when the recording was made (*Criminal Procedure Act 2009* ss 366(2), 367, 368(2)).

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[44] See 2.3.1 Alternative Arrangements for the definition of "sexual offences".

4. A VARE is admissible as the witness' evidence-in-chief. It should not be admitted as an exhibit (*Criminal Procedure Act 2009* s 368; *R v Lewis* [2002] VSCA 200; *R v BAH* (2002) 5 VR 517). However, it should generally be marked for identification (see *Gately v R* (2007) 232 CLR 208).

5. Objections to leading questions in examination in chief must be applied with caution to leading questions during a VARE. The VARE is produced in a different context from the trial itself (*SLJ v R* (2013) 39 VR 514).

Indictable Offence Involving Assault, Injury or Threat of Injury

6. One of the circumstances in which the VARE procedure may be used is where the proceeding relates to a charge for an indictable offence which involves assault, injury or threat of injury (*Criminal Procedure Act 2009* s 366(1)(b)).

7. The word "injury" in s 366(1)(b) includes mental harm (*R v Anders* (2009) 20 VR 596).

8. In determining whether an offence falls within this category, the judge must look to the elements of the offence, as the elements apply in the particular case (*Saenz v R* [2011] VSCA 154; *R v Anders* (2009) 20 VR 596).

9. As the elements of the offence of stalking (*Crimes Act 1958* s 21A) involve injury or threat of injury, s 366(1)(b) applies to that offence (*R v Anders* (2009) 20 VR 596).

10. The elements of kidnapping can be committed by force or fraud. Where the elements are committed by force, the offence will involve an assault, injury or threat or injury and the VARE procedure applies. The same result may not follow where the offence is committed by fraud (*Saenz v R* [2011] VSCA 154).

Playing the VARE

11. At the proceeding, the witness must:

    - Identify himself or herself and attest to the truthfulness of what he or she said on the recording;[45] and
    - Be available for cross-examination (*Criminal Procedure Act 2009* s 368(1)(c)).

12. If the witness fails to attest to the truthfulness of the recording, the evidence may only be admitted if counsel for the defence does not object (*R v LRG* (2006) 16 VR 89).

13. The witness does not need to remember the matters which are the subject of the recording. The requirement that he or she attest to the truthfulness of the contents of the recording is satisfied if the witness is able to depose at trial that what he or she said would have been a truthful account of his or her recollections at the time the recording was made (*R v Anders* (2009) 20 VR 596).

14. The judge may order at any time during the trial that the jury be provided with transcript of audiovisual recordings of evidence (*Criminal Procedure Act 2009* s 223(1)(j); *R v Welstead* [1996] 1 Cr App R 59). See 2.2 Providing Documents to the Jury for information on the provision of transcripts.

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[45] The witness should be asked whether his or her statements on the recording are truthful, rather than being asked whether the recording is truthful. The later question may mean no more than that the tape accurately recorded his or her statements. This question must be asked in language able to be understood by the witness (*R v LRG* (2006) 16 VR 89).

15. This may empower the judge to permit the jury to take a VARE transcript into the jury room. However, the leading authorities caution strongly against doing this, on the basis that there is no safeguard against the jury giving the transcribed evidence disproportionate weight (*R v BAH* (2002) 5 VR 517; *R v Welstead* [1996] 1 Cr App R 59).

16. These authorities were decided at a time when it was unusual for judges provide the trial transcript to the jury (compare *Criminal Procedure Act 2009* s 223(1)(ha)). It is now common for Victorian judges to provide the transcript. In cases where the jury has transcript of all, or substantially all the evidence in the trial, there may be no reason to exclude the VARE transcript from the jury room.

Replaying the VARE

17. Juries often ask to be allowed to view a VARE again during their deliberations. In responding to such a request, the judge has an overriding duty to ensure a fair trial (*R v BAH* (2002) 5 VR 517).

18. In such cases, the judge may choose to replay the tape in the courtroom, or to read relevant passages to the jury from the transcript or from his or her notes (*R v BAH* (2002) 5 VR 517).

19. In determining how to exercise this discretion, the judge should discuss the matter with counsel. If necessary, the judge may ask questions of the jury to identify the reason they wish to review the tape. Such questions should not intrude on the content of the jury's deliberations (*R v BAH* (2002) 5 VR 517; *R v H* [1999] 2 Qd R 283).

20. If the jury only require a reminder of *what* the witness said, it will usually be preferable to remind them of the relevant evidence by reading from the transcript. In contrast, if the jury seeks a reminder of *how* the witness said something, that may indicate a need to view the VARE again (*R v Rawlings; R v Broadbent* [1995] 1 WLR 178).

21. Like any other request to be reminded about the evidence, requests for VARE should be dealt with in open court. The relevant evidence should either be read out in court, or the tape should be played in the courtroom (*R v BAH* (2002) 5 VR 517; *R v Lyne* [2003] VSCA 118).

22. Previously, judges did not permit the jury to replay a VARE in the jury room. The authorities doubted that judges had power to permit this, and considered that if judges did have this power, it would rarely be proper to exercise the discretion in this way. This was because of the risk of the jury giving the evidence disproportionate weight in contrast to other evidence, and the perception that this may prejudice the accused (*R v BAH* (2002) 5 VR 517; *R v Lyne* [2003] VSCA 118; *R v Lewis* [2002] VSCA 200).

23. Since these cases were decided, the law has been changed to expressly permit the judge to order at any time during the trial that the jury be provided with audio or audiovisual recordings of evidence (*Criminal Procedure Act 2009* s 223(1)(i)).

24. This appears to give the judge a discretion to allow the jury to play a VARE in the jury room, overcoming any limitations of the repealed s 19 of the *Crimes (Criminal Trials) Act 1999* (see *R v BAH* (2002) 5 VR 517; *R v Lyne* [2003] VSCA 118*).*

25. If this statutory change permits judges to allow the jury to play a VARE in the jury room, it may also broaden the circumstances where this is a proper exercise of discretion. However that discretion must continue to be exercised with regard to the requirements of fairness and balance (see *R v BAH* (2002) 5 VR 517; *R v Lyne* [2003] VSCA 118*).*

Jury Directions and Comments

26. As a VARE stands as the evidence-in-chief of a witness, it is not appropriate to tell the jury that such evidence is in any way inferior to evidence given in the courtroom (*R v MTP* [2002] VSCA 81; *Clarke v R* [2013] VSCA 206).

27. If a VARE is replayed to the jury, or given to the jury to replay in the jury room, the judge should usually:

    - Remind the jury that what they are viewing is only part of the witness's evidence, and that they are viewing it a second or subsequent time and well after all the other evidence;

- Warn the jury that they must not give the evidence disproportionate weight, and must consider the other evidence in the case (*R v BAH* (2002) 5 VR 517; *R v H* [1999] 2 Qd R 283; *R v MAG* [2005] VSCA 47); and
- Ask the jury if they also wish to hear the rest of the witness's evidence replayed or consider providing the jury with the Division 6 (special hearing) recording.

28. This warning must be given with the authority of the judge's office. It is not sufficient for the judge to simply make a comment that there is other evidence that the jury may wish to consider (*R v Lyne* [2003] VSCA 118).
29. If a VARE is replayed, or given to the jury to replay in the jury room, the judge may also need to remind the jury of the witness's cross-examination, if not also replayed or provided to them, and of any weaknesses that have been identified in his or her evidence. This is not mandatory, and should be based on the jury's needs and the principle of a fair trial (*R v BAH* (2002) 5 VR 517; *R v H* [1999] 2 Qd R 283).

The Special Hearing Procedure

30. In a criminal trial that relates (wholly or partly) to a charge for a sexual offence,[46] the evidence of a complainant who was a child or who had a cognitive impairment when proceedings were commenced must be given at a special hearing, unless the court directs otherwise (*Criminal Procedure Act 2009* ss 369, 370).[47]
31. A special hearing may be held before or during the trial. At a special hearing, the whole of the complainant's evidence must be recorded. Where the special hearing is held before the trial, the complainant's evidence must be presented in the form of that recording (*Criminal Procedure Act 2009* s 370).
32. On the application of the prosecution, the court may direct that a special hearing not be held, and that the complainant give direct testimony in the proceeding, if it is satisfied that:
    - The complainant is aware of his or her right to have his or her evidence taken and recorded at a special hearing; and
    - The complainant is able and wishes to give direct testimony in the proceeding (*Criminal Procedure Act 2009* s 370(2)).
33. During a special hearing, the complainant's evidence is to be given by closed-circuit television, and no person except those authorised by the court may be present in the same room as the complainant when his or her evidence is being given. In the case of a special hearing held during a trial, the jury must be present in the courtroom (*Criminal Procedure Act 2009* s 372).
34. The court must direct that the complainant be permitted to have an emotional support person beside him or her when giving evidence, unless it is satisfied that the complainant is aware of the right to have an emotional support person with him or her, and he or she does not want such a person to be present (*Criminal Procedure Act 2009* s 365).
35. The court may also direct the use of other alternative arrangements in the special hearing (e.g. requiring legal practitioners not to robe) (*Criminal Procedure Act 2009* s 360). See 2.3.1 Alternative Arrangements for further information.

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[46] See 2.3.1 Alternative Arrangements for the definition of a "sexual offence".

[47] Proceedings commence when the charge–sheet for the offence charged, or a related offence, is filed or signed, or when the Director of Public Prosecutions files a direct indictment (*Criminal Procedure Act 2009* s 5).

36. A VARE may be used as the witness's evidence-in-chief in a special hearing (see "The VARE Procedure" above).

37. A recording of a special hearing held before the trial is admissible as the witness' evidence. It should not be admitted as an exhibit (*R v Gately* (2007) 232 CLR 208).

Replaying a Special Hearing Tape

38. A request by the jury to be reminded of the contents of a special hearing tape should ordinarily be dealt with in the same manner as other requests to be reminded about the evidence given in the trial (*R v Gately* (2007) 232 CLR 208). See also 3.15 Charge: Concluding Remarks and 2.2 Providing Documents to the Jury.

39. Historically, courts have held that it is not appropriate to provide audio visual recordings to the jury to watch in the jury room. Rather, judges were expected to either read out the relevant evidence, or to play the relevant parts of the recording in open court (see, e.g. *Gately v The Queen* (2007) 232 CLR 208).

40. With the advent of the *CPA 2009* s 223(1)(i), there is a statutory basis for the court to provide the jury with audio or audio-visual recordings of evidence.

41. While the judge must be careful that the provision of material is consistent with a fair trial, there is no longer a prohibition on providing recordings for the jury to watch in the jury room. Instead, the judge can ensure a fair trial by providing recordings along with a direction reminding the jury that the recordings are only part of the case, that the jury must decide the case on all the evidence (see *Carson v The Queen* [2019] VSCA 317, [105]–[113]. C.f. *R v BAH* (2002) 5 VR 517; *R v Lyne* [2003] VSCA 118; *R v Lewis* [2002] VSCA 200).

Jury Directions and Comments

42. Following the commencement of the *Jury Directions and Other Acts Amendment Act 2017* on 1 October 2017, the *Criminal Procedure Act 2009* no longer specifies any jury directions that are necessary when a special hearing recording is played.

43. In some cases, including if a recording is given to the jury in the jury room, it may be necessary to warn the jury when they are watching the recording for a second or subsequent time that they must also consider other evidence in the case or other considerations raised by the accused (*R v Gately* (2007) 232 CLR 208).

44. Prior to the repeal of *CPA 2009* s 375 (which had specified directions that judges needed to give about special hearing recordings), the Court of Appeal had held that a judge must not give any directions which are inconsistent with section 375. It was therefore inappropriate to give general direction about the need for caution when assessing evidence given on a VARE or a special hearing (*Clarke v R* [2013] VSCA 206).

45. *CPA 2009* s 375 was repealed on the basis that the mandatory directions were unnecessary because the special hearing procedure was commonplace, and to reduce the risk that a direction about the need to treat special hearing evidence the same way as other evidence would operate perversely by prompting jurors to treat special hearing evidence as unusual (Jury Directions and Other Acts Amendment Bill 2017 Explanatory Memorandum, clause 13).

Previous Trial Evidence Procedure

46. In a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence,[48] the evidence of a complainant who did not give evidence at a special hearing may be given through a recording of the complainant's evidence at a previous trial (*Criminal Procedure Act 2009* ss 378, 379).
47. The court may allow a complainant's evidence to be given using a previous trial recording if it is in the interests of justice to do so, having regard to:
    (a) whether the complainant's recorded evidence is complete, including cross-examination and re-examination;
    (b) the effect of editing any inadmissible evidence from the recording;
    (c) the availability or willingness of the complainant to give further evidence;
    (d) whether the accused would be unfairly disadvantaged by the admission of the recording;
    (e) any other matter that the court considers relevant.
48. Following the commencement of the *Jury Directions and Other Acts Amendment Act 2017* on 1 October 2017, the *Criminal Procedure Act 2009* no longer specifies any jury directions that are necessary when a previous trial recording is used.
49. For more information on a previous trial recording, see the Victorian Criminal Proceedings Manual.

Last updated: 20 February 2020

2.3.3.1 Charge: Playing a VARE

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The evidence of the next witness, NOW, is going to be given in a slightly different manner from usual. First, you are going to see an audiovisual recording of him/her answering questions. That recording is considered to be part of his/her evidence. NOW will then confirm the truthfulness of that evidence and answer any additional questions the prosecution may have. Defence counsel will then have the opportunity to cross-examine NOW.

[*If alternative arrangements will be used for the evidence given during the proceeding, add the following shaded section:*]

When confirming the truthfulness of the recording, and being cross-examined, [*describe alternative arrangements, e.*g. "NOW will not be present in the courtroom. His/her evidence will be given from a different location, using closed-circuit television" or "A screen will be in place"].

These arrangements are made routinely in cases like this. As a matter of law, you must not draw any inference adverse to the accused from the fact that these arrangements have been made, and you must not give NOW's evidence any greater or lesser weight because of the use of these arrangements. You must treat his/her evidence in exactly the same way that you treat the evidence of any other witness in these proceedings.

Last updated: 3 June 2011

[48] See 2.3.1 Alternative Arrangements for the definition of a "sexual offence".

2.3.3.2 Charge: Replaying a VARE

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You are about to see [part of] the recording of NOW's evidence-in-chief again. When you watch this recording, you must keep in mind the fact that this is the second time that you are seeing this particular evidence, that you are seeing it after all the other evidence has been given in this case, and that it is only part of NOW's evidence.

In light of these factors, I must warn you to be careful not to give this part of NOW's evidence any greater weight than you give to any of the other evidence in this case. It is merely one part of the evidence, and you are required to consider all of the evidence when making your decision.

[*If the jury needs to be reminded of the weaknesses of the evidence, add the following shaded section:*]

In particular, you must consider [*summarise relevant matters for consideration, such as the cross-examination of the witness or any weaknesses that have been identified in the evidence*].

Last updated: 3 June 2011

2.3.3.3 Charge: Special Hearing Evidence

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The evidence of the complainant, NOC, has been pre-recorded at what is called a "special hearing". This is a routine practice in cases where the complainant [is under the age of 18/has a cognitive impairment]. As a matter of law, you must not draw any inference adverse to the accused from the fact that NOC's evidence has been pre-recorded, and you must not give his/her evidence any greater or lesser weight. You must treat NOC's evidence in exactly the same way that you treat the evidence of any other witness in these proceedings.

Last updated: 13 April 2010

2.3.4 Witness Support Dog

Click here for a Word version of this document

1. The Office of Public Prosecutions has a Witness Support Dog Program. Under the program, witnesses can ask for a trained support dog to accompany them while giving evidence from the remote witness facility or the courtroom.
2. The support dog usually lies calmly next to the witness giving evidence and the witness holds the dog's lead.
3. Support dogs provide comfort to vulnerable witnesses when waiting for court and while giving evidence.
4. The support dog only accompanies the witness with the Court's permission. The dog will usually lie on a mat while the witness is giving evidence and is out of view of the camera in the remote witness facility. If the witness is giving evidence physically in the courtroom, the dog will lie beside the witness out of view of the jury.
5. When a witness with a support dog is giving evidence physically in the courtroom, some judges ask the jury to leave the courtroom as the dog is brought in and out so the jury does not see the dog. However, this practice may not be necessary or practical if the witness is giving evidence over an extended period, with multiple breaks.
6. Feedback on the use of the support dog indicates that the dog helps witnesses give evidence with less stress, to stay focussed and give evidence with fewer breaks.
7. It is recommended that judges only allow dogs trained at schools accredited by Assistance Dogs International to provide support to witnesses giving evidence. This will help to reduce the risk of the dog behaving inappropriately or being a distraction to the proceedings.

Last updated: 26 April 2021

2.3.4.1 Charge: Witness Support Dog

Click here to download a Word version of this charge

This charge is designed for those cases where the judge believes the jury should be informed about the Witness Support Dog. It will not be necessary in all cases, as the dog usually lies out of view of the camera while the witness is giving evidence from the remote facility or out of view of the jury if the witness is giving evidence from the witness stand.

This charge may be modified for use where the judge decides to give the direction after the witness has given evidence.

Members of the jury, the next witness, NOW, will give evidence while accompanied by a support dog.

Some witnesses are allowed to use a support dog to help reduce the stress of giving evidence. The dog is not a pet, but is a trained support animal.

When you come to assess NOW's evidence, you should not take [his/her] use of a support dog into account. Do not give [his/her] evidence more or less weight because [he/she] had a support dog. Treat NOW the same as any other witness.

Last updated: 26 April 2021

2.4 Unavailable Witnesses

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1. This topic addresses the need for a direction in running where hearsay evidence is led from a witness who is unavailable to give evidence. For general information on directions relating to hearsay evidence, see 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements).
2. *Evidence Act 2008* s 65 sets out a series of exceptions to the hearsay rule that apply when the person who made the previous representation is not available to give evidence. These exceptions include:
    - Where the statement was made in circumstances where there are sufficient indicators of reliability (see *Evidence Act 2008* ss 65(2)(b)–(d));
    - where evidence is led of a previous representation made in the course of giving evidence in a proceeding where the accused cross-examined the witness who became unavailable, or had a reasonable opportunity to do so (*Evidence Act 2008* s 65(3)).
3. *Evidence Act 2008* Dictionary, clause 4, specifies when a person is not available to give evidence about a fact. The circumstances listed include where the person is dead, not competent to give the evidence, or, despite all reasonable steps, the party seeking to call the witness has not been able to find or compel the person to give evidence.
4. Evidence of statements made in other proceedings can be adduced by producing an authenticated transcript or recording of the witness giving evidence (*Evidence Act 2008* s 65(6)).
5. These exceptions may allow the prosecution to lead the evidence in the form of the witness' statement to police, evidence given at committal hearings and evidence on voir dire (see, e.g. *Clarke v R* [2017] VSCA 115; *Luna v R* [2016] VSCA 10; *Fletcher v R* (2015) 45 VR 634; *Bray v R* (2014) 46 VR 623. See also see *Criminal Procedure Act 2009* ss 112, 130).
6. Where the prosecution seeks to lead evidence from the committal hearing, the witness' police statement will generally stand as the witness' evidence in chief at the committal hearing (*Luna v R* [2016] VSCA 10).

7. As a matter of practice, a witness' police statement is introduced by the prosecutor reading the relevant parts of the statement to the jury and not by tendering the statement as an exhibit. During this process, the prosecutor's reading of the statement should form part of the trial transcript which is given to the jury at the end of the trial.
8. At present, evidence given at committal hearings is audio recorded only. When the audio recording is played, the jury may be given a transcript of the recording, in the same way that a jury may be given a transcript when listening to other audio-recorded evidence. See 2.2 Providing Documents to the Jury and 2.2.3 Charge: Transcripts of Taped Evidence for information and directions about providing transcripts of audio-recorded evidence to the jury.
9. Where a party proposes to lead evidence from a witness who is not available to give evidence, it is appropriate for the judge to briefly explain the reason the evidence is being led in that manner.
10. At the end of the trial, a party may seek a direction that such evidence may be unreliable (*Jury Directions Act 2015* ss 31, 32). Directions at the end of the trial may also be necessary to address any risk of unfair prejudice arising from the reliance on the witness' previous statements (*Bray v R* (2014) 46 VR 623; *DPP v BB & QN* (2010) 29 VR 110).
11. Where unreliability directions are sought in relation to hearsay evidence from an unavailable witness, it may be appropriate to inform the jury of:
    - The disadvantages flowing from being unable to observe the witness giving evidence;
    - The disadvantages flowing from being unable to observe the witness being cross-examined;
    - The differences between cross-examination at committal and at trial;
    - The inability of defence counsel to put any newly discovered issues to the witness (see *Luna v R* [2016] VSCA 10, [46]).

Last updated: 11 July 2018

2.4.1 Charge: Unavailable Witness

Click here to download a Word version of this charge

This direction is designed for use in cases where the evidence of an unavailable witness is led by reading the witness' statement to the jury and then playing a recording of the witness being cross-examined at the committal hearing. It may be adapted for other circumstances.

The next evidence you will hear is going to be given in a slightly different manner than usual. The next witness, NOW, is not available to give evidence to you in person. Instead, you will receive [his/her] evidence in two parts.

First, the prosecutor will give you and will read out NOW's witness statement. This is a statement that NOW made to the police.

Then, you will hear a recording of NOW being cross-examined at the committal hearing. A committal hearing is a hearing before a magistrate to determine if the case should go to a jury.

At the end of the trial, I will tell you if there are any special principles you need to apply to this evidence. However, for the moment, you should treat the evidence the same way you treat the evidence from any other witness who gives evidence in person.

[*If the judge considers it necessary to do so in the circumstances of the trial, add the following direction instructing the jury not to speculate on why NOW is unavailable.*]

I also direct you, as a matter of law, do not speculate about the reason why NOW is not available to give evidence in person. The law allows evidence to be given in this form for many reasons, including where a person has died, or has a serious medical condition, or is overseas and cannot be reached.

Last updated: 11 July 2018

2.5 Witness Invoking Evidence Act 2008 s 128

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1. *Evidence Act 2008* s 128 governs the exercise of the privilege against self-incrimination by witnesses. The section provides that:
    - a witness may object to giving evidence on the basis that the answer may tend to prove that the witness committed an offence or is liable to a civil penalty;
    - the court must determine whether there are reasonable grounds for the objection;
    - where the court finds there are reasonable grounds, it must inform the witness that the witness need not give evidence unless required to do so by the court, and that if the witness gives evidence either willingly or as required by the court, then the court will issue a s 128 certificate and the effect of a s 128 certificate
    - evidence covered by a s 128 certificate and evidence obtained as a direct or indirect consequence of such evidence cannot be used against the witness, except in proceedings regarding the falsity of the evidence (Evidence Act 2008 s 128)
2. A s 128 certificate is different from an indemnity from prosecution. Witnesses who receive a certificate can still be prosecuted for offences disclosed during their evidence. The certificate merely provides use and derivative use immunity in respect of the witness' evidence, except in proceedings regarding the falsity of the evidence (*Spence v R* [2016] VSCA 113, [68]).
3. A judge should correct erroneous statements made by parties about the effect of a s 128 certificate, such as a suggestion that the certificate means the witness is immune from prosecution, or could give false evidence with impunity (*Trudigan v WA* (2006) 33 WAR 163, [29]–[30]).

Procedure

4. Where it appears to the court that a witness may have the right to claim the privilege against self-incrimination, the judge must satisfy him or herself, in the absence of the jury, that the witness is aware of that right (*Evidence Act 2008* s 132).
5. Witnesses who may have the right to claim the privilege against self-incrimination may need independent legal advice to decide whether to exercise that right, whether to volunteer answers under the protection of a s 128 certificate and matters that may be relevant to whether the court should compel an answer in the interests of justice.
6. As a matter of practice, where the issue of self-incrimination arises, the court will need to consider what steps should take place in the presence of the jury and what should occur in the absence of the jury.
7. It is not permissible to draw an adverse inference against a witness from the witness' claim of the privilege against self-incrimination (*R v Roberts* (2004) 9 VR 295, [83]).
8. It may therefore be appropriate in some cases to identify in the jury's absence whether the witness will raise the privilege and whether to grant a s 128 certificate. However, there is no absolute rule that claiming and determining the privilege must occur in the jury's absence.

Relevance of a s 128 certificate

9. The mere grant of a certificate does not automatically put the witness into a special category where the defence can say that the witness' evidence is unreliable (*Spence v R* [2016] VSCA 113, [85]).

10. However, there are cases where it is necessary to inform the jury of the fact that evidence was given under a certificate, as the grant of a certificate may affect the witness' credibility. Whether the existence of a certificate will require a direction on unreliability will necessarily depend on the facts of the case (*Spence v R* [2016] VSCA 113, [85]–[87]).

11. Where the jury are informed of a s 128 certificate, the judge should explain the effect of the certificate and explain that the certificate does not provide immunity from prosecution, or allow the witness to lie with impunity because the certificate does not protect against perjury (*Spence v R* [2016] VSCA 113, [88]).

Last updated: 22 August 2018

2.5.1 Charge: Witness Invoking Evidence Act 2008 s 128 Jury Information

Click here for a Word version of this document for adaptation

This direction should only be given where, because of particular features of the case, the jury have been informed that a witness' evidence is covered by a s 128 certificate.

Members of the jury, you have heard references to the fact that NOW gave evidence 'under a certificate'. I need to explain this legal shorthand to you.

The law says that a witness may object to giving evidence on the basis that the evidence may incriminate them. That is, a witness may object to giving evidence which may tend to prove they have committed a crime.

To protect this important right, but also to allow juries to hear important evidence, the law has struck a balance.

If the judge thinks there was a reasonable basis for the witness' objection, then judge can issue a certificate which protects the witness from having [his/her] evidence used against [him/her] in other proceedings. In this case, I gave NOW this certificate. This meant that NOW could give evidence to you without needing to worry about having [his/her] evidence used against [him/her].

There are two limitations to a certificate which I must tell you about. First, the certificate does not prevent the witness' evidence being used where the witness is charged with giving untrue evidence. So if it could be proved that NOW lied to you, [he/she] could be charged with perjury, and the certificate would not protect [him/her] in that circumstance.

Second, the certificate does not render [him/her] immune from prosecution. NOW could still be charged with [*identify relevant crime*], if the prosecution has independent evidence. The certificate only prevents the prosecution from using the evidence [he/she] gave in this case, and any evidence discovered as a result of [his/her] answers, in later proceedings.

The certificate does not mean the witness is telling the truth or was accurate. It is for you to decide whether NOW told you the truth and was accurate. You will make your decision based on all of the evidence and the matters each party has raised about NOW's credibility and reliability.

[*If a warning about the witness' potential unreliability is required, add it here. See* Charge: Unreliable Evidence. *But see* Spence v R [*2016*] *VSCA 113,* [*85*]–[*87*] *on the limited circumstances in which the grant of a certificate will itself justify an unreliability warning*.]

Last updated: 22 August 2018

2.5.2 Charge: Explanation of Evidence Act 2008 to a Witness

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This script may be adapted where a judge becomes aware that a witness may have grounds for making an objection under Evidence Act 2008 s 128 and needs to explain the effect of that section. The court must satisfy itself that the witness is aware of the effect of *Evidence Act 2008* s 128 in the absence of the jury: *Evidence Act 2008* s 132.

NOW, I have sent the jury out because the law requires me to ensure that you are aware of your rights to object to giving evidence.

The [prosecution/defence] will soon be asking you questions about [*identify relevant topic*].

The law says that you may object to answering these questions on the ground that your answers may tend to prove that you have committed an offence.

If you do not object to those questions on this basis, then the trial will proceed and you must answer the questions.

If you object to answering, then I will need to decide whether there are reasonable grounds for your objection. I will do this in the absence of the jury.

If I find that you do not have reasonable grounds for objecting, then I will override the objection and you will need to answer the question.

If I find that you have reasonable grounds for objecting, I will uphold the objection. At that point, I will need to consider what kind of offence you may have committed. If it is an offence in another country, then that is the end of the matter – You will not need to give evidence on that topic.

However, if it is an offence against the law of Australia, then you will not need to give the evidence unless I require you to do so. If you do give the evidence, either voluntarily or because I require you to, the court will issue an Evidence Act certificate.

An Evidence Act certificate has the effect that your answers given in this proceeding cannot be used in other proceedings and no evidence can be led which is obtained as a direct or indirect consequence of your evidence today, except in proceedings where you are charged with giving false evidence. In other words, a certificate means that your answers today cannot be used against you, unless you give false evidence.

I said a moment ago that if I uphold your objection, then you not need to give the evidence unless I require you to do so. The law allows me to find that, even though you have reasonable grounds for objecting to answering a question because it may show you have committed an offence, the interests of justice require me to insist that you give evidence. If we get to that point, then I will hear what the prosecution and defence have to say about the need for your evidence, and what you have to say about what the interests of justice require.

I'm now going to ask you some questions so that I can satisfy myself that you understand your right to object, and you understand what a certificate to protect your answers does.

[*The judge will then ask the witness whether he or she understands this explanation. The judge may use closed or open questions. If the judge chooses to use open-ended questions, the following sample questions may be adapted:*

- Do you understand that you can object to answering questions because the answers may show that you committed an offence?
- If you do object on this basis, what will happen?
- If I uphold your objection, but you end up giving evidence anyway, what can the prosecution do with your answers?
- If you object to giving evidence, I give you a certificate and you give false evidence, what can the prosecution do?]

[*Once the witness has confirmed that he or she understands the objection and certificate process, the judge will need to decide whether to have the witness questioned on voir dire to discover if the witness will raise an objection, or whether the objection should be made in the presence of the jury*.]

Last updated: 22 August 2018

3 Final Directions

3.1 Directions under Jury Directions Act 2015

Click here to obtain a Word version of this document

1. The *Jury Directions Act 2015* codifies the law on:
    - obligation of parties to request directions;
    - the content of directions on matters including post-offence conduct, other misconduct evidence, unreliable evidence, identification evidence, delay and forensic disadvantage, failure to give or call witnesses, delay and credibility and family violence;
    - the judge's obligations when summing up;
    - the meaning of proof beyond reasonable doubt.
2. This topic focuses on the request for direction process.

Guiding Principles

3. The *Jury Directions Act 2015* contains the following guiding principles:
    - the role of a jury is to determine the issues that are in dispute between the prosecution and the accused;
    - in recent decades, the law of jury directions in criminal trials has become increasingly complex;
    - as jury directions have become complex, technical and lengthy, it has been increasingly difficult for trial judges to comply with the law and has been increasingly difficult for jurors to understand and apply directions;
    - research indicates that jurors find complex, technical and lengthy directions difficult to follow;
    - it is the responsibility of the trial judge to determine the matters in issue, the directions that should be given and the content of the directions; and
    - one of the responsibilities of legal practitioners appearing in a criminal trial is to assist the judge to determine the matters in issue, the directions that should be given and the content of the directions (*Jury Directions Act 2015* s 5).
4. The Act states that it is Parliament's intention that when giving directions, the judge should:

    (a) give directions on only so much of the law as the jury needs to know to determine the issues in the trial; and

    (b) avoid using technical legal language whenever possible; and

    (c) be as clear, brief, simple and comprehensible as possible (*Jury Directions Act 2015* s 5(4)).
5. The Act also states that it is to be applied and interpreted having regard to the guiding principles (*Jury Directions Act 2015* s 5).

Requests for Directions

6. Part 3 of the *Jury Directions Act 2015* creates a process for parties to request directions, and sets out the consequences of a party requesting or failing to request a direction.

7. The purpose of Part 3 is to assist the judge to identify the matters in issue between the parties, the directions that should be given and the content of those directions and ensure that legal practitioners discharge their duty to assist the trial judge to determine those matters (*Jury Directions Act 2015* s 9).

8. Part 3 also sets out how the judge determines what directions to give if the accused is not represented by a legal practitioner.

9. The Act does not prevent judges giving directions which are consistent with the Act which the judge considers necessary before the close of the evidence. However, in deciding whether to give a direction in running, the judge must have regard to the submissions of the parties (*Jury Directions Act 2015* s 10).

Directions Request Process

10. Part 3 of the *Jury Directions Act 2015* sets out a process for judges to ask prosecution and defence counsel about the issues in the case at the end of the trial. It is good practice for trial judges to discuss these matters early in the trial, and use the process required under *the Jury Directions Act 2015* to identify any changes in the position of the parties.

11. After the close of the evidence and before closing addresses, the prosecution must inform the trial judge whether it considers the following matters are open and whether it relies on them:

    (a) any alternative offence, including an element of any alternative offence;

    (b) any alternative basis of complicity in the commission of the offence charged and any alternative offence.

12. Once the prosecution has provided this information to the trial judge, defence counsel must inform the trial judge whether or not the following matters are in issue:

    (a) each element of the offences charged;

    (b) any defences;

    (c) any alternative offences and the elements of any alternative offences;

    (d) any alternative bases of complicity for the offences charged or any available alternative offences (*Jury Directions Act 2015* s 11).

13. While s 11 provides that parties must identify available alternative offences in issue after the close of the evidence, defence counsel may be under an obligation to identify necessary alternative charges earlier in proceedings. This obligation arises where the defence believes the alternative is necessary to ensure a fair trial, and it is clear that the prosecution has rejected the availability of those alternatives (*Chaarani & Ors v The Queen* (2020) 61 VR 353, [89]).

14. After prosecution and defence counsel set out the matters that are or are not in issue, the prosecution and defence counsel must ask that the judge give or not give particular directions about:

    (a) the matters in issue; and

    (b) the evidence in the trial relevant to the matters in issue (*Jury Directions Act 2015* s 12).

15. The judge will usually seek requests for directions before final addresses and give the parties an opportunity to make further requests after final directions and after the judge's charge.

16. Vague terms such as "the directions given in the previous trial" or "delay, impact on credibility" should be avoided in favour of clear identification of any directions sought (*Horton v R* [2015] VSCA 319, [34] (Redlich JA)).

17. The judge must give the jury any directions that are requested, unless there are good reasons for not doing so. The Act specifies that in determining whether there are good reasons for not giving a direction, the judge must consider:

(a) the evidence in the trial;

(b) the manner in which the parties have conducted their cases, including whether the direction raises a matter not relied on by the accused and whether the direction would involve the jury considering the issues in a manner different from the way the accused presented his or her case (*Jury Directions Act 2015* s 14).

18. Subject to a residual obligation, the trial judge must not give the jury a direction which has not been requested (*Jury Directions Act 2015* s 15).

19. Parties are under an obligation to request the directions they believe should be given. The fact that a judge has given a preliminary indication that a certain direction is not necessary, even in strong terms, does not relieve a party of that obligation. In that situation, parties are expected to attempt, "politely but firmly" to persuade the judge that the direction should be given (*Pyliotis v The Queen* [2020] VSCA 134, [85]).

20. Under the *Jury Directions Act 2013*, the equivalent to section 15 only removed the obligation on a judge to give directions which were not requested. Under the 2015 Act, "the trial judge must not give the jury a direction that has not been requested under section 12" (emphasis added). Under the new provision, judges may only give directions which are general directions (and hence not subject to a request), requested directions, or directions under the residual obligation. There is no power for judges to give directions outside these three categories on a discretionary or prudential basis.

Residual Obligation to Give Directions Not Requested

21. As the trial judge has the responsibility to determine the matters in issue, the directions that are required and the content of the directions, the judge has a residual obligation to give a direction if there are substantial and compelling reasons for doing so, even though the direction has not been sought (*Jury Directions Act 2015* s 16).

22. Reasons will not be substantial and compelling "unless they are of considerable importance and strongly persuasive in the context of the issues in the trial" (*Gul v R* [2017] VSCA 153, [48]).

23. One situation in which there will be substantial and compelling reasons is where the judge considers that the failure to seek the direction is due to incompetence (*Gul v R* [2017] VSCA 153, [48] (Ashley and Priest JJA)).

24. Prior to the commencement of the *Jury Directions Act 2015*, the residual obligation required judges to give a direction where it was necessary to avoid a substantial miscarriage of justice. This test was modified by the 2015 Act to remove the requirement for trial judges to predict how the Court of Appeal may deal with the issue (Explanatory Memorandum, Jury Directions Bill 2015). This new test applies to all trials that commence on or after 29 June 2014.

25. Where a judge considers that a direction is necessary under the residual obligation, he or she must inform the parties that he or she is considering giving the direction and invite submissions about the direction and whether there are substantial and compelling reasons for giving the direction (*Jury Directions Act 2015* s 16).

26. The residual obligation sets a higher threshold for when a direction is necessary than the common law obligation from *R v Miletic* that the judge give "any direction that is necessary and practical, in the circumstances of the case, to avoid a perceptible risk of miscarriage of justice" (*R v Miletic* [1997] 1 VR 593).

27. While the old residual obligation used the same language as the criminal appeal provisions, it did not adopt the jurisprudence that had arisen under *Criminal Procedure Act 2009* s 276. The appeals test invites attention to the strength of the evidence and the impact of the jury's verdict. Such considerations are inappropriate as a test for whether a direction is necessary at trial (*Xypolitos v R* (2014) 44 VR 423).

28. Under the 2013 Act, the residual obligation was a test of necessity, which was narrower than the common law test. Under the 2013 Act, the judge was required to consider whether there would, not might, be a substantial miscarriage of justice in the absence of the direction. In *Xypolitos v R*, the Court of Appeal held that this:

> [R]equires a state of affirmative satisfaction by the trial judge that the direction is of such central importance to one or more issues in the trial that, if the accused is convicted, a failure to give the direction will have occasioned a miscarriage of justice. If the circumstances, considered objectively, did not require such a conclusion, the failure to give the direction would not have amounted to an error in the trial. The trial judge, applying formulations such as that of Barwick CJ in R v Storey, must be satisfied that in the absence of the direction, the appellant will have lost a 'real chance of acquittal', or that had the direction been given 'a reasonable jury might well have acquitted.' (see also *Tukuafu v R* [2014] VSCA 345, [91]; *Horton v R* [2015] VSCA 319 (Redlich JA)).

29. In most cases, the obligation to identify the directions required and the issues in dispute falls on counsel (*Xypolitos v R* (2014) 44 VR 423; *Horton v R* [2015] VSCA 319 (Redlich JA)).

30. The new terms of the residual obligation are more stringent than under the 2013 Act, and the above extract from *Xypolitos* must be read in that light (*Keogh v R* [2018] VSCA 145, [76]; *Dunn v R* [2017] VSCA 371, [82]).

31. The residual obligation operates in the context of the trial as it has been conducted by the parties. The judge must consider the issues in the case (as identified in accordance with ss 11 and 12 of the *Jury Directions Act 2015*), the forensic decisions of counsel and the way the defence has sought to answer the charge (*Gul v R* [2017] VSCA 153, [48]–[49]. See also *Dunn v R* [2017] VSCA 95, [22]; *Keogh v R* [2018] VSCA 145, [77]; *Arico v R* [2018] VSCA 135, [132]–[133] (Maxwell ACJ and Weinberg JA)).

32. The potential for a direction to be detrimental to the defence case, either generally or on some charges, can exclude the possibility that there are substantial and compelling reasons to give a direction that was not requested (*The Queen v Falzon* [2018] HCA 29, [48]. See also *Keogh v R* [2018] VSCA 145, [80]–[82]).

33. Subject to the residual obligation, the *Jury Directions Act 2015* expressly abolishes the common law requirement to direct on defences or alternative offences open on the evidence which have not been identified as reasonably open during the trial. The judge is also not required to direct on alternative bases of complicity which have not been identified as reasonably open during the trial (*Jury Directions Act 2015* s 17).

Part 3, the Common Law and Matters Not Raised

34. At common law, a judge had a duty to leave alternative offences to the jury, depending on the evidence and the nature of the offences. See 3.10 Alternative Verdicts.

35. It was also an error to withdraw an element from the jury's consideration, even if it was not contested by the accused. However, where an element was not in issue in the trial, and the evidence itself did not raise an issue as to the existence of that element, it was not necessary for the judge to direct the jury about that element (*Huynh & Ors v R* [2013] HCA 6; *R v VN* (2006) 15 VR 113; *Griffiths v R* (1994) 125 ALR 545; *R v Simon* [2010] VSCA 66).

36. At common law, if there was evidence that disclosed the possibility of a defence, the judge was also required to instruct the jury that about that defence (*Fingleton v R* (2005) 227 CLR 166; *Zecevic v DPP* (1987) 162 CLR 645; *Pemble v R* (1971) 124 CLR 107; *R v Thompson* (2008) 21 VR 135).

37. This obligation applied even if the judge considered the evidence about a particular defence was weak or tenuous. The judge was required to direct the jury about a defence if there was evidence on which a reasonable jury could decide the issue favourably to the accused (*R v Kear* [1997] 2 VR 555; *R v Youssef* (1990) 50 A Crim R 1; *Zecevic v DPP* (1987) 162 CLR 645).

38. Under Part 3 of the *Jury Directions Act 2015*, the prosecution must indicate whether alternative offences or alternative forms of complicity are relied upon and defence counsel must indicate whether each element of the offence is in issue and whether any defences, alternative offences or alternative bases of complicity are in issue. A judge does not need to direct a jury on matters that are not in issue, subject to the residual obligation to give directions where there are substantial and compelling reasons to do so (see *Gul v R* [2017] VSCA 153, [39]–[40]).

39. In addition, the Act recognises that the manner in which the parties have conducted their case is relevant to deciding if there are good reasons for not giving a direction which has been requested (see *Gul v R* [2017] VSCA 153, [39]–[40]).

40. In *Parker v The King* [2024] VSCA 72, the Court of Appeal considered the situation which arises where it is the trial judge that proposes that certain elements are not in issue and proposes a direction to explain that to the jury. Even though defence counsel accepted the judge's analysis and proposed direction, the Court of Appeal held that this was not a statement that the elements were not in issue under s 11 (at [123] per Whelan JA) or a request under s 12 for the direction proposed by the judge (at [4]–[5] per Niall and Boyce JJA and [124], [131(2)] per Whelan JA). In any event, the Court concluded that the proposed direction was wrong, and so should not have been given (at [7] per Niall and Boyce JJA and [129] per Whelan JA). This suggests that when judges are too interventionist in the Part 3 conversation process, statements by counsel will not be treated as operative under *Jury Directions Act 2015* ss 11 or 12 and so may not be capable of narrowing the scope of matters in issue.[49]

Exceptions to Request for Directions Process

41. The request for directions process does not apply to "general directions" or directions the judge must give or must not give under the provisions of the *Jury Directions Act 2015* or another Act (*Jury Directions Act 2015* s 10).

42. "General directions" are defined as "directions concerning matters relating to the conduct of trials generally". The Act contains an inclusive list of general directions which includes:

    (a) the role of the trial judge, the jury and counsel;

    (b) the empanelment of a jury and the selection of a foreperson;

    (c) trial procedure;

    (d) the need to decide issues on the basis of admissible evidence only;

    (e) the need to decide each charge separately according to the evidence relating to that charge;

    (f) the assessment of witnesses;

    (g) the presumption of innocence and the burden and standard of proof, including what must be proved beyond reasonable doubt;

    (h) the drawing of conclusions and the distinction between direct and circumstantial evidence;

    (i) jury deliberations and verdicts.

43. Within this Charge Book, the directions contained in Part 1: Preliminary Directions and Part 3: Final Directions (other than Chapter 3.8) are treated as general directions. The obligation to give such directions is unaffected by Part 3 of the Jury Directions Act 2015.

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[49] Niall and Boyce JJA also doubted that a direction which removed an element could be a request for "particular directions in respect of the matters in issue" under *Jury Directions Act 2015* s 12(a), stating:

> "[a] direction that had the effect of removing a matter in issue, is not easily seen as being a direction in relation to a matter in issue" (at [6]).

44. Section 10(b) provides that Part 3 of the Act does not apply to directions the judge must give or must not give under the Jury Directions Act or any other Act. In this Charge Book, at least part of the following directions must be given under an Act and so the Part 3 process does not apply:

    - 2.3.2 Protected Witnesses;
    - 3.9 Judge's Summing Up on Evidence and Issues;
    - 4.6 Incriminating Conduct (Post Offence Lies and Conduct).

Obligation to Correct Prohibited Statements or Suggestions

45. The trial judge must correct any statement or suggestion by the prosecutor, defence counsel or an unrepresented accused that is prohibited by the Act. The judge must also correct a statement or suggestion prohibited by the Act that is in a question from the jury. This obligation does not depend on any request for directions. However, the judge need not correct a statement or suggestion if there are good reasons for not doing so, such as where the prosecutor or defence counsel corrects their own misstatement (*Jury Directions Act 2015* s 7).

46. Provisions of the *Jury Directions Act 2015* which prohibit certain statements or suggestions include:

    - section 33 – Prohibitions on certain statements concerning child witnesses
    - section 42 – Prohibitions on certain statements regarding the accused's failure to give or call evidence
    - section 51 – Prohibitions on certain statements regarding complainants in sexual offence cases.

Self-Represented Accused

47. Where the accused is not represented, the trial judge must comply with the request for directions process as if the accused has stated that all matters are in issue and had requested all directions which it would have been open to request, if the accused had been represented by a legal practitioner (*Jury Directions Act 2015* s 13).

48. Despite the general rule that the judge must treat the accused as having requested all directions open, the judge need not give a direction if he or she considers that there are good reasons for not giving the direction or if it is otherwise not in the interests of justice to give the direction (*Jury Directions Act 2015* s 13(2)).

Application to hearings not involving a jury

49. The following parts of the *Jury Directions Act 2015* apply to the court's reasoning in certain hearings that do not involve a jury:

    (a) a summary hearing under the *Criminal Procedure Act 2009* that commenced on or after 1 October 2017.

    (b) a committal proceeding under the *Criminal Procedure Act 2009* when the committal hearing commenced on or after 1 October 2017.

    (c) a case stated under the *Criminal Procedure Act 2009* or Part 5.4 of the *Children, Youth and Families Act 2005*, when the hearing from which the question of law arose commenced on or after 1 October 2017.

    (d) an appeal under the *Criminal Procedure Act 2009*, Part 5.4 of the *Children, Youth and Families Act 2005*, or ss 24AA or 38ZE of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, when the appeal commenced on or after 1 October 2017.

(e) a special hearing under Division 3 of Part 5A of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, when the special hearing commenced on or after 1 October 2017 (*Jury Directions Act 2015* s 4A).

(f) a trial by judge alone (*Criminal Procedure Act 2009* s 420ZG).

50. In these hearings, the court's reasoning with respect to any matter in relation to which Parts 4 (Evidentiary directions), 5 (Sexual offences), 6 (Family violence), and 7 (General directions) of the *Jury Directions Act 2015* makes provision:

(a) must be consistent with how a jury would be directed in accordance with the Act; and

(b) must not accept, rely on or adopt a statement or suggestion that the Act prohibits a trial judge from making, or a direction that the Act prohibits a trial judge from giving (*Jury Directions Act 2015* s 4A(2)).

51. These provisions do not require a party in a summary hearing to file an incriminating conduct notice before relying on that type of evidence (*DPP v Dyke* [2020] VSC 300, [13]–[17]).

Last updated: 14 May 2024

3.2 Overview of Final Directions

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1. The fundamental task of a judge is to ensure a fair trial of the accused (*RPS v R* (2000) 199 CLR 620; *Crofts v R* (1996) 186 CLR 427).

2. The requirement for a fair trial requires the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. In most cases, this will require the judge to:

    1. Give instructions about the burden and standard of proof, the respective roles of the judge and jury, and the elements of the relevant offences and defences;

    2. Succinctly and accurately identify the issues in the case and relate the law to those issues;

    3. Refer to how the prosecution and defence have put their cases, without needing to summarise the closing addresses;

    4. Identify so much of the evidence as is required to help the jury determine the issues in the trial; and

    5. Give the jury any warnings about how it may reason, or about particular kinds of evidence, as is required in the case (*Jury Directions Act 2015* s 65; *RPS v R* (2000) 199 CLR 620; *R v Coombes* 16/4/1999 CA Vic. See also *R v Zorad* (1990) 19 NSWLR 91; *R v Lawrence* [1982] AC 510).

3. Regardless of the way in which judges approach their role, they must ensure that they tailor their charge to the case before them. The charge should be custom built to make the jury understand their task in the case. It must not merely formulaically adopt the principles of law set out in the charge book, which are intended as a guide only (*R v Zilm* (2006) 14 VR 11; *R v Coombes* 16/4/1999 CA Vic; *R v Anderson* [1996] 2 VR 663; *R v Lawrence* [1982] AC 510).

4. The summing-up should not address issues of law which are not raised by the particular case, nor should it be a complete statement of the law in relation to the crime charged. It should also not address every piece of evidence given in the trial. The judge should only address *as much* of the law and evidence as is necessary to guide them to a decision on the real issues that arise in the case (*R v VN* (2006) 15 VR 113; *R v Zilm* (2006) 14 VR 11; *Fingleton v R* (2005) 227 CLR 166; *R v Chai* (2002) 187 ALR 436; *RPS v R* (2000) 199 CLR 620; *Alford v Magee* (1952) 85 CLR 437).

5. The identification of issues and any necessary evidentiary directions is informed by the statutory conversation required under *Jury Directions Act 2015* ss 11–12.

6. As a matter of practice, the judge should consider the jury's attention span in structuring the charge. It is undesirable to give directions on important issues when the jury may be losing concentration. Similarly, if the final directions are interrupted by a weekend or longer adjournment, it may be necessary to remind the jury of key matters when the directions resume.
7. When a party raises an issue with the directions, the judge will need to decide whether any redirection is needed to clarify the issue for the jury. If the redirection is responding to earlier, erroneous, directions, the judge should explicitly tell the jury that the earlier directions were wrong. It is not sufficient to give the jury corrected directions without also telling the jury to disregard the earlier directions, as that produces a situation where the jury has conflicting and confusing directions (*Ritchie v The Queen* [2019] VSCA 202, [130]).
8. See 3.9 Judge's Summing Up on Evidence and Issues for further information concerning the judge's summing-up.

Last updated: 17 February 2020

3.2.1 Charge: Overview of Final Directions

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Members of the jury, before you leave the court to consider your verdict, I must give you instructions on the law and the evidence. There are three parts to these instructions.

First, I will remind you of several important principles of law which apply to this case. While I have already told you some of these principles at different times during the trial, it is important that I tell them to you again – not only to remind you of what I said earlier, but also to place those principles in the context of the trial which has now taken place. You must apply these instructions carefully.

Secondly, I will tell you the issues that you need to decide, and will refer you to the evidence that relates to those issues and the arguments from prosecution and defence counsel. In doing this, I will have to be selective. The mere fact that I don't mention certain evidence does not mean that that evidence is not important. Similarly, the fact that I include certain evidence does not make that evidence more important than other evidence. You must consider all of the evidence, not just the parts of it that I mention. Which parts of that evidence are important or not important is a matter for you to determine.

Thirdly, I will explain what verdict[s] you may return in this case, and how you may wish to approach your discussion of the case in the jury room.

Remember, if at any time you have a question about anything I say, you are free to ask me by passing a note to my tipstaff.

Last updated: 30 November 2015

3.3 Review of the Role of the Judge and Jury

3.3.1 Charge: Review of the Role of Judge and Jury

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Note: This charge is based on the assumption that the judge has already instructed the jury about the respective roles of the judge and jury at the beginning of the trial (see 1.4.1 Charge: Role of Judge and Jury). If this has not been done, it will need to be modified accordingly.

See 1.4 The Role of Judge and Jury, for a discussion of the legal principles relevant to this area.

Review of the Role of the Jury

In this case, it is alleged by the prosecution that NOA committed the offence[s] of [*insert offences*].[50] S/he has pleaded "not guilty", and so it is for you, and you alone, to decide whether s/he is guilty or not guilty of [this/these] crime[s].

You do that by deciding what the facts are in this case. As I have told you, you are the only ones in this court who can make a decision about the facts. You make that decision from all of the evidence that has been given during the trial.

You then apply the law to the facts that you have found, and decide whether the accused is guilty or not guilty of the offence[s] charged.

Review of the Role of the Judge

It is my role, as the judge, to explain to you the principles of law that you must apply to make your decision. You must accept and follow all of those directions.

I want to emphasise again that it is not my responsibility to decide this case – that is your role. The verdict that you return has absolutely nothing to do with me. So while you must follow any directions I give you about the law, you are not bound by any comments I may make about the facts.

As I told you at the start of the trial, it is unlikely that I will make any comments about the evidence. If I do make a comment about the evidence, you must not give it any extra weight because I, as the judge, have made that comment. You must disregard any comment I make about the evidence, unless you agree with that view after making own independent assessment of the evidence. That is what I mean when I say that you alone are the judges of the facts in this case.

Review of the Role of Counsel

Throughout the trial, counsel have presented the prosecution and defence cases. While their comments and arguments have been designed to assist you to reach your decision, you also do not need to accept what they have said. Of course, if you agree with an argument they have presented, you can adopt it. But if you do not agree with their view, you must put it aside.

Last updated: 17 May 2019

3.4 Review of the Requirement to Decide Solely on the Evidence

3.4.1 Charge: Review of the Need to Decide Solely on the Evidence

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Note: This charge is based on the assumption that the judge has already instructed the jury about the need to base their decision solely on the evidence at the beginning of the trial (see 1.5.1 Charge: Decide Solely on the Evidence). If this has not been done, it will need to be modified accordingly.

See 1.5 Decide Solely on the Evidence, for a discussion of the legal principles relevant to this area.

[50] This charge is drafted for cases involving one accused. If the case involves multiple accused, it will need to be modified accordingly.

Introduction: The Evidence

I have told you that it is your task to determine the facts in this case. In determining the facts, you must consider all of the evidence that you heard from the witness box. Remember, it is the answers the witnesses gave that are the evidence, not the questions they were asked.

You must also take into account the exhibits that were tendered. These include [*insert examples*]. When you go to the jury room to decide this case, [most of/some of] the exhibits will go with you, where you may examine them. Consider them along with the rest of the evidence and in exactly the same way.[51] [However, the following exhibits will not go with you to the jury room [*insert exhibits*]].

[*If any formal admissions were put to the jury, add the following shaded section:*]

In addition, in this case the following admissions were made: [*insert admissions*]. You must accept these admissions as established facts.

Nothing else is evidence in this case. As I have told you, this includes any comments counsel make about the facts.[52] It also includes:

[*Identify other relevant matters which do not constitute evidence in the case. See* 2.2 Providing Documents to the Jury *and associated charges. It may be appropriate to insert charges relating to these matters here.*]

Review of the Need to Decide Solely on the Evidence

It your duty to decide this case only on the basis of the witnesses' testimony, [the admissions] and the exhibits. You should consider the evidence which is relevant to a particular matter in its individual parts and as a whole, and come to a decision one way or another about the facts.

As I have told you, in doing this you must ignore all other considerations, such as any feelings of sympathy or prejudice you may have for anyone involved in the case. You should not, for example, be influenced by [*insert case specific examples*].[53] Such emotions have no part to play in your decision.

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[51] Depending on the nature of the evidence, it may be necessary to warn the jury of the possible dangers of conducting experiments in the jury room: see 1.5 Decide Solely on the Evidence for further information.

[52] If the accused is unrepresented, the jury should be told that what s/he said in his/her addresses, or when questioning witnesses, is also not evidence.

[53] Some matters which it may be appropriate to point out (as they could conceivably give rise to prejudice or sympathy) include:

• The nature of the injuries suffered by the complainant;

• The race or ethnicity of the accused or the complainant;

• The sexual orientation of the accused or the complainant;

• The fact that the accused or the complainant are drug users.

In some cases, it may be appropriate to point out that although a party's behaviour does not accord with what the jury might think is morally acceptable, the jury is not a court of morals. Everyone has the right to be treated equally before the law.

Remember, you are the judges of the facts. That means that in relation to all of the issues in this case, you must act like judges. You must dispassionately weigh the evidence logically and with an open mind, not according to your passion or feelings.

Outside Information

At the start of the trial I also told you that you must not base your decision on any information you may have obtained outside this courtroom. For example, you must completely ignore anything that you have seen or heard in the media about this case, or about the people involved in it. You must consider only the evidence that has been presented to you here in court.[54]

Last updated: 17 May 2019

3.5 Review of the Assessment of Witnesses

3.5.1 Charge: Review of the Assessment of Witnesses

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Note: This charge is based on the assumption that the judge has already instructed the jury about how to assess witnesses at the beginning of the trial (see 1.6.1 Charge: Assessing Witnesses). If this has not been done, it will need to be modified accordingly.

See 1.6 Assessing Witnesses, for a discussion of the legal principles relevant to this area.

You have now listened to what each witness has said, and watched how they presented their evidence and answered the questions under cross-examination. No further evidence will be given.

To decide what the facts are in this case, you now need to assess this evidence. It is up to you to decide how much or how little of the testimony of any witness you will believe or rely on. You may believe all, some or none of a witness's evidence. No one can tell you how to approach any particular witness's evidence in this regard.

It is also for you to decide what weight should be attached to any particular evidence – that is, the extent to which the evidence helps you to determine the relevant issues.

As I mentioned at the start of the trial, in assessing witnesses' evidence, some matters which may concern you include their credibility and reliability. It is for you to judge whether the witnesses told the truth, and whether they correctly recalled the facts about which they gave evidence. This is something you do all the time in your daily lives. There is no special skill involved – you just need to use your common sense.

While you may take into account the witness's manner when he or she gave evidence, you should be careful when doing so. As I noted at the start of the case, giving evidence in a trial is not common, and may be a stressful experience. People react and appear differently. Witnesses come from different backgrounds, and have different abilities, values and life experiences. There are too many variables to make the manner in which a witness gives evidence the only, or even the most important, factor in your decision.

In making your decision, do not consider only the witnesses' testimony. Also take into account the exhibits [and admissions]. Consider all of the evidence in the case, use what you believe is true and reject what you disbelieve. Give each part of it the importance which you – as the judge of the facts – think it should be given, and then determine what, in your judgment, are the true facts.

[54] If there has been significant publicity about the case or the parties involved, it may be necessary to give a more detailed warning.

[*This may be an appropriate point to instruct the jury about any issues relating to particular* types of witnesses *who have given evidence, such as:*

- 4.1 The Accused as a Witness*;*
- 4.2 Child Witnesses*;*
- 4.21 Unreliable Evidence Warning.

It may also be an appropriate point to instruct the jury about any issues relating to particular types of evidence given in the case, such as:

- 4.3 Character Evidence*;*
- 4.5 Confessions and Admissions*;*
- 4.12 Identification Evidence*;*
- 4.13 Opinion Evidence*;*
- 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements);
- 4.17 Tendency Evidence;
- 4.18 Coincidence Evidence.]

3.6 Circumstantial Evidence and Inferences[55]

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What is Circumstantial Evidence?

1. A fact that is in issue can be proved in two ways:

   i) By providing evidence which *directly proves* that fact, without requiring the jury to draw any inferences ("direct evidence"[56]); or

   ii) By providing evidence of a related fact or facts, from which the jury can *infer the existence* of the fact in issue ("circumstantial evidence") (*Shepherd v The Queen* (1990) 170 CLR 573. See also *Doney v R* (1990) 171 CLR 207; *Festa v R* (2001) 208 CLR 593; *Myers v DPP* [1965] AC 1001; *R v Spina* [2005] VSCA 319).

2. The distinction between direct and circumstantial evidence does not relate to the *nature or content of the evidence given* (e.g. whether it is evidence of an event the witness personally saw, rather than evidence of an event they were told about), but to the *way in which the evidence is to be used*. If it is necessary for the jury to infer a particular fact from the evidence, it will be circumstantial evidence of that fact.[57]

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[55] This document was last updated on 21 July 2021.

[56] The term "direct evidence" is also used to refer to testimonial evidence given by a witness of a matter they have personal knowledge about (e.g. which they personally saw or heard). When used in this sense, direct evidence is contrasted with hearsay evidence rather than circumstantial evidence (see *Cross on Evidence* para 1110).

[57] This is in contrast to the distinction between "direct evidence" and "hearsay evidence", which relates to the nature of the evidence given (see above).

3. The same piece of evidence can therefore be both direct and circumstantial, depending on what it is being used to prove. For example, evidence given by a witness that s/he saw the accused holding a gun could be:

    - Direct evidence that the accused possessed a firearm; and
    - Circumstantial evidence that the accused murdered someone with that firearm.

Use of Circumstantial Evidence

4. In many cases no one will have directly witnessed the facts which the prosecution must prove, and so they will need to rely on circumstantial evidence. In such cases, the ultimate inference which the jury will often be asked to draw is that of the accused's guilt (*Shepherd v The Queen* (1990) 170 CLR 573).
5. As there is nothing in the law that makes proof by circumstantial evidence unacceptable or suspect of itself (*De Gruchy v R* (2002) 211 CLR 85), circumstantial evidence can be used to prove the accused's guilt in this way (*Festa v R* (2001) 208 CLR 593; *Chamberlain v R (No 2)* (1984) 153 CLR 521).
6. However, research using mock juries indicates that there is a risk that jurors will consider circumstantial evidence inherently weaker or less reliable than direct evidence. Judges may address this misconception, and may consider using the phrase 'indirect evidence' rather than 'circumstantial evidence' (Simplification of Jury Directions Project, 2012).
7. If circumstantial evidence is relied upon by the prosecution, it may be necessary for the judge to direct the jury that before the accused's guilt can be inferred, it must be the only rational inference that can be drawn from that evidence.

Inferential Reasoning ('*Hodge*' direction)

8. Where the prosecution case depends upon circumstantial evidence, it is usually necessary to give the following two directions:

    i) To find the accused guilty, his or her guilt must not only be a *reasonable inference*, it must be the *only* reasonable inference which can be drawn from the circumstances established by the evidence; and

    ii) If the jury considers that there is *any reasonable explanation* of those circumstances which is consistent with the innocence of the accused, they must find him or her not guilty (*R v Hodge* (1838) 2 Lewin 227; *Mannella v R* [2010] VSCA 357; *Knight v R* (1992) 175 CLR 495; *Shepherd v The Queen* (1990) 170 CLR 573; *Chamberlain v R (No 2)* (1984) 153 CLR 521; *Barca v R* (1975) 133 CLR 82; *Plomp v R* (1963) 110 CLR 234; *Thomas v R* (1960) 102 CLR 584).

9. These directions stem from the general requirement that guilt must be proved beyond reasonable doubt. They simply convey the meaning of "beyond reasonable doubt" in cases involving circumstantial evidence. They do not reflect a separate rule that operates in such cases (*R v Kotzmann* [1999] 2 VR 123; *R v Lancefield* [1999] VSCA 176; *Knight v R* (1992) 175 CLR 495; *Shepherd v The Queen* (1990) 170 CLR 573; *R v Sorby* [1986] VR 753; *Grant v R* (1976) 11 ALR 503).

Reasonable Inference

10. Given the high standard of proof required in criminal trials, it is important that the jury only draws inferences which can be properly deduced from the direct evidence ("reasonable inferences"), rather than making guesses or engaging in speculation (*R v McIntyre* (2000) 111 A Crim R 211).

11. In determining whether an inference is reasonable, the jury should consider the evidence as a whole. A reasonable inference can be drawn from a combination of facts, none of which viewed alone would support that inference (*Chamberlain v R (No 2)* (1984) 153 CLR 521; *R v Sorby* [1986] VR 753; *Shepherd v The Queen* (1990) 170 CLR 573; *R v Hillier* (2007) 228 CLR 618; *R v Allen* [2007] VSCA 97).

12. The jury should therefore not reject one circumstance because, considered alone, no reasonable inference of guilt can be drawn from it. The jury must consider the weight which is to be given to the united force of all the circumstances put together. One piece of evidence may resolve the jury's doubts about another (*R v Hillier* (2007) 228 CLR 618; *R v Allen* [2007] VSCA 97; *Chamberlain v R (No 2)* (1984) 153 CLR 521; *Van Beelen; Thomas v R* [1972] NZLR 34; *Shepherd v The Queen* (1990) 170 CLR 573).

"Only" Reasonable Inference

13. The inference drawn by the jury must be the only reasonable inference which can be drawn from the facts (*Shepherd v The Queen* (1990) 170 CLR 573; *Chamberlain v R (No 2)* (1984) 153 CLR 521).

14. The existence of a particular fact-in-issue will be the only rational inference to be drawn from circumstantial evidence if:

    - The jury find those circumstances to have been established; and
    - According to the common course of human affairs, there is such a high probability that the occurrence of those circumstances would be accompanied by the existence of that fact-in-issue that the contrary cannot reasonably be supposed (*Martin v Osborne* (1936) 55 CLR 367; *Plomp v R* (1963) 110 CLR 234; *R v Taouk* [2005] NSWCCA 155).

No Other Reasonable Hypothesis

15. When the case against an accused person rests substantially upon circumstantial evidence, the jury cannot return a verdict of guilty unless the circumstances exclude any reasonable hypothesis other than the guilt of the accused (*Peacock v R* (1911) 13 CLR 619; *Barca v R* (1975) 133 CLR 82; *Chamberlain v R (No 2)* (1984) 153 CLR 521; *Doney v R* (1990) 171 CLR 207; *R v Allen* [2007] VSCA 97).

16. This is because a reasonable doubt will necessarily arise where any other inference consistent with innocence is reasonably open on the evidence (*Shepherd v The Queen* (1990) 170 CLR 573; *Doney v R* (1990) 171 CLR 207).

17. So if the jury finds that an inference or hypothesis consistent with innocence is open on the evidence, they must give the accused the benefit of the doubt necessarily created by that circumstance and acquit him or her (*Knight v R* (1992) 175 CLR 495).

18. The judge should not invite the jury to determine whether there are any other reasonable conclusions arising from the facts. Such a direction misstates the onus of proof, as it is for the prosecution to exclude all reasonable hypotheses consistent with innocence (*Gregg v The Queen* [2020] NSWCCA 245, [523]).

19. An alternative hypothesis does not have to be "equally open" or "equally compelling" in order to give rise to a reasonable doubt as to guilt. Such a doubt will arise where any other inference consistent with innocence is reasonably open on the evidence (*Mannella v R* [2010] VSCA 357).

20. The jury does not have to be able to infer that the event suggested by the innocent hypothesis actually occurred. It is sufficient if there is a reasonable possibility that such an event took place (*R v McIntyre* (2000) 111 A Crim R 211; *R v Gover* (2000) 118 A Crim R 8).

21. Even if there is only one circumstance inconsistent with a conclusion of guilt, that may be sufficient to destroy the hypothesis of guilt (*Peacock v R* (1911) 13 CLR 619; *R v Taouk* [2005] NSWCCA 155).

22. Where competing inferences arise in a case, it is for the jury to determine whether the inference of guilt arises, and if so whether it completely overcomes all other inferences so as to leave no reasonable doubt in their minds (*R v Plomp* (1963) 110 CLR 234; *Peacock v R* (1911) 13 CLR 619).

Must Be A "Reasonable" Hypothesis

23. The jury cannot act upon some fanciful supposition or possibility that cannot reasonably be inferred from the facts proved. The hypothesis must be "reasonable" (*R v Clarke* (1995) 78 A Crim R 226).

24. A "reasonable hypothesis" must possess some degree of acceptability or credibility. A hypothesis will not be reasonable if it is fanciful, impossible, incredible, not tenable or too remote or tenuous (*Bushell v Repatriation Commission* (1992) 175 CLR 408; *R v Clarke* (1995) 78 A Crim R 226).

25. For an inference to be reasonable, it must rely upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the accused guilty, if the inference of guilt is the only inference reasonably open upon a consideration of all the facts (*Peacock v R* (1911) 13 CLR 619; *Barca v R* (1975) 133 CLR 82).

26. The mere existence of a conclusion consistent with innocence therefore will not necessarily mean that the prosecution has failed to establish its case. The existence of that conclusion may be regarded by the jury as of little weight in the circumstances of the case (*Chan* (1992) 28 NSWLR 421).

27. While a reasonable hypothesis must be based on something more than mere conjecture, there need not be positive evidence supporting that hypothesis. Even in the absence of such evidence, a hypothesis may be reasonable so long as it is consistent with the evidence accepted by the jury (*R v McIntyre* (2000) 111 A Crim R 211; *R v Gover* (2000) 118 A Crim R 8).

28. However, it is wrong to tell the jury that they must decide whether they accept the evidence which establishes the hypothesis consistent with innocence. Such a direction reverses the burden of proof. Instead, the prosecution must exclude the hypothesis as a reasonable possibility (*Ankur v The Queen* [2021] VSCA 110, [30]–[39], [57]).

29. While it is proper for a judge to tell a jury that they must not engage in speculation or make guesses, s/he needs to be careful that such a direction does not detract from the jury's duty to acquit if they cannot exclude all reasonable hypotheses consistent with innocence. Although it will often be a matter of speculation as to whether one of these innocent explanations occurred, there is no speculation involved in considering whether the hypotheses are reasonable possibilities (*R v McIntyre* (2000) 111 A Crim R 211).

Warning of dangers in drawing inferences ('*Hodge*' warning)

30. The need for expanded directions on the process of drawing inferences arises because the human mind is apt to jump to conclusions, attaching too much weight to a fact that is really only one part of the case, or being too quickly convinced by an accumulation of detail that is in truth explicable as coincidence or in some other way consistent with innocence (*R v Kotzmann* [1999] 2 VR 123).

31. In addition, a single circumstance inconsistent with guilt is of more importance than all other circumstances, as it may destroy a hypothesis of guilt (*R v Hodge* (1838) 2 Lewin 227).

32. While there is little case-law on the need for these directions, the model direction in this Charge Book includes these warnings as part of the expanded direction on circumstantial evidence.

When to give the Charge

33. Whenever circumstantial evidence is relied upon by the prosecution, the judge must consider whether or not the case calls for directions about the need for guilt to be the only rational inference, and the requirement for reasonable hypotheses consistent with innocence to be excluded (*Grant v R* (1976) 11 ALR 503; *R v Sorby* [1986] VR 753).

34. Such directions do not need to be given in every case in which the prosecution relies on circumstantial evidence. It is for the trial judge to determine whether they should be given, based on the circumstances of the case and the nature of the summing-up (*Shepherd v The Queen* (1990) 170 CLR 573; *R v Spina* [2005] VSCA 319; *R v Garth* (1990) 49 A Crim R 298; *R v Sorby* [1986] VR 753; *Grant v R* (1976) 11 ALR 503; *R v Rajakaruna (No 2)* (2006) 15 VR 592; *R v KDY* [2008] VSCA 104).

35. In many, if not most, cases involving substantial circumstantial evidence, it will be helpful to give such directions (*R v Kotzmann* [1999] 2 VR 123; *Shepherd v The Queen* (1990) 170 CLR 573; *R v Plomp* (1963) 110 CLR 234; *R v Peacock* (1911) 13 CLR 619).

36. These directions should be given if, in a particular case, the jury cannot be expected to understand and apply the rules concerning the onus and standard of proof (*R v Sorby* [1986] VR 753).

37. If the directions are unnecessary, or are likely to confuse the jury rather than assist them, they should not be given (*Grant v R* (1976) 11 ALR 503; *R v Sorby* [1986] VR 753; *La Fontaine v R* (1976) 136 CLR 62; *Shepherd v The Queen* (1990) 170 CLR 573).

38. The direction should generally not be given in cases which do not depend on circumstantial evidence, or where the amount of circumstantial evidence involved is slight. In such cases, these directions will put an unnecessary gloss on the explanation of the onus of proof (*La Fontaine v R* (1976) 136 CLR 62. See also *Shepherd v The Queen* (1990) 170 CLR 573).

39. There is no obligation to give such directions where the only substantial inference which needs to be drawn is about the accused's state of mind (*R v Rogerson* (1992) 65 A Crim R 530; *R v Tillott* (1991) 53 A Crim R 46; *R v Shepherd (No 3)* (1988) 85 ALR 387; *McGreevy v DPP* (1973) 57 Cr App R 424. But see *R v Knight* (1992) 175 CLR 495).

Directing the Jury About Alternative Hypotheses

40. If evidence raises a reasonable possibility that the circumstances pointed to someone other than the accused being guilty of the offence, then a direction about the need to exclude such a possibility beyond reasonable doubt should usually be given (*R v Clarke* (1995) 78 A Crim R 226).

41. Such a direction should be given even if the evidence is very slight, if it could be interpreted as raising a reasonable possibility of innocence (*R v Clarke* (1995) 78 A Crim R 226).

42. The failure of the defence to put forward an alternative hypothesis consistent with innocence does not relieve the prosecution of the burden of proving its case to the requisite standard (*R v Lancefield* [1999] VSCA 176). It is not incumbent on the defence either to establish that some inference other than guilt should reasonably be drawn from the evidence, or to prove particular facts that would tend to support such an inference. If the jury thinks that the evidence as a whole is susceptible of a reasonable alternative explanation, the accused is entitled to be acquitted (*Barca v R* (1975) 133 CLR 82).

43. However, the judge is only required to direct the jury about the real issues in the case. The defence must indicate the elements or defences that are in issue and the directions required. Unless there are substantial and compelling reasons to do so, the trial judge must not give a direction which is not requested (*Jury Directions Act 2015* ss 12, 14, 15, 16).

44. It will be a misdirection to direct the jury that a reasonable explanation consistent with innocence must be given by the accused before it can be considered (*R v Betancur-Galvis* [2003] NSWCCA 333; *Druett v R* (1994) 123 FLR 249; *R v Baartman* [2000] NSWCCA 298; *Loader v R* [2003] NTCCA 10).

Content of the Charge

45. The content of the charge will vary according to the nature of the evidence that the prosecution offers as proof. Directions should be constructed around the central principle that the prosecution must establish guilt beyond reasonable doubt, and should be more or less elaborate according to the risks in the case (*R v Sorby* [1986] VR 753).

46. In most cases, it will be sufficient simply to tell the jury that the accused's guilt must be established beyond reasonable doubt, and that they must entertain such a doubt where any inference consistent with innocence is reasonably open on the evidence (*Shepherd v The Queen* (1990) 170 CLR 573).

47. If some cases, however, a more detailed direction may be required. In such cases the judge should explain clearly to the jury that:

    - The prosecution case cannot succeed unless the prosecution has proved all of the elements beyond reasonable doubt;
    - The prosecution case against the accused (on a particular issue) is a circumstantial evidence case;
    - For a circumstantial evidence case to succeed, guilt must not only be a rational inference, but must be the *only* rational inference that can be drawn from the evidence;
    - A reasonable doubt arises where any inference consistent with innocence is reasonably open on the evidence;
    - In so far as any alternative hypotheses consistent with innocence are open, it is part of the prosecution's burden of proof to refute each and every one of those alternative hypotheses; and
    - They may only draw an inference of guilt if it so overcomes any other possible inferences as to leave no doubt in their minds. Otherwise, they should give the accused the benefit of doubt created by the alternative hypothesis, and acquit (See, e.g., *R v Taouk* [2005] NSWCCA 155; *R v Chen, Siregar & Isman* (2002) 130 A Crim R 300; *R v Kotzmann (No 2)* (2002) 128 A Crim R 479; *Wedd v R* (2000) 115 A Crim R 205; *Pitkin v R* (1995) 130 ALR 35; *Knight v R* (1992) 175 CLR 495).

48. It is proper for a judge to explain to the jury that a reasonable hypothesis consistent with innocence means a reasonable hypothesis having regard to the whole of the evidence, not to each individual item of circumstantial evidence regarded separately (*R v Perera* [1986] 1 Qd R 211; *R v Beble* [1979] Qd R 278).

49. Where "fanciful" or "unreal" possibilities have been put to the jury by defence counsel, it is appropriate for the trial judge to redress the balance (see 1.7 Onus and Standard of Proof). In doing so, the judge must be careful not to give a direction which is likely to distract the jury from the simple task of considering whether a hypothesis consistent with innocence is reasonably open on the evidence (*R v Lancefield* [1999] VSCA 176).

50. A judge must also avoid giving a direction about when a possibility is fanciful or unreal that implies or suggests that the defence case is fanciful or unreal. An example which shows the difference between reasonable hypotheses and guesswork will adequately explain the concept without needing to specifically give an example which involves a fanciful explanation (see *Ankur v The Queen* [2021] VSCA 110, [59]–[78]).

Base Decision on Established Evidence

51. It is not the evidence presented, but what is accepted of it by the jury which is to be considered in relation to any hypotheses. To justify conviction, the jury must be satisfied beyond reasonable doubt that the evidence they accept is inconsistent with a hypothesis of innocence (*Barca v R* (1975) 133 CLR 82).

52. The jury should therefore be told that they are not obliged to accept as proved all the circumstances to which the witnesses have testified. It is for them to determine which of the circumstances to accept, and whether those circumstances establish the accused's guilt. As with direct evidence, any circumstantial evidence unacceptable to them may be discarded (*R v Van Beelen* (1973) 4 SASR 353).

Misdirections

53. The jury should not be told that they must consider the explanation or inference contended for by the prosecution and consider whether it was a reasonable one. This may lead the jury to mistakenly think that they are also required to consider any other possibilities they regard as reasonable, and to weigh them against the prosecution's explanation to see which is preferable. It may also lead the jury to wrongly think that it is their function to see whether the accused has offered an alternative reasonable explanation, and if no alternative reasonable explanation has been offered to convict (*R v Lancefield* [1999] VSCA 176).

54. The jury should not be led to think they should only take into account a possibility if it exceeds the level of a "mere" possibility. If they have *any* possibility in mind which gives them cause for retaining doubt about the accused's guilt, they must acquit (*R v Lancefield* [1999] VSCA 176).

55. The jury should not be told that they must choose between two (or more) inferences which are "equally open". To convict, the jury must be able to reject as rational any inferences which are consistent with innocence (*Knight v R* (1992) 175 CLR 495; *Mannella v R* [2010] VSCA 357).

56. The jury should not be told that for an inference to be reasonable it has to be "based on evidence", or based on the evidence they accept. This may lead them to think they cannot consider as reasonable any possibilities suggested by defence counsel, or any other possibilities which occurred to them, unless evidence had been given to support that inference by or on behalf of the accused. This is likely to reverse the onus of proof, or at least to dilute the standard of proof (*R v Lancefield* [1999] VSCA 176. See also *Ankur v The Queen* [2021] VSCA 110, [30]–[39], [57]).

Proof of Facts on Which Inferences are Based

57. At common law, prior to 1984, it was widely understood that the prosecution only needed to establish the elements of a crime beyond reasonable doubt. They were not required to prove any other facts to that standard (see, e.g., *R v Dickson* [1983] 1 VR 227).

58. However, this understanding changed in 1984, when the High Court held that if proof of an element of a crime is to be inferred, the facts relied upon to found the inference must also be proved beyond reasonable doubt (*Chamberlain v R (No 2)* (1984) 153 CLR 521).

59. *Chamberlain* was initially interpreted as requiring the jury to be satisfied, beyond reasonable doubt, of *all* of the facts upon which they based their inferences (see, e.g., *R v Sorby* [1986] VR 753; *R v Maleckas* [1991] 1 VR 363).

60. However, in *Shepherd v The Queen* (1990) 170 CLR 573 the High Court rejected this interpretation. The Court held that when the majority in *Chamberlain* had said that facts relied upon as a basis for an inference of guilt must be proved beyond reasonable doubt, they were only referring to *intermediate facts* which are an *indispensable step* upon the way to an inference of guilt. Other facts upon which inferences are based need not be proved to that high standard.

61. In reaching this conclusion, the High Court drew a distinction between two different types of circumstantial cases:

    i) Cases in which the accused's guilt is proved by an accumulation of detail ("strands in a cable"); and

    ii) Cases in which the accused's guilt is proved by sequential reasoning ("links in a chain").

62. Under the *Jury Directions Act 2015*, this approach has been abolished. Unless an Act otherwise provides, the only matters which a judge can direct the jury must be proved beyond reasonable doubt are the elements of the offence charged or an alternative offence and the absence of any relevant defence (*Jury Directions Act 2015* s 61. See also *DPP v Roder* [2024] HCA 15, [15]).

63. This applies to all trials commencing on or after 29 June 2015 (*Jury Directions Act 2015* s.2).

64. All common law rules which require judges to direct that a matter other than the elements and the absence of any defences must be proved beyond reasonable doubt are abolished (*Jury Directions Act 2015* s 62; *Beqiri v R* [2017] VSCA 112 at [121], [130]; *DPP v Roder* [2024] HCA 15, [17]). A note to the section states that it abolishes the rule attributed to *Shepherd v The Queen* (1990) 170 CLR 573 regarding the standard of proof for circumstantial evidence and the rule attributed to *R v Sadler* (2008) 20 VR 69 regarding the standard of proof for uncharged acts.

65. As a consequence of *Jury Directions Act 2015* s 61, counsel should not tell the jury that, as a matter of law, the jury needs to be satisfied of certain, non-elemental, facts beyond reasonable doubt in order to convict. Counsel may, however, make evidentiary arguments that certain factual matters are critical to a conclusion of guilt (*Beqiri v R* [2017] VSCA 112 at [112]–[120]).

66. In general, the prosecution does not need to prove any fact, or any piece of evidence relied upon to prove an element by inference, beyond reasonable doubt. The jury may properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, as long as they reach their *conclusion* upon the criminal standard of proof (see *Shepherd v The Queen* (1990) 170 CLR 573; *R v Spina* [2005] VSCA 319; *Beqiri v R* [2017] VSCA 112 at [121], [130]; *DPP v Roder* [2024] HCA 15, [27]–[31]).

67. It is the function of the jury to determine the weight which should be given to the circumstances relied upon by the prosecution and whether, at the end of the day, the combination of circumstances which they accept are of sufficient strength to prove the guilt of the accused beyond reasonable doubt (see *R v Kotzmann (No 2)* (2002) 128 A Crim R 479).

68. Unless an Act otherwise provides, the judge must not direct the jury that they cannot use a fact as a basis for inferring guilt unless that fact is proved beyond reasonable doubt. This applies even if the evidence would, at common law, be treated as a 'link in a chain' or is potentially so significant that, as a matter of prudence, the jury should not act on it unless satisfied beyond reasonable doubt (see *Beqiri v R* [2017] VSCA 112 at [121], [130] and compare *Kotvas v R* [2010] VSCA 309; *R v LRG* (2006) 16 VR 288).

69. Section 61 does not relieve the judge of the obligation to identify the evidence that establishes the elements (see *Jury Directions Act 2015* ss 65, 66).

70. In some cases, there will be critical evidence that would allow a jury to decide the case on that evidence alone. Types of evidence that might have this character include confessions, identification evidence and DNA evidence. In such cases, it may be appropriate for the judge to identify clearly for the jury the importance of that evidence to prove the element. Judges should discuss the issue with counsel and hear submissions on what additional directions or comments are appropriate. One option is to refer to the evidence and direct the jury that it must be satisfied that that evidence proves the element beyond reasonable doubt (*Jury Directions Act 2015* s 61, Example).

71. Where the judge instructs on the elements in the form of a factual question under *Jury Directions Act 2015* s 67, the judge must direct the jury that it must be satisfied of those matters beyond reasonable doubt (*Jury Directions Act 2015* s 61, notes).

Timing of the Charge

72. If a direction about circumstantial evidence is given, it does not need to be kept separate and distinct from the direction that the prosecution must prove its case beyond reasonable doubt (see 1.7.1 Charge: Onus and Standard of Proof). The judge may simply elaborate on the general directions (*Plomp v R* (1963) 110 CLR 234).

73. It may also be desirable to introduce the concept of circumstantial evidence at the beginning of the trial, or when the jury is first asked to draw an inference, to help the jury to understand that:

    - That there need not be direct evidence of every essential element of the offence charged;
    - That the essential elements of the offence may be proved by circumstantial evidence;
    - That circumstantial evidence involves drawing an inference; and

- That circumstantial evidence is perfectly good evidence, not an inferior form of proof (Canadian Judicial Council, *Model Jury Instructions in Criminal Matters*. See also *R v PZG* [2007] VSCA 54).

3.6.1 Charge: Circumstantial Evidence and Inferences

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Evidence comes in many forms. It can be evidence about what someone saw or heard. It can be an exhibit admitted into evidence. It can be someone's opinion.

Some evidence can prove a fact directly. For example, if a witness said that s/he saw or heard it raining outside, that would be direct evidence of the fact that it was raining.

Other evidence can prove a fact indirectly. For example, if a witness said that s/he saw someone enter the courthouse wearing a raincoat and carrying an umbrella, both dripping wet, that would be indirect or 'circumstantial' evidence of the fact that it was raining outside. You can conclude from the witness's evidence that it was raining, even though s/he didn't actually see or hear the rain.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. Although people often believe that indirect or circumstantial evidence is weaker than direct evidence, that is not true. It can be just as strong or even stronger. What matters is how strong or weak the particular evidence is, not whether it is direct or indirect.

However, you must take care when drawing conclusions from indirect evidence. You should consider all of the evidence in the case, and only draw reasonable conclusions based on the evidence that you accept. Do not guess. While we might be willing to act on the basis of guesses in our daily lives, it is not safe to do that in a criminal trial.

[*In cases involving a significant amount of circumstantial evidence, add the following shaded section*.]

In determining whether a conclusion is reasonable, you should look at all of the evidence together. It may help you to consider the pieces of evidence to be like the pieces of a jigsaw puzzle. While one piece may not be very helpful by itself, when all the pieces are put together the picture may become clear.

However, when putting all the pieces together, you must take care not to jump to conclusions. It is sometimes easy for people to be too readily persuaded of a fact, on the basis of insufficient evidence or evidence that turns out to be truly coincidental. Once convinced of that fact, they may then seek support for it in the other evidence, perhaps distorting that evidence to fit their theory or disregarding 'inconvenient' facts. You must make sure that you do not do this. You must keep an open mind, and be prepared to change your views.

You may only convict the accused if you are satisfied that his/her guilt is the only reasonable conclusion to be drawn from the whole of the evidence, both direct and indirect. If there is another reasonable view of the facts which is consistent with the accused's innocence, then the prosecution will not have proved his/her guilt beyond reasonable doubt, and you must acquit him/her.

Last updated: 14 May 2024

3.6.2 Charge: Sole Evidence Direction

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This charge may be used where there is a single piece of evidence relied on to prove one or more elements. This charge may be suitable where the prosecution case is entirely dependent on a confession or an identification.

You will remember my direction the prosecution must prove its case beyond reasonable doubt. In this case, the only evidence that [*identify relevant elements or facts in issue*] is the evidence that [*describe relevant single piece of evidence, e.g.* "NOA confessed to NOW"]. You therefore cannot be satisfied that the prosecution has proved its case beyond reasonable doubt unless you are satisfied this evidence proves [*identify relevant element*] beyond reasonable doubt.

Last updated: 14 May 2024

3.6.3 Recent Possession

The topic "Recent Possession" is addressed in this charge book in the Dishonesty and Property Offences chapter in 7 Victorian Offences. See:

- Recent Possession
- Charge: Recent Possession

3.7 Review of the Onus and Standard of Proof

3.7.1 Charge: Conventional Directions

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Note: This charge is based on the assumption that the judge has already instructed the jury about the onus and standard of proof at the beginning of the trial (see 1.7.1 Charge: Onus and Standard of Proof). If this has not been done, it will need to be modified accordingly.

See 1.7 Onus and Standard of Proof, for a discussion of the legal principles relevant to this area.

I want to emphasise again that under our justice system people are presumed to be innocent, unless and until they are proved guilty. So before you may return a verdict of guilty, the prosecution must satisfy you that [each of] the accused is guilty of the charge[s] in question. The accused does/do not have to prove anything.

The prosecution must do this by proving [each of] the accused's guilt of the charge[s] beyond reasonable doubt. As I have told you, these words mean exactly what they say – proof beyond reasonable doubt.

Beyond reasonable doubt is the highest standard of proof that our law demands. It is not enough for the prosecution to prove that the accused is probably guilty, or very likely to be guilty.

As I have told you, it is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so. A reasonable doubt is not an imaginary or fanciful doubt, or an unrealistic possibility.

You cannot be satisfied the accused is guilty if you have a reasonable doubt whether the accused is guilty.

As I have told you, these words mean exactly what they say – proof beyond reasonable doubt. The prosecution does not need to prove every fact that they allege to this standard. It is the essential ingredients or "elements" of the charge[s] that they must prove beyond reasonable doubt. I will explain these elements in detail in a moment.

[*If a defence is in issue, add the following shaded section.*]

The prosecution must also disprove any possible defences beyond reasonable doubt. In this case, that means the prosecution must prove, beyond reasonable doubt, that NOA was not [*insert relevant defence*]. I will also explain this defence in more detail shortly.

It is only if you are satisfied that the prosecution has proven all of the elements of a charge [and disproved all defences] beyond reasonable doubt that you may find the accused guilty of that charge. If you are not satisfied that the prosecution has done this, your verdict must be "Not Guilty".

Last updated: 1 January 2023

3.7.2 Charge: Reverse Onus

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This charge can be given if there is a matter which the accused is required to prove on the balance of probabilities.

The requirements for this charge were not modified by the commencement of the *Evidence Act 2008*.

In this case, there is one exception to the general rule that the prosecution must prove the case against the accused beyond reasonable doubt. The law says that in relation to the offence of [*insert relevant offence*], it is for the accused to prove [*insert relevant matter*].

I will explain this requirement in more detail shortly. For now, however, I want to emphasise that where it is for the accused to prove a matter, it is not necessary for him/her to do this to the same extent as the prosecution. That is, s/he does not need to prove matters "beyond reasonable doubt".

Instead, the accused only needs to establish matters on what is called the "balance of probabilities". That is, such matters only need to be shown to be more likely than not.

Last updated: 1 December 2009

3.7.3 Charge: Liberato Direction

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This charge should be given if the case turns on a conflict between the evidence of a prosecution witness and a defence witness, and there is a reasonable likelihood that the jury will think that they must believe the defence evidence to be true before they can acquit the accused. See 1.7 Onus and Standard of Proof for further information.

The requirements for this charge were not modified by the commencement of the *Evidence Act 2008*.

In this case, there is a clear conflict between the evidence of [*insert name of prosecution witness*] and the evidence of [*insert name of defence witness*].

It is not necessary for you to accept [*insert name of defence witness's*] evidence in order to find the accused "not guilty". In keeping with the requirement that the prosecution must prove their case beyond reasonable doubt, you must acquit NOA if [*insert name of defence witness's*] evidence gives rise to a reasonable doubt.

This is the case even if you prefer the evidence of [*insert name of prosecution witness*] to the evidence of [*insert name of defence witness*]. It is not sufficient for you merely to find the prosecution case to be preferable to the defence case. Before you can convict NOA, you must be satisfied that the prosecution have proven their case beyond reasonable doubt.

So even if you do not think [*insert name of defence witness*] is telling the truth, but are unsure where the truth lies, you must find the accused "not guilty".

In fact, even if you are convinced that [*insert name of defence witness's*] evidence is not true, it is not the case that you must convict NOA. In such circumstances, you should put [*insert name of defence witness's*] evidence to one side, and ask yourself whether the prosecution have proved the accused's guilt beyond reasonable doubt on the basis of the evidence you do accept.

Last updated: 1 December 2009

3.8 Review of Separate Consideration

3.8.1 Charge: Multiple Accused

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Note: This charge is based on the assumption that the judge has already instructed the jury about the need for separate consideration at the beginning of the trial (see 1.8.1 Charge: Separate Consideration Multiple Accused). If this has not been done, it will need to be modified accordingly.

See 1.8 Separate Consideration, for a discussion of the legal principles relevant to this area.

As you know, in this trial there are really [*insert number*] trials [all] being heard together for convenience.

I want to remind you that you must be careful not to allow convenience to override justice. The accused and the prosecution are entitled to have the case against each accused considered separately.

You must consider the case against each accused separately, in light only of the evidence which applies to that accused. You must ask yourselves, in relation to each accused, whether the evidence relating to that accused has satisfied you, beyond reasonable doubt, that s/he is guilty of the offence s/he has been charged with. If the answer is yes, then you should find him/her guilty. If the answer is no, then you should find him/her not guilty.

You will note that I said you must consider the case against each accused "in light only of the evidence which applies to that accused". This is because some of the evidence you have heard in this case is only relevant to the case against one accused or another. If a particular piece of evidence is only relevant to one accused, you may only use it when deciding whether or not that accused is guilty. You must not consider it in relation to [any of] the other accused.

In this case [*instruct jury about which evidence is or is not admissible in relation to each accused*].

Last updated: 19 December 2006

3.8.2 Charge: Multiple Charges

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Note: This charge is based on the assumption that the judge has already instructed the jury about the need for separate consideration at the beginning of the trial (see 1.8.2 Charge: Separate Consideration Multiple Charges). If this has not been done, it will need to be modified accordingly.

See 1.8 Separate Consideration, for a discussion of the legal principles relevant to this area.

As you know, in this trial the prosecution has brought [*insert number*] charges against the accused. As I explained earlier, while these are separate matters, they are [all] being dealt with in the one trial for convenience.

I want to remind you that you must be careful not to allow convenience to override justice. Both the prosecution and the accused are entitled to have each charge considered separately.

It would therefore be wrong to say that simply because you find the accused guilty or not guilty of one charge, that s/he must be guilty or not guilty, as the case may be, of another.

[*If logic dictates that a finding in relation to one charge is material to another charge, this should be clearly explained to the jury here. For example, the jury should be told if an acquittal on one charge would require an acquittal on another.*]

Each charge must be considered separately, in light only of the evidence which applies to it. You must ask yourselves, in relation to each charge, whether the evidence relating to that charge has satisfied you, beyond reasonable doubt, that the accused is guilty of that particular crime. If the answer is yes, then you should find the accused guilty of that charge. If the answer is no, then you should find the accused not guilty of it.

You will note that I said you must consider each charge "in light only of the evidence which applies to it". This is because some of the evidence you have heard in this case is only relevant to one charge or another. If a particular piece of evidence is only relevant to one charge, you may only use it when deciding whether or not the accused is guilty of that charge. You must not consider it in relation to [any of] the other charge[s].

In this case [*instruct jury about which evidence is or is not admissible in relation to each charge*].

Last updated: 17 May 2019

3.9 **Judge's Summing Up on Issues and Evidence**

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Obligations When Summing Up

1. A judge's charge need not follow any specific pattern. Each charge must be tailored to the particular circumstances of the case (*Alford v Magee* (1952) 85 CLR 437; *Werry v R* [2010] VSCA 314; *Huynh v R* [2013] HCA 6).
2. When summing up, the judge must:
    - Explain only so much of the law as is necessary for the jury to determine the issues in the trial;
    - Refer to the way the parties have put their cases in relation to the issues, but need not summarise the closing addresses;
    - Identify so much of the evidence as he or she considers necessary to assist the jury determine the issues in the trial, but need not give a summary of the evidence (*Jury Directions Act 2015* s 65).
3. This reflects the judge's obligations at common law when summing up (*Harris v The Queen* [2021] VSCA 197, [66]).
4. The summing up may use a combination of oral and written components (*Jury Directions Act 2015* s 65).
5. The *Jury Directions Act 2015* draws a distinction between "referring" to or "identifying" evidence or arguments and "summarising", and removes any obligation to summarise evidence or arguments, or remind the jury of the content of the evidence (*Murrell v R* [2014] VSCA 334, [14]).
6. While a judge does not need to summarise the evidence, he or she must still give the jury guidance on how the evidence relates to the directions of law (*R v RNS* [1999] NSWCCA 122; *R v Condon* (1995) 83 A Crim R 335).
7. Whether the judge is bound to refer to an evidentiary matter or argument depends upon whether a reference to that matter or argument is necessary to ensure that the jurors have a sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence (*R v Thompson* (2008) 21 VR 135; *Domican v R* (1992) 173 CLR 555; *R v Williams* (1999) 104 A Crim R 260; *R v Veverka* [1978] 1 NSWLR 478).

Identification of issues

8. Based on the matters identified by prosecution and defence counsel as being in issue (see *Jury Directions Act 2015* s 11), the judge must decide what are the real issues in the case, tell the jury what those issues are, direct the jury on so much of the law as is necessary to enable the jury to resolve those issues and explain how the law applies to the facts of the case (*R v Thompson* (2008) 21 VR 135; *R v DD* (2007) 19 VR 143; *R v Zilm* (2006) 14 VR 11; *R v AJS* (2005) 12 VR 563; *R v Chai* (2002) 187 ALR 436; *R v Anderson* [1996] 2 VR 663; *Alford v Magee* (1952) 85 CLR 437; *Murrell v R* [2014] VSCA 334).

9. It is not necessary to direct the jury about all elements of every offence charged. The responsibility of the judge is to determine what matters are in issue in the case and explain to the jury only as much of the law as is necessary to resolve those matters (*Jury Directions Act 2015* s 65; *Huynh v R* [2013] HCA 6; *R v VN* (2006) 15 VR 113; *R v Aden and Toulle* (2002) 162 A Crim R 1; *Holland v R* (1993) 67 ALJR 946; *Quail v R* [2014] VSCA 336).

10. The judge may identify an issue as a factual question, rather than any underlying legal question (*Quail v R* [2014] VSCA 336). See Integrated Directions and Factual Questions below for more detail.

11. While the judge need not direct the jury about every element, it is erroneous to withdraw an issue from the jury (*Griffiths v R* (1994) 125 ALR 545; *Huynh v R* [2013] HCA 6).

12. It is the judge's responsibility to focus the jury's attention on the issues he or she identifies. That responsibility should not be delegated to counsel (*R v Amado-Taylor* [2000] 2 Cr App R 18).

13. The obligation to identify issues and relevant evidence is limited to the issues or matters that are actually in dispute in the trial (*R v RR* [2011] NSWCCA 235; *Buckley v R* [2012] NSWCCA 85).

14. In identifying the issues, there must be evidence to support those issues. In assessing which defences arise, and the factual basis for defences, there must be some evidence on which a reasonable jury could decide the issue favourably to the accused (*Quail v R* [2014] VSCA 336, [22]).

15. A factual basis for a defence may arise as a matter of inference from other evidence, even where witnesses are asked and deny that particular conclusion (see, e.g. *Mathieson v The Queen* [2021] VSCA 102, [22]–[26]).

16. The judge should ensure that the issues for decision in the trial are simply but adequately presented to the jury, without unnecessary emphasis on abstract legal concepts or theories. The judge should tell the jury what the prosecution must prove, rather than give the jury a short lecture on the law (*R v Whiting* [1995] 2 Qd R 199).

17. The *Jury Directions Act 2015* allows judges to direct the jury on issues in the form of factual questions which address the elements or defences in issue. See Integrated Directions and Factual Questions below.

Identification of Evidence

18. The judge must identify only so much of the evidence as is necessary to help the jury to determine the issues in the trial. To determine what evidence must be identified, the judge must consider the following matters:

    (a) The facts in issue and the complexity of the facts in issue

    (b) The length of the trial;

    (c) The complexity of the evidence;

    (d) The submissions and addresses of the parties;

    (e) The manner in which the judge refers to the way in which the parties put their cases;

    (f) Any special needs or disadvantages of the jury in understanding or recalling the evidence;

    (g) Any transcript of evidence or other document provided to help the jury understand the evidence (Jury Directions Act 2015 s 66).

19. The obligation in s 66 reflects the scope of the common law obligation on trial judges to identify evidence (*Harris v The Queen* [2021] VSCA 197, [66]).

20. The Act does not draw a distinction between the obligation to identify direct evidence and circumstantial evidence. All evidence, whether direct or circumstantial, which may bear upon the primary or subsidiary issues must be identified. Indeed, the nature of circumstantial evidence may make it more important for a judge to identify how circumstantial evidence relates to the different issues in the case. This will require the judge to identify the factual conclusions which the prosecution must prove, and identify the evidence which the prosecution relies on to establish those factual conclusions. It is not enough to tell the jury to decide the case 'on 'all the evidence' (*Murrell v R* [2014] VSCA 334, [15]; *Harris v The Queen* [2021] VSCA 197, [52], [58]).

21. The summing-up must be fair and accurate, and must not usurp the role of the jury as finder of fact. The judge must be careful not to misrepresent the evidence in any way, or use language that may cause the jury to think they are being directed to find the facts in a particular way (*Courtney-Smith (No 2) v R* (1990) 48 A Crim R 49; *R v Hughes* (1989) 42 A Crim R 270; *R v Perera* [1986] 1 Qd R 211; *R v Tikos (No 2)* [1963] VR 306).

22. There is no absolute rule as to what the judge must address in the charge to ensure a fair trial. What is required will vary according to the circumstances of the case, and factors such as the length of the case, the complexity of the issues and the manner in which the case is conducted by the parties (*Jury Directions Act 2015* s 66; *Werry v R* [2010] VSCA 314; *R v Thompson* (2008) 21 VR 135; *R v DD* (2007) 19 VR 143; *R v Yusuf (No 2)* [2006] VSCA 117; *R v Zilm* (2006) 14 VR 11; *R v Dao* [2005] VSCA 196).

23. The duty to identify the facts relevant to the issues is not confined to the ultimate facts in issue. The judge must also identify any substratum of facts which are in dispute and which bear upon the resolution of the ultimate issues. The evidence which is relevant to those subsidiary issues must also be identified (*R v Thompson* (2008) 21 VR 135; *Murrell v R* [2014] VSCA 334; *Harris v The Queen* [2021] VSCA 197).

24. The judge does not need to read out all the evidence or to analyse all the conflicts in it. Instead, judges must provide a fair and balanced explanation of the law, the issues and the respective cases of the prosecution and defence (see *R v Meher* [2004] NSWCCA 355; *R v Piazza* (1997) 142 FLR 64; *R v DH* [2000] NSWCCA 360; *Mathieson v The Queen* [2021] VSCA 102).

25. In discharging the obligation to put the defence case to the jury, the judge must refer to any items of evidence necessary to understand the defence case. It is not sufficient to refer to defence arguments in general terms without identifying the supporting pieces of evidence (*El-Jalkh v R* [2009] NSWCCA 139; *Mencarious v R* [2008] NSWCCA 237; *R v Piazza* (1997) 142 FLR 64; *Gurung v The Queen* [2019] VSCA 196, [73]–[74]).

26. Where there is a significant dispute about material facts, the judge should succinctly identify the pieces of evidence in conflict, to focus the jury's attention on the issues they have to resolve (*R v Amado-Taylor* (2000) 2 Cr App R 189; *R v Mears* (1993) 97 Cr App R 239).

27. Where the evidence is relatively short and the issues clearly drawn, and there is no delay between the giving of the evidence and the judge's charge, a detailed account of the evidence may not be necessary (*PA v R* [2010] VSCA 85; *R v Thompson* (2008) 21 VR 135; *R v Yusuf (No.2)* [2006] VSCA 117; *R v Zilm* (2006) 14 VR 11; *R v Dao* [2005] VSCA 196; *R v Amado-Taylor* [2000] 2 Cr App R 18).

28. However, in determining whether and to what extent it is necessary to identify evidence, judges should not assume that what a trained and experienced lawyer can recollect will be the same as what each member of the jury, without the same or any similar training, can recollect at the end of a trial. Many jurors do not have the experience, ability or opportunity of a judge to note significant evidence and cross-reference evidence from different sources which relate to the same issue (see *Scetrine v R* (2010) 28 VR 213; *R v Thompson* (2008) 21 VR 135; *R v De'Zilwa* (2002) 5 VR 408; *R v Amado-Taylor* [2000] 2 Cr App R 18; *Murrell v R* [2014] VSCA 334).

Relate Evidence to the Issues in the Case

29. As evidence is given witness by witness, rather than sequentially according to the issues, it is the judge's responsibility to arrange the evidence issue by issue, rather than leaving this task to the jury (*R v Amado-Taylor* [2000] 2 Cr App R 18).

30. The judge should provide the jury with a collected overview of the evidence that relates to each of the elements of the charged offences that are in issue, and a brief outline of the arguments which have been put in relation to that evidence (*Jury Directions Act 2015* s 65; *R v Hannes* (2000) 158 FLR 359; *R v Piazza* (1997) 94 A Crim R 459; *R v Zorad* (1990) 19 NSWLR 91. See also *Harris v The Queen* [2021] VSCA 197).

31. A detailed summary of all of the evidence given by each witness, without reference to prosecution or defence arguments, is not necessary or sufficient. It does not help in isolating the real issues for the jury's determination (*R v Hytch* (2000) 114 A Crim R 573; *Jury Directions Act 2015* s 65).

32. Fairness requires that, if a judge refers to the evidence on a crucial issue, there also be reference to any competing versions and considerations, including any inferences that arise (*Cleland v R* (1982) 151 CLR 1; *Domican v R* (1992) 173 CLR 555).

33. Judges should usually avoid illustrating issues in the trial by way of factual examples which bear close resemblance to disputed facts in the case. Such examples might improperly be taken to invite a conclusion adverse to the accused (*R v Ivanovic* [2005] VSCA 238).

34. It is conventional to warn the jury that, while the judge is going to try to relate the evidence to the issues to assist the jury, it is for the jury, as the judges of the facts, to determine what evidence they think to be significant. Anything which the judge identifies as being significant is neither binding on the jury, nor necessarily accurate (*R v Brdarovksi* (2006) 166 A Crim R 366; [2006] VSCA 231; *R v Yusuf* (2005) 11 VR 492; *R v De'Zilwa* (2002) 5 VR 408).

Cases Involving Multiple Counts

35. In a trial involving multiple counts, as well as giving a separate consideration direction (see 1.8 Separate Consideration), the judge should carefully explain to the jury what evidence relates to which count, and what evidence is inadmissible on each count (*T v R* (1996) 86 A Crim R 293; *R v Mooseek* (1991) 56 A Crim R 36).[58]

36. The judge must identify the conduct encompassed by the separate counts. The jury must be under no misapprehension concerning what the prosecution has to establish in order to secure a conviction on any particular count (*R v Huver* [2005] VSCA 170).

37. In some cases, the judge should direct the jury that if they are not satisfied that a particular ingredient of one count has been proved, that finding will be material to their deliberations in respect of a related count. Whether such a direction is required will depend on the nature of the counts alleged, and the evidence led in support of them (*R v Patton* [1998] 1 VR 7; *R v Anderson* [1996] 2 VR 663).

38. The jury should be told if an acquittal on one count would require an acquittal on another (*R v Scott* (1996) 131 FLR 137; *R v Patton* [1998] 1 VR 7).

39. In cases involving multiple counts, it may also be necessary to give a warning against tendency reasoning (see 4.17 Tendency Evidence).

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[58] If evidence which is admissible on one count is not admissible on another, and in consequence there is a real risk of impermissible prejudice to the accused, the judge may need to consider ordering separate trials (see *R v TJB* [1998] 4 VR 621; *Criminal Procedure Act 2009* s 193).

Cases Involving Multiple Accused

40. One problem which a judge has to overcome in joint trials is the risk of prejudice resulting from evidence being allowed in which is not admissible against all of the accused (*R v Nessel* (1980) 5 A Crim R 374; *Webb v R* (1994) 181 CLR 41 (Toohey J)).

41. While this risk will be partly overcome by giving a separate consideration direction (see 1.8 Separate Consideration), such a direction will usually not be sufficient. The judge must also:

    - Tell the jury which evidence can be used against each accused, the circumstances in which that evidence can be used, and the purposes for which it can be used; and
    - Identify the evidence which is not admissible against each accused, and warn the jury not to use it against that accused (*R v Nessel* (1980) 5 A Crim R 374; *R v Hauser* (1982) 6 A Crim R 68; *R v Minuzzo and Williams* [1984] VR 417; *Nicoletti v R* 4/11/97 WA CCA; *R v Mayberry* [2000] NSWCCA 531).

42. It is not sufficient simply to tell the jury that they must base their decision on the evidence that is admissible against each accused, because this tacitly attributes knowledge of the rules of evidence to the jury. The judge must apply those rules to the evidence in the case (*R v Minuzzo and Williams* [1984] VR 417).

43. The best way in which to identify the evidence that is admissible and inadmissible against each accused will depend on the facts of the case. In some cases it may be appropriate to identify all of the evidence generally, and then focus on the evidence that is inadmissible against each accused. In other cases it may be necessary to identify the evidence admissible against each accused separately (*Jury Directions Act 2015* s 75; *Nicoletti v R* 4/11/97 WA CCA; *R v Minuzzo and Williams* [1984] VR 417. See also *R v Taouk* 17/12/92 NSW CCA; *R v Masters* (1992) 26 NSWLR 450).

44. Where a substantial body of the evidence is common to more than one accused, and the judge has identified the relevant evidence in relation to the first accused, it is not necessary to repeat that evidence in the same detail when dealing with each of the other accused to whom the same material relates. However, unless the evidence is wholly identical against each accused, it is necessary to deal with each accused separately by presenting the case against him or her separately (*R v Taouk* 17/12/92 NSW CCA; *R v Masters* (1992) 26 NSWLR 450; *R v Towle* (1955) 72 WN (NSW) 338).

45. If the defence of one accused is conducted in a manner likely to prejudice a second accused (due to the inclusion of evidence that would ordinarily be inadmissible against him or her), the judge must give very full and detailed directions, referring to the inadmissible evidence and the potential prejudice it creates, and directing the jury to ignore that evidence when considering the case against the second accused. If the nature of the prejudice is such that not even a strong warning will be sufficient to guard against it, the judge should discharge the jury in respect of the second accused, and order that he or she be tried separately (*R v Taouk* 17/12/92 NSW CCA; *R v Hauser* (1982) 6 A Crim R 68; *Webb v R* (1994) 181 CLR 41).

46. The jury should usually be told that a certain item of evidence is inadmissible against a particular accused at the time that it is tendered. However, whether or not such a direction is given at that stage, it must always be given in the judge's summing-up (*R v Nessel* (1980) 5 A Crim R 374; *R v Towle* (1955) 72 WN (NSW) 338).

47. Similarly, if a document is admissible in relation to one accused but not in relation to a second accused, the judge must give the jury a clear and forceful direction about the limitations of the use they can legitimately make of the document at the time that it is provided to them, and again in his or her summing-up (*R v Hauser* (1982) 6 A Crim R 68).

Referring to the Parties' Cases

48. The judge does not need to summarise the closing addresses of the parties, but must refer the jury to the way in which the prosecution and accused have put their cases on the issues in the trial (*Jury Directions Act 2015* s 65).

49. The judge must put the respective cases for the prosecution and the defence to the jury accurately, fairly and in neutral terms (*Domican v R* (1992) 173 CLR 555; *Cleland v R* (1982) 151 CLR 1; *Kayirici v The Queen* [2021] NSWCCA 127, [160]).

50. It is especially important that the judge fully, clearly and fairly present the defence case, as this provides a fundamental safeguard in our system. Failure to present an important part of the defence case will be a miscarriage of justice (*R v Thompson* (2008) 21 VR 135; *R v Coombes* 16/4/1999 CA Vic; *R v Melbourne* (1999) 198 CLR 1; *R v McKellin* [1998] 4 VR 757; *R v Wiles and Briant* [1965] VR 475; *R v Schmahl* [1965] VR 745).

51. The judge is obliged to ensure that the jury's attention is drawn to the evidence on which the defence relies. However, the judge does not need to summarise defence counsel's address or the evidence (*Jury Directions Act 2015* s 65. See also *R v Thompson* (2008) 21 VR 135; *R v Soldo* [2005] VSCA 136).

52. The way in which a judge refers to counsel's address will depend on the circumstances of the case. In some cases, in order to ensure that the defence case is adequately presented to the jury, it will be necessary to refer to the addresses in some detail (e.g. where the arguments put forward in the address do not emerge clearly from the judge's references to the evidence, or the nature of the case itself). In other cases, a much briefer reminder of counsel's arguments will suffice (*Werry v R* [2010] VSCA 314).

53. This requirement does not oblige the judge to put to the jury every argument made by counsel for the accused, as long as the accused's case is put fairly. Whether it is necessary to refer to a particular argument will depend on the nature of the case (*Werry v R* [2010] VSCA 314; *R v Sukkar* [2005] NSWCCA 54; *R v Meher* [2004] NSWCCA 355; *Domican v R* (1992) 173 CLR 555; *R v Forster* [1955] VLR 253).

54. The defence should be put in such a way that, upon their retirement to consider the verdict, the jury has a clear understanding of the accused's position (*R v Nguyen* [2006] VSCA 158; *R v Dao* [2005] VSCA 196; *Stokes v R* (1960) 105 CLR 279).

55. Putting the defence fairly and adequately will generally require the judge to refer to any evidence of inconsistencies in the prosecution witnesses' accounts that the accused has sought to exploit (*R v Amado-Taylor* [2000] 2 Cr App R 18).

56. Judges should not intermingle their explanation of the defence case with disparaging and adverse comments upon it. It is not part of the proper function of the judge to pass comments regarding the quality of counsel's arguments (*R v Abdirahman-Khalif* [2020] HCA 36, [77]. See also "Distinction between Directions and Comments" below).

57. The judge should also avoid structuring their summary of the prosecution and defence case in a manner that intermingles prosecution rebuttal of defence arguments with the summary of the defence case (*Becker v The King* [2023] VSCA 332, [242]–[251]).

58. However, where the prosecution or defence make a statement or suggestion that is prohibited by the *Jury Directions Act 2015*, the trial judge must correct that statement or suggestion unless there are good reasons for not doing so (*Jury Directions Act 2015* s 7). For example, a direction may not be required if the party withdraws the statement and corrects their misstatement at the invitation of the judge (see, e.g. *Reeves v R* (2013) 41 VR 275).

59. It is insufficient for judges to rely on counsels' addresses. They must lend the weight of their judicial position and authority to the respective cases by referring to the way each party have put their case (see *R v Tomazos* 6/8/71 NSW CCA; *Jury Directions Act 2015* s 65).

60. The summing-up must present a balanced account of the conflicting cases. Where one case is strong and the other weak, this is not achieved by under-weighting the strong case and over-weighting the weak one. A balanced account in such a situation would reflect the strength of the one and weakness of the other (*R v Ali* (1981) 6 A Crim R 161; *Sumner v R* [2010] VSCA 298).

61. The obligation to present a balanced summing up can be particularly difficult when the defence misstates the evidence. It is not necessary to correct every error. The judge will need to balance the need to present fair and neutral summing up with the need to correct errors. In doing so, the judge must not express ridicule or scepticism regarding the defence case (see *Kayirici v The Queen* [2021] NSWCCA 127, [154]–[162]).

62. A balanced summing up does not involve instructing the jury only on the different paths it could take to conviction. As part of providing a balanced summing up that puts the defence case, the judge should refer to specific evidentiary issues which may favour the defence case (*Gurung v The Queen* [2019] VSCA 196, [73]–[74]).

63. The summing-up is not to be used for the purpose of filling gaps, or rectifying deficiencies, in counsels' submissions to the jury. A desire on the part of the trial judge to reduce a perceived imbalance in the quality of representation cannot provide a justification for an unbalanced summing-up (*R v Esposito* (1998) 45 NSWLR 442).

64. It is not the judge's role to respond to matters raised in defence counsel's address that the prosecution has not adequately dealt with. Doing so may give the jury the impression that the judge disagrees with the defence arguments and is urging the jury to infer guilt (*R v Lao and Nguyen* (2002) 5 VR 129).

65. Keeping a balance between the prosecution and defence cases requires the use of moderate and reasoned language which is not likely to inflame the jury. The judge should never betray an emotional approach to the facts (*R v Machin* (1996) 68 SASR 526; *Cornelius & Briggs v R* (1988) 34 A Crim R 49; *Galea v R* (1989) 1 WAR 450; *Green v R* (1971) 126 CLR 28; *R v Byczko* (1982) 30 SASR 578).

66. Where the prosecution case seems to be very strong, it is particularly important that the judge maintain the appearance of strict judicial impartiality by taking a disinterested position (*Sumner v R* [2010] VSCA 298).

67. It is inappropriate for a judge to refer to the accused by his or her surname only, while preceding the surname of the complainant and prosecution witnesses with the terms "Ms", "Mrs" or "Mr" (*R v Soldo* [2005] VSCA 136).

Integrated Directions and Factual Questions

68. The *Jury Directions Act 2015* allows judges to give directions in the form of factual questions that address the matters the jury must consider or be satisfied of in order to reach a verdict (*Jury Directions Act 2015* s 67). These directions are sometimes also called "question trails".

69. Factual question directions are designed to reduce the difficulty of the jury understanding and applying abstract principles of law. Instead, the directions will ask the jury to resolve specific factual questions and spell out the legal consequences of possible findings of fact. Such directions are designed to put the critical issues of fact before the jury, without complications from the interpretation of the relevant law (see, e.g. *Stuart v R* (1974) 134 CLR 426).

70. For example, in *Quail v R* [2014] VSCA 336, the trial judge, with the consent of prosecution and defence counsel, integrated the legal question of self-defence within the factual question of whether the accused or the victim was the original aggressor. Resolution of that question was sufficient to determine whether the prosecution had disproved self-defence.

71. The judge may combine directions in the form of factual questions with:

    (a) Directions on the evidence and how the evidence is to be assessed;

    (b) The reference to the way the parties have put their case in relation to the issues;

(c) The identification of evidence necessary to assist the jury determine the issues in the trial (Jury Directions Act 2015 s 67).

72. A judge who gives a direction in the form of a factual question or a factual question combined with another matter (an "integrated direction") does not need to also address the matter in another form (*Jury Directions Act 2015* s 67).

73. Where a person is charged with committing the same offence on multiple occasions, a question trail may identify the central factual question, the occasions that are relevant to each charge, and contain a short factual statement about how the prosecution and defence puts their case in relation to each occasion. Such a process is likely to be of great assistance to the jury by simplifying the issues to be decided and integrating the elements with the facts in the form of easily comprehensible questions (see *Star v The Queen* [2020] VSCA 331, [42]–[43]).

74. Where there are multiple accused and the evidence against each accused is different, there are risks in using a question trail which does not differentiate between the accused (*McKinnen v The Queen* [2019] VSCA 114, [77]).

75. Integrated directions should contain questions that are tied to individual elements and explain the consequences that flow from each answer for the next step in the reasoning (*McKinnin v The Queen* [2019] VSCA 114, [78]).

76. A judge should not describe a jury document as a question trail unless it is an integrated direction in accordance with s 67 of the Jury Directions Act 2015 (*McKinnin v The Queen* [2019] VSCA 114, [78]).

77. Under the *Jury Directions Act 2015*, it is only the elements and the absence of any defences which must be proved beyond reasonable doubt. When a judge directs on the elements in the form of factual questions, those factual issues must be proved beyond reasonable doubt (*Jury Directions Act 2015* s 61).

Jury Checklists

78. An alternative to integrated directions and factual questions is to provide the jury with an element checklist. That is a document which succinctly states the elements of each offence or defence the jury must consider, and identifies how decisions on each element lead to a particular legal conclusion.

79. Sample checklists are provided in this Charge Book for most offences.

80. Checklist questions are designed to present questions which are answered either as yes or no.

81. Consistent with the onus of proof, in most situations, the jury may only answer yes to a checklist question if it is satisfied of the relevant matter beyond reasonable doubt.[59] The corollary to this is that if the jury is not satisfied of an element beyond reasonable doubt, then the jury should answer no to the question that reflects that element.

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[59] To provide consistency for a jury between questions regarding elements of offences and elements of defences, questions which require the prosecution to prove a negative proposition as often framed in the form "Has the prosecution proved, beyond reasonable doubt that the accused did not …?". The alternative, where the prosecution must prove a negative, is to ask the jury "Is it reasonably possible that the accused …?". If used, that formulation is best used for exculpatory matters, such as the elements of self-defence (see *Gregg v The Queen* [2020] NSWCCA 245, [503]–[510]; *Moore v The Queen* [2016] NSWCCA [43], [99]–[127]; *Towney v The Queen* [2018] NSWCCA 65, [71]–[82]; c.f. *Hadchiti v The Queen* (2016) 93 NSWLR 671, [67]–[112]).

82. A judge must not leave the jury with the impression that it may only answer no to a checklist question which asks if the prosecution has proved a particular element if it has a positive belief that the answer is no. Such an impression would diminish or reverse the onus of proof (*Gregg v The Queen* [2020] NSWCCA 245, [508]–[510]).

83. In New South Wales, there was a practice of directing the jury, as part of a checklist, that "if you are undecided as to the answer of any of the questions, you should consider the remaining ones in order to determine whether the answer to any of them is in the negative and if so, you should acquit the accused". This instruction has now been disapproved, on the basis that it undermines the prosecution's burden of proof by suggesting that a positive state of belief is required when answering either yes or no to a checklist question (*Gregg v The Queen* [2020] NSWCCA 245, [509]).

84. It is likely that the impugned instruction reflects a concern raised by Judge Berman in *Question trails in jury instruction – a note of caution* 24(4) Judicial Officers Bulletin (May 2012), that in following a checklist, a jury may collectively cease their deliberations due to an inability to agree on one element, even though the jury would agree that an offence was not proved if they considered all elements.

85. In Victoria, this concern is addressed by jurors using the checklist individually, rather than expecting the jury to work through the checklist in a collective, step-by-step, process where unanimity is required at each step.

Written Directions

86. Under the *Criminal Procedure Act 2009* s 223, a judge may give the jury written directions summarising relevant matters of law, setting out the questions it may be pertinent for them to consider, or describing the possible verdicts at which they may properly arrive.

87. The judge may also provide the jury with a "jury guide", which contains any of the following:

    (a) A list of questions to assist the jury in reaching a verdict, including a written form of any factual question directions or integrated directions; or

    (b) Evidentiary directions; or

    (c) References to how the parties have put their cases; or

    (d) References to evidence which the judge considers necessary to assist the jury to determine the issues in the trial; or

    (e) Any other information (Criminal Procedure Act 2009 s 223).

88. These directions should not be used as a substitute for directions of law or references to how the parties have put their case. Instead, written directions may be used in conjunction with and to supplement oral directions (see *Jury Directions Act 2015* ss 65, 66).

89. The court should mark and tender any written directions, question trails or jury guides as exhibits. This ensures that they are preserved for any future proceedings.

90. See 2.2 Providing Documents to the Jury for further information concerning written directions.

Distinction between Directions and Comments

91. A distinction is drawn between "directions" and "comments":

    - A direction is something which the law requires a judge to give to the jury, and which they must heed;

- A comment is something the judge tells the jury, which they may choose to ignore (*Azzopardi v R* (2001) 205 CLR 50; *Mahmood v State of Western Australia* (2008) 232 CLR 397).[60]

92. A judge must give all directions required by the law. In doing so, he or she must make it clear that he or she is giving a direction, and that the direction must be heeded (*Azzopardi v R* (2001) 205 CLR 50; *Mahmood v State of Western Australia* (2008) 232 CLR 397).

93. However, as it is for the jury alone to determine the facts, the judge must never direct them that they must accept his or her view of disputed evidence (*RPS v R* (2000) 199 CLR 620; *R v Boykovski and Atanasovski* (1991) A Crim R 436).

94. Although a judge may make non-binding comments or observations about the evidence, he or she should generally avoid doing so (*R v Brdarovksi* (2006) 166 A Crim R 366; *R v Ivanovic* [2005] VSCA 238; *R v Mathe* [2003] VSCA 165; *R v Soldo* [2005] VSCA 136).

95. In particular, the judge must not comment on a disputed issue in such a way as to suggest how the jury should resolve that issue. This prohibition applies equally to comments that might be favourable to the prosecution and the defence, even though a comment that unfairly favours the defence cannot be remedied by appeal (*McKell v The Queen* [2019] HCA 5, [46]; *McKinnin v The Queen* [2019] VSCA 114; *Mareangareu v The Queen* [2019] VSCA 101; *Pyliotis v The Queen* [2020] VSCA 134; *R v Abdirahman-Khalif* [2020] HCA 36, [77]).

96. Comments about disputed factual issues, or the resolution of those issues, have two vices. First, they are not consistent with the different constitutional functions of the judge and jury. The judge's function in addressing the jury is to ensure the jury have a fair and accurate understanding of what they need to know to do justice to the issues of fact. Comments are not necessary for performing that duty. Second, there is tension between suggesting how the jury might or should think and directing the jury that they are free to ignore that suggestion. Such a comment risks being an attempt to persuade the jury, and function as a second address that favours either the prosecution or defence (*McKell v The Queen* [2019] HCA 5, [48]–[52], [55]. See also *R v Brdarovksi* (2006) 166 A Crim R 366; *R v Ivanovic* [2005] VSCA 238; *Mule v R* (2005) 221 ALR 85; *Neena v The Queen* [2021] VSCA 183, [78]–[81]).

97. In addition, the powerful position occupied by judges should make them slow to comment on the facts of a case. As judges appear to be neutral, with their statements carrying the earmarks of balanced justice, their comments cannot fail to bear heavily on the jury. This creates a risk that the jury will be overawed by a judge's view, even if they are warned that they need not take that view into account (*Broadhurst v R* [1964] AC 441; *R v Mawson* [1967] VR 205; *R v Machin* (1996) 68 SASR 526; *R v Mong* (2002) 5 VR 565; *R v Mathe* [2003] VSCA 165; *Neena v The Queen* [2021] VSCA 183, [95]).

98. It will therefore most often be the safer course for a judge to make no comment on the facts (*RPS v R* (2000) 199 CLR 620; *Azzopardi v R* (2001) 205 CLR 50; *R v Mong* (2002) 5 VR 565; *R v Mathe* [2003] VSCA 165; *R v Soldo* [2005] VSCA 136; *R v Ivanovic* [2005] VSCA 238).

99. A judge may comment to restore the balance and correct misleading impressions created by counsel, provided the comment is made in a way that only restores the balance and does not tip the balance in the other direction. Such statements might be necessary where counsel misrepresents the evidence (*McKell v The Queen* [2019] HCA 5, [53]–[54]; *R v Abdirahman-Khalif* [2020] HCA 36, [81]; *R v Castle* (2016) 259 CLR 449, [61]).

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[60] In *Mahmood v State of Western Australia* (2008) 232 CLR 397, the court gave the following examples: Telling the jury that they may attach particular significance to a fact, or that other evidence may be considered of greater weight, is a comment. Warning the jury about the care needed in assessing some evidence, or the use to which it may be put, is a direction.

100. Any judicial comments that are made must be fair and appropriate, and exhibit a judicial balance, so that the jury is not deprived of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence (*Stokes v R* (1960) 105 CLR 279; *Green v R* (1971) 126 CLR 28; *B v R* (1992) 175 CLR 599; *R v Meher* [2004] NSWCCA 355).

Redirection

101. The judge should, at the conclusion of the summing-up, ask counsel, in the absence of the jury, whether the judge failed to give any directions of law or warnings which were requested, and hear submissions on the correctness or otherwise of the directions of law which have been given (*R v Gulliford* [2004] NSWCCA 338; *R v Mostyn* [2004] NSWCCA 97; *R v Roberts* (2001) 53 NSWLR 138; *Lean v R* (1993) 66 A Crim R 296).

102. Counsel may also seek additional directions which were not previously sought in relation to the matters in issue or the evidence relevant to the matters in issue (see *Jury Directions Act 2015* s 12). See also Overview – Directions Under Jury Directions Act 2015.

103. Counsel may be asked to formulate any direction, warning or comment they believe is required by the judge, if they submit that what the judge has said was insufficient to ensure a fair trial for the accused or the prosecution (*R v Micalizzi* [2004] NSWCCA 406).

104. It is appropriate to redirect the jury if the judge is satisfied that he or she failed to give a requested direction and were no good reasons for not giving the direction. However, the trial judge must ensure that any redirection does not give undue emphasis to any matter which would affect the balance of fairness (*Holt v R* (1996) 87 A Crim R 82; *Jury Directions Act 2015* s 14).

105. When giving a redirection to address an earlier, erroneous, direction, the judge should explicitly tell the jury that the earlier direction was wrong. It is not sufficient to give the jury a corrected direction without also telling the jury to disregard the earlier direction, as that produces a situation where the jury has conflicting and confusing directions (*Ritchie v The Queen* [2019] VSCA 202, [130]).

106. The judge should ensure that an appropriate note is made of any submissions, rulings and redirections. The failure to take exception to an aspect of the judge's charge is often significant to the disposal of an appeal, as it may demonstrate that the matter in question did not cause a substantial miscarriage of justice (*R v Clarke* [1986] VR 643; *R v McKellin* [1998] 4 VR 757; *R v Zilm* (2006) 14 VR 11; *R v MAG* [2005] VSCA 47; *R v IAB* [2009] VSCA 229. See also *Jury Directions Act 2015* ss 15, 16).

107. A judge should ensure that no further directions are to be sought or given before asking the jury to consider their verdict (*R v McCormack* (1995) 85 A Crim R 445. See also *Knight v R* 18/12/90 NSW CCA; *Trivitt* 13/6/91 NSW CCA; *Lean v R* (1993) 66 A Crim R 296).

Last updated: 4 March 2024

3.9.1 Charge: Judge's Summary of Issues and Evidence

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I am now going to take you to the issues you need to decide, and remind you of some of the evidence that has been given in relation to those issues. Before doing so, I want to remind you again that the mere fact that I may leave out a part of a particular witness's evidence does not mean that that evidence is not important.

Similarly, the fact that I include evidence from a particular witness does not make that evidence more important than the evidence of other witnesses. You must consider all of the evidence, not just the parts of it that I mention. Which parts of that evidence are important or not important is a matter for you to determine.

I also want to emphasise again that it is not my responsibility to decide this case – that is your role. So while you must follow any directions I give you about the law, you are not bound by any comments I may make about the facts. If I happen to express any views upon questions of fact, you must disregard those views, unless they happen to agree with your own assessment of the evidence.

[*Insert directions on relevant offences, incorporating references to the evidence, parties' arguments and evidentiary directions. Judges should* only *refer to so much of the evidence as is relevant to the real issues in the case, clearly relating the evidence to the issues: see* 3.9 Judge's Summing Up on Issues and Evidence.]

Last updated: 30 November 2015

3.10 Alternative Verdicts

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When is an Alternative Verdict Available?

1. The *Crimes Act 1958* provides that the jury may return specified alternative verdicts[61] in relation to a number of offences, including:
    - Murder (ss 421, 6(2));
    - Negligently causing serious injury or culpable driving causing death (s 422A);
    - Indictable offences alleging wounding or causing grievous bodily harm (s 423);
    - Conduct endangering life (including unlawfully and maliciously administering poison) (s 424);
    - Destroying or damaging property (s 427(1));
    - Arson causing death (s 427(2));
    - Unauthorised modification of data to cause impairment (s 428);
    - Unauthorised impairment of electronic communication (s 429);
    - Riot-related charges (s 435).[62]
2. A list of statutory alternatives is available in the Victorian Criminal Proceedings Manual.
3. Some assistance about available alternative verdicts may be obtained from I. Freckelton *Indictable Offences in Victoria* (4th Ed, 1999).
4. In addition, in a trial for any offence except treason or murder, the jury may return an alternative verdict for another offence, if the allegations in the indictment amount to or include (expressly or by necessary implication) an allegation of that other offence (*Criminal Procedure Act 2009* s 239(1)).
5. This involves the application of the common law 'red pencil' test. An offence will amount to or include another offence if words could be deleted from the particulars of an offence in the indictment in a way that leaves the particulars of the alternative offence (*Mareangareu v The Queen* [2019] VSCA 101, [44]; *Chaarani & Ors v The Queen* (2020) 61 VR 353, [83]).

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[61] An alternative verdict is a verdict in relation to an offence which has not been specifically charged (*R v Salisbury* [1976] VR 452).

[62] On 28 February 2018, *Justice Legislation Amendment (Victims) Act 2018* s 7 commenced operation. This repealed *Crimes Act 1958* s 425, which previously specified alternative verdicts for certain sexual offences. According to the Explanatory Memorandum, s 425 had become obsolete due to *Criminal Procedure Act 2009* s 239, which provides general rules on when an alternative verdict is available.

6. The availability of an alternative verdict depends on the terms in which the charged offence is laid, and not upon the evidence adduced. The evidence led at the trial is only relevant to the extent that an accused cannot be found guilty of a lesser charge unless the evidence led supports a conviction on that charge (*R v Salisbury* [1976] VR 452; *Reid v R* (2010) 29 VR 446; *Pollard v R* (2011) 31 VR 416; *R v Perdikoyiannis* (2003) 86 SASR 262; *Chaarani & Ors v The Queen* (2020) 61 VR 353).

7. Section 239 does not allow a court to leave a State offence as a necessarily included alternative to a Commonwealth offence. This is because while s 239 may be 'picked up' by *Judiciary Act 1903* s 79(1) to permit an alternative verdict of one Commonwealth offence for another, a substantive offence cannot be picked up by s 79 to become 'another offence within the jurisdiction of the court' (*Chaarani & Ors v The Queen* (2020) 61 VR 353, [66]; *Fattal & Ors v The Queen* [2013] VSCA 276, [122]).

8. Any allegation of an offence (other than treason) includes an attempt to commit that offence (*Criminal Procedure Act 2009* s 239(2)).[63]

9. A judge may not leave a driving offence, such as dangerous driving causing death, as an alternative to a charge of murder under *Crimes Act 1958* s 421(1) (*R v Borthwick* [2010] VSC 306).

10. The offence of sexual penetration of a child under 16 is not an alternative to a charge of rape (*Pollard v R* (2011) 31 VR 416).

Duty to leave alternative verdicts

11. Although an alternative verdict may be available at law, a judge is not always obliged to leave such a verdict to the jury. A judge may order that the guilt of a person in respect of such alternatives shall not be determined at the trial if he or she considers that it is expedient to do so in the interests of justice (*Criminal Procedure Act 2009* s 240).

12. The judge's duty to leave an available alternative verdict to the jury will depend on the course of the trial and the evidence in the case.

13. Under the *Jury Directions Act 2015*, after the close of all the evidence, the prosecution must indicate whether any alternative offences are open on the evidence and, if so, whether it relies on them. Defence counsel must then indicate whether they consider any alternative offences are in issue and must request directions on the matters in issue (*Jury Directions Act 2015* ss 11, 12).

14. Three situations may therefore arise

    - If the possibility of an alternative verdict forms part of *either party's case*, appropriate directions about that verdict must be given to the jury (*Jury Directions Act 2015* s 14; *R v Kane* (2001) 3 VR 542 (Ormiston JA));
    - If the possibility of an alternative verdict has *not* formed part of either party's case, but one of the parties has *requested* such a verdict be left to the jury, the judge must consider whether there are good reasons for not giving the requested direction (see "Good Reasons for Not Giving Requested Direction" below);
    - If the possibility of an alternative verdict has *not* formed part of either party's case, and the parties have not requested such a verdict be left to the jury (or have objected to such a verdict being left), the judge must decide whether fairness to the accused requires that the jury consider the alternative charge (see "Leaving Alternative Verdicts Even if Not Sought by Counsel") below.

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[63] While *Criminal Procedure Act 2009* s 239 does not apply to a charge of murder, s 421(1) states that attempted murder is an alternative verdict to murder.

Good Reasons for Not Giving Requested Direction

15. *Jury Directions Act 2015* s 14(1) states:

> The trial judge must give the jury a requested direction unless there are good reasons for not doing so.

16. In deciding whether there are good reasons for not giving a requested direction, the judge must consider the manner in which the parties have conducted their cases and whether the direction would involve the jury considering the issues in a manner different from the way in which the accused presented his or her case (*Jury Directions Act 2015* s 14(2)(b)(ii)).

17. This provision appears designed to limit the ability of counsel to seek directions which require the jury to assess alternative theories of the case which are not raised with the jury by defence counsel. Until the provision is interpreted, it is not known when a judge should refuse to give a direction sought on the basis that it is not raised or relied on by the accused.

Leaving Alternative Verdicts Even if Not Sought by Counsel

18. *Jury Directions Act 2013* s 16 abolished the common law rule which required a trial judge to direct the jury about offences open on the evidence which had not been identified during the trial and alternative bases of complicity. This abolition has continued despite the repeal of the *Jury Directions Act 2013*, but does not limit the residual obligation under *Jury Directions Act 2015* s 16 (*Interpretation of Legislation Act 1984* s 14(2)(c); *Jury Directions Act 2015* s 17 Note).

19. Under the *Jury Directions Act 2015*, a judge has a residual obligation to give the jury a direction if there are substantial and compelling reasons for doing so even though the direction has not been requested (*Jury Directions Act 2015* s 16).

20. This residual obligation presupposes that the parties have complied with their obligations under Jury Directions Act 2015 s 11 to identify alternative offences that are open on the evidence and whether those alternatives are relied upon or in issue (*Aston v The Queen* [2019] VSCA 225, [45], [52]).

21. While a judge is not required to leave an alternative charge that is not a realistic alternative, fairness to the accused may require that the judge leave an alternative charge where the jury might reasonably return a verdict on that alternative, even if the alternative charge was not sought by any party (*Aston v The Queen* [2019] VSCA 225, [46], [57]).

22. Before giving a direction that was not sought, the judge must inform the parties of his or her intention to give the direction and invite submissions on the direction and whether there are substantial and compelling reasons for giving the direction (*Jury Directions Act 2015* s 16).

23. At common law, there was a greater obligation on judges to leave alternative verdicts in homicide cases compared to non-homicide cases.[64] It is unclear whether different principles continue to apply when determining whether a judge must give a direction regarding alternative offences under the residual obligation. These common law authorities are addressed below.

[64] The distinction is actually between murder/manslaughter cases and other cases (see "Other Alternative Verdicts to Murder" below). For the sake of simplicity, however, this topic refers to this distinction as the distinction between homicide and non-homicide cases.

Homicide Cases

Judge Must Direct Jury About Manslaughter if "Viable"

24. At common law, the judge in a murder trial was required to direct the jury to consider the alternative verdict of manslaughter if a "viable" case is available on the evidence. This was necessary even if the possibility of a manslaughter verdict has not been raised by any party, and even if a party objects (or all parties object) to the issue being left to the jury (*R v Kanaan* (2005) 64 NSWLR 527; *DPP v Tabbit* [2007] VSC 137; *R v Parsons* (2004) 145 A Crim R 519; *R v Makin* (2004) 8 VR 262; *Gillard v R* (2003) 219 CLR 1; *R v Kane* (2001) 3 VR 542; *Gilbert v R* (2000) 201 CLR 414; *R v Doan* (2001) 3 VR 349; *Pemble v R* (1971) 124 CLR 107; *Gammage v R* (1969) 122 CLR 444).

25. This duty also extended to cases of accessorial liability. Where the principal offender could be found guilty of either murder or manslaughter, the jury was directed about any "viable" bases of accessorial liability for both possible verdicts (*R v Nguyen* (2010) 242 CLR 491; *R v Nguyen* [2010] VSCA 23).[65] However, *Jury Directions Act 2013* s 16 expressly removed the obligation to direct on alternative bases of complicity and the note to that section expressly referred to *R v Nguyen* (2010) 242 CLR 491 (see also *Jury Directions Act 2015* s 17).

26. There was be a "viable" case of manslaughter if there was a basis for a manslaughter verdict on a reasonable view of the facts.[66] The evidence must have disclosed a reasonable basis upon which such a verdict could be found (*R v Williamson* (2000) 1 VR 58. See also *R v Kane* (2001) 3 VR 542; *R v Doan* (2001) 3 VR 349; *R v Thorpe* [1999] 1 VR 326; *Van den Hoek v R* (1986) 161 CLR 158; *Varley v R* (1976) ALJR 245; *Pemble v R* (1971) 124 CLR 107).

27. A retrial was generally required if a judge failed to direct the jury about manslaughter when it was available on the evidence, as this deprived the accused of a chance of being acquitted of murder (and convicted of manslaughter instead), causing a miscarriage of justice (*Gillard v R* (2003) 219 CLR 1; *Gilbert v R* (2000) 201 CLR 414; *R v Kanaan* (2005) 64 NSWLR 527; *R v King* (2004) 59 NSWLR 515; *R v Kane* (2001) 3 VR 542; *R v Nguyen* (2010) 242 CLR 491).

28. If there was no viable manslaughter case, and counsel has not raised the issue, the jury was not be directed about it (unless questioned about it by the jury: see below) and it may have been a misdirection to do so[67] (*R v Williamson* (2000) 1 VR 58; *R v Kanaan* (2005) 64 NSWLR 527; *R v Iannazzone* [1983] 1 VR 649; *Markby v R* (1978) 140 CLR 108; *Gammage v R* (1969) 122 CLR 444; *Mraz v R* (1955) 93 CLR 493).

Do Not Mislead Jury About their Ability to Return a Manslaughter Verdict

29. This section discusses the obligation on a trial judge not to mislead a jury about their ability to return a verdict of manslaughter. These principles remain relevant under the *Jury Directions Act 2015*.

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[65] The "viable" bases of accessorial liability may vary for each verdict. For example, while complicity on the bases of acting in concert or extended common purpose may be viable in relation to a verdict of murder, in some cases these forms of complicity may not be viable in relation to a verdict of manslaughter (see, e.g. *R v Nguyen* [2010] VSCA 23).

[66] The requirement that there must have been a "viable" case of manslaughter did not differ in substance from the test in *Pemble v R* (1971) 124 CLR 107 that manslaughter should be left to the jury if such a verdict was "open on the evidence" (*R v Kanaan* (2005) 64 NSWLR 527).

[67] See, e.g. *Mraz v R* (1955) 93 CLR 493, in which it was held to be a misdirection to direct the jury about manslaughter where it was a case of murder or nothing (i.e. there was no doubt that a murder was committed, but the accused denied any involvement in it).

30. While the judge should not direct the jury about manslaughter if there is no viable case, he or she must not lead the jury to understand that a manslaughter verdict is beyond their power. The jury has the right under *Crimes Act 1958* s 421(1) to return such a verdict, even if it is not open on the evidence (a "merciful verdict") (*Gammage v R* (1969) 122 CLR 444; *Packett v R* (1937) 58 CLR 190).[68]

31. It will therefore be a misdirection to tell the jury that they are not at liberty to find a verdict other than guilty or not guilty in relation to murder, even if on the evidence it is a case of murder or nothing (*Brown v R* (1913) 17 CLR 570).

32. Because of the possibility of merciful verdicts, the judge is bound to inform the jury of their capacity to return a manslaughter verdict if they ask about that possibility, even if such a verdict is not open on the evidence. To do otherwise would be to misstate the law, and would deny the jury a power they possess by statute (*R v Williamson* (2000) 1 VR 58; *Gammage v R* (1969) 122 CLR 444; *R v Stone (*1965) 84 WN (Pt 1) (NSW) 361; *Brown v R* (1913) 17 CLR 570).

33. The fact that the jury asks a question about the mental element of murder does not oblige the judge to leave manslaughter as an alternative verdict. In the absence of a viable case, a judge only needs to direct the jury about manslaughter if they specifically ask about its availability, or if they ask about the power to return a verdict other than murder (*R v Williamson* (2000) 1 VR 58).

34. While the judge must not tell the jury that they *cannot* return a manslaughter verdict, he or she may tell them that they *should* not return a manslaughter verdict if there is no evidence to support such a verdict (*Gammage v R* (1969) 122 CLR 444; *R v Stone* (1965) 84 WN (Pt 1) (NSW) 361).

35. If there is no viable manslaughter case, and the judge is asked by the jury whether they can return a manslaughter verdict, the judge should therefore:

    - Tell the jury that they may return a manslaughter verdict;
    - Inform the jury of the basis on which they may properly return a manslaughter verdict (e.g. if they are not satisfied that the accused committed murder, but are satisfied that the accused killed the deceased by an unlawful and dangerous act: see Manslaughter by Unlawful and Dangerous Act); and
    - Tell the jury that if they are satisfied beyond reasonable doubt of all the elements of the crime of murder, their duty is to convict of murder (*Gammage v R* (1969) 122 CLR 444).

36. A judge is not obliged to direct the jury about manslaughter simply because defence counsel asks them to do so in the absence of the jury. At common law, a judge only needed to direct the jury on manslaughter if it arose on the evidence, or if he or she was questioned about it by the jury (*R v Williamson* (2000) 1 VR 58). Under the *Jury Directions Act 2015*, the judge should consider whether there are good reasons for not giving the direction sought, as it was not a matter raised or relied on by the accused and would involve the jury considering the issues in the trial in a manner different from the way in which the accused presented his or her case (*Jury Directions Act 2015* s 14).

Other Alternative Verdicts to Murder

37. The principles discussed above were limited to the alternative offence of manslaughter, and did not to apply to the other alternative offences to murder available under *Crimes Act* ss 421(1), 6(2) or 10(3).

38. This was clearly the case in relation to the alternative offence of "assist offender" (*Crimes Act 1958* s 325). It was not always necessary to leave this offence as an alternative verdict in a murder case, even if it was open on the evidence. The question of whether to leave the alternative verdict of assist offender to the jury was decided according to the same principles that operated in relation to non-homicide offences (see below) (*R v Saad* [2005] VSCA 249).

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[68] If the jury returns a verdict of manslaughter where there is no evidence to support it, the judge may request them to reconsider the matter. However, if they persist in that verdict, the judge must accept it (*R v Kanaan* (2005) 64 NSWLR 527).

Non-Homicide Cases

39. At common law, a judge was not required to direct the jury on alternative charges to offences other than murder (*James v R* (2013) 39 VR 149; *R v Nous* (2010) 26 VR 96; *R v DD* (2007) 19 VR 143; *R v Saad* [2005] VSCA 249; *R v Doan* (2001) 3 VR 349. However, see *R v Kane* (2001) 3 VR 542; *R v Rehavi* [1999] 2 Qd R 640; *R v Elfar* (2000) 115 A Crim R 64).

40. However, the common law recognised that there were cases where the circumstances required a direction on an alternative offence, even if the possibility of that offence has not been raised by any party (*James v The Queen* (2014) 253 CLR 475, [38]; *R v Nous* (2010) 26 VR 96; *R v DD* (2007) 19 VR 143; *R v Christy* (2007) 16 VR 647; *R v Saad* [2005] VSCA 249).

41. Whether an alternative offence should be left depended on all the circumstances of the case, including the dictates of the public interest, fairness to the accused, the course of the trial and the scope of forensic judgment on the part of counsel. The ultimate test was what justice required in the particular case (*R v Nous* (2010) 26 VR 96; *R v DD* (2007) 19 VR 143; *R v Bui* [2005] VSCA 300; *R v Saad* [2005] VSCA 249; *R v Kane* (2001) 3 VR 542).

42. The judge's obligation is to direct the jury only on the real issues in the case. Directions on alternative offences which have not been addressed by the parties may be inconsistent with this obligation and may cause unfairness to the parties by expanding the case beyond the issues the parties addressed. Such directions may also breach the separation of prosecutorial and judicial functions (*James v R* (2013) 39 VR 149; *James v The Queen* (2014) 253 CLR 475, [37]).

43. The interests of justice could demand that lesser alternatives be left to the jury, even if not raised by counsel, to guard against the following two dangers:

    i) Faced with a false choice between conviction or acquittal of the main offence and nothing else, the jury would acquit the accused altogether when he or she should be convicted of the alternative offence; or

    ii) Faced with the same false choice, the jury would convict the accused of the more serious offence rather than let him or her get off scot-free for what is, on any view, serious misconduct (*Aston v The Queen* [2019] VSCA 225, [47]–[48]; *R v Saad* [2005] VSCA 249; *R v Kane* (2001) 3 VR 542; *R v Maxwell* [1990] 1 WLR 401; *R v Fairbanks* [1986] 1 WLR 1202).

44. The following factors bear upon whether, in the interests of justice, a lesser alternative offence should be left to the jury:

    - The presence of evidence which raises the alternative offence as a real and not remote or artificial possibility;
    - A party's reliance upon that evidence as being inconsistent with the proof of one or more of the elements of the more serious offence;
    - A real chance that the jury may convict the accused of the lesser offence; and
    - A request by a party that the lesser alternative offence be left to the jury (*R v Nous* (2010) 26 VR 96).

45. Thus, there may be no need to leave an alternative verdict to the jury where:

    - There is no reasonable basis on the evidence for that verdict (e.g. where there is no dispute that the principal offence was committed, and the only issue is whether the accused committed it) (*R v DD* (2007) 19 VR 143; *R v Bui* [2005] VSCA 300; *R v Benbolt* (1993) 60 SASR 7; *R v Perdikoyiannis* (2003) 86 SASR 262; *R v Willersdorf* [2001] QCA 183; *R v King* (2004) 59 NSWLR 515; *Jensen v R* (1991) 52 A Crim R 279);
    - The evidence in support of the alternative verdict is flimsy, or the prospect of a conviction on the lesser offence rather than the major offence is fanciful (*R v King* (2004) 59 NSWLR 515); or

- The principal offence is grave and the alternative is comparatively trifling and remote from the real point of the case (*R v Saad* [2005] VSCA 249; *R v Kane* (2001) 3 VR 542; *R v King* (2004) 59 NSWLR 515; *R v Maxwell* [1990] 1 WLR 401; *R v Fairbanks* [1986] 1 WLR 1202).

46. Above all, the common law required judges to keep in mind the course of the trial. Other things being equal, the effect of forensic judgment on the part of counsel was likely to be one of the most important considerations. In non-homicide cases, calculated abstention from raising an alternative verdict was a relevant consideration (*R v Saad* [2005] VSCA 249; *R v Nous* (2010) 26 VR 96; *James v R* (2013) 39 VR 149). These principles are likely to remain relevant under the *Jury Directions Act 2015*.

47. Under the *Jury Directions Act 2015*, counsel have a positive duty to identify to the judge alternative offences that are open on the evidence and must indicate whether those offences are relied upon or in issue. Under this scheme, there appears to be less scope for 'calculated abstention' from raising an alternative. Such abstention is likely to involve a failure to fulfil counsel's obligations under the Act. Where that occurs, the focus on appeal will be on what fairness to the accused required, rather than whether there were substantial and compelling reasons for leaving the alternative charge (see *Aston v The Queen* [2019] VSCA 225, [51]–[55]).

48. While the judge and not counsel is responsible for deciding what are the real issues to be left to the jury, the forensic decisions of counsel affect the scope of issues in dispute. Where the judge was of the opinion that there was a real issue as to whether the prosecution had established an element of the more serious offence and, after discussion with counsel (see below), considered that there was a real possibility that the jury could find the accused guilty of the lesser alternative offence, the common law stated that the offence should be left to the jury (*R v Nous* (2010) 26 VR 96; *James v R* (2013) 39 VR 149 (Maxwell P)).

Discuss Alternative Verdicts with Counsel

49. At common law, judges needed to ensure that leaving to the jury the possibility of convicting the accused of an alternative offence did not involve a risk of injustice to the accused, and that the accused had the opportunity of fully meeting that alternative in the course of his or her defence (*Commissioner of Police v Wilson* [1984] AC 242).

50. It was therefore prudent for the judge to ask counsel before empanelment, or at least no later than at the close of the defence case, whether consideration had been given to alternative verdicts (*Ross v R* (1922) 30 CLR 246; *R v Evans* [1969] VR 858; *R v Pureau* (1990) 19 NSWLR 372; *R v Perdikoyiannis* (2003) 86 SASR 262).

51. These considerations will remain relevant when a judge is deciding whether to exercise the residual power to give a direction not sought by the parties (see *Jury Directions Act 2015* s 16).

52. If it seems clear that an alternative charge arises on the prosecution case, but the prosecution does not open on that alternative, the judge should raise the issue with the prosecution. The judge may also wish to draw the alternative verdict to the jury's attention before the evidence is called, so that they have it in mind when they hear the evidence (*R v Benbolt* (1993) 60 SASR 7 (Perry J)).

53. If the judge proposes to leave an alternative verdict which has not been raised by counsel, he or she should inform counsel of this fact before their final addresses. This will allow submissions to be made about whether raising such an alternative so late would be likely to cause injustice to the accused, and will also allow counsel to address it in their closing arguments (*R v Benbolt* (1993) 60 SASR 7; *R v Pureau* (1990) 19 NSWLR 372).

54. In determining whether to leave an alternative verdict which has not been sought by the prosecution, the judge should consider the fact that objections to the evidence, lines of cross-examination and decisions upon the material to be presented on behalf of the accused will have been governed by the nature of the prosecution case. It is therefore possible that real prejudice could arise if he or she raises new approaches available to, but not expressly relied upon by, the prosecution (*R v Solomon* [1980] 1 NSWLR 321; *R v Cameron* [1983] 2 NSWLR 66; *R v Pureau* (1990) 19 NSWLR 372).

55. Raising an alternative verdict for the first time during the summing-up is likely to prejudice the accused, because defence counsel will not have had an opportunity to address the issue in their closing address. This prejudice cannot be remedied by allowing counsel to make supplementary submissions after the judge's summing-up, as that would give undue emphasis to the alternative charge, and tend to make it more likely that the jury would find the accused guilty at least on that alternative charge (*R v Kane* (2001) 3 VR 542 (Ormiston JA); *R v Benbolt* (1993) 60 SASR 7; *Quinn v R* (1991) 55 A Crim R 435; *R v Heaton* 1/6/90 NSW CCA; *R v Pureau* (1990) 19 NSWLR 372).

56. As the factual situation which gives rise to the prospect of an alternative verdict of attempt is often not apparent until the trial is under way, this offence may differ from other alternative offences. A judge may be more likely to conclude that the late raising of attempt will not prejudice the accused. However, the alternative of attempt should not be raised for the first time during summing-up, when neither counsel will have had the opportunity of addressing it (*R v Pureau* (1990) 19 NSWLR 372; *Quinn v R* (1991) 55 A Crim R 435).

Directions About Alternative Verdicts

57. If an alternative offence is to be left to the jury, the judge must explain to the jury to issues of law and fact involved determining whether the alternative offence is proved, including how the prosecution puts its case in relation to the alternative (*R v Pureau* (1990) 19 NSWLR 372; *R v Crisologo* (1997) 99 A Crim R 178; *Pemble v R* (1971) 124 CLR 107).

58. Where the evidence is unclear about the date of the offence, and the judge needs to direct the jury about an alternative offence which pre-dates the charged offence, the judge will need to explain how a doubt about the date of the offence affects the jury's verdict. In some cases, the date may only be an essential particular in relation to the more recent offence. The jury may then be able to return a verdict of guilty in relation to the alternative offence if satisfied that the conduct occurred, even if it cannot be satisfied beyond reasonable doubt that it occurred either before or after the relevant date. Whether this is permissible will depend on the nature of the offences and the operation of any relevant transitional provisions (see *Dibbs v R* [2012] VSCA 224).

59. The jury cannot return a verdict on an alternative charge until it returns a verdict on the principal charge. The judge must ensure that the jury understands this rule. If the jury cannot agree on the principal charge, any agreement on an alternative charge would involve impermissible compromise (*LLW v R* (2012) 35 VR 372; *Medici v R* (2013) 39 VR 350).

60. At common law, jurors were free to organise their processes of reasoning and their discussions in any way they see fit. As a result, a judge was prohibited from giving any direction which interfered with this freedom. This included a direction on the order in which the jury must *consider* various offences. This was distinguished from a direction about the order in which the jury must *return* its verdicts, which was permissible (*Stanton v R* (2003) 198 ALR 41; *LLW v R* (2012) 35 VR 372; *Medici v R* (2013) 39 VR 350; *Smith v R* (2013) 39 VR 336; *Vo v R* (2013) 39 VR 543).

61. *Jury Directions Act 2015* s 64E, as amended in 2017, abolishes that common law rule. Judges may direct the jury on the order in which they must consider the offences. Section 64E also preserves judges' common law ability to suggest an order in which they may consider the offences (see also *Smith v R* (2013) 39 VR 336).

62. Judges may also direct the jury on the order in which it must consider the following matters:

    - some or all of the elements of an offence charged or an alternative offence;
    - defences to an offence charged or an alternative offence;
    - the matters in issue;
    - an alternative basis of complicity in the commission of an offence charged or an alternative offence (*Jury Directions Act 2015* s 64F).

63. Such a direction may be given in the form of an integrated direction or factual question under *Jury Directions Act 2015* s 67. For further information see 3.9 Judge's Summing Up on Issues and Evidence.

64. The judge needs to be careful not to leave alternatives to the jury in a way that suggests that the only question is of which alternative the accused is guilty (e.g. murder or manslaughter). The jury must be told of its entitlement to acquit, and of its obligation to acquit if it is not satisfied beyond reasonable doubt of the accused's guilt (*R v Williamson* (1996) 67 SASR 428; *Pemble v R* (1971) 124 CLR 107).

65. Written directions are of particular assistance to the jury where alternative verdicts are available (*R v Youssef* (1990) 59 A Crim R 1. See 2.2 Providing Documents to the Jury for further information).

Last updated: 14 May 2021

3.11 Unanimous Verdicts and Extended Jury Unanimity

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When to Give the Charge

1. It is appropriate to instruct the jury about the need for unanimity in all cases (*R v Rajakaruna* (2004) 8 VR 340).

Issues

2. An appropriate person, such as the judge's associate, should question jurors prior to the judge receiving the verdict, to ensure the decision is unanimous (*Milgate v R* (1964) 38 ALJR 162; *R v Sergi* [1974] VR 1).

Extended Jury Unanimity

3. In some cases it may be necessary to direct the jury that they must be unanimous about a particular matter (in addition to being unanimous about whether or not the accused is guilty).

4. In addressing this issue, a distinction is drawn between two types of cases:

    i) Those in which alternative bases of guilt are proposed by the prosecution; and

    ii) Those in which one offence is charged, but a number of discrete acts is relied upon as proof, any of which would entitle the jury to convict (*R v Walsh* (2002) 131 A Crim R 299; *R v Klamo* (2008) 18 VR 644; *R v Cramp* (1999) 110 A Crim R 198; *Zandipour v R* [2017] VSCA 179).

Alternative Bases of Guilt

5. Where the prosecution has presented alternative bases for a finding of guilt, the need for an expanded direction about unanimity will depend on whether the case involves:

    i) Alternative factual bases of liability (e.g. where the accused is charged with culpable driving causing death due either to gross negligence or intoxication); or

    ii) Alternative legal formulations of liability based on the same or substantially the same facts (e.g. where the accused is charged with unlawful and dangerous act manslaughter and/or manslaughter due to gross negligence) (*R v Cramp* (1999) 110 A Crim R 198).

6. In the first type of case, the jury must be directed that they need to unanimously agree about at least one of the alleged bases of liability. It is not sufficient for some jurors to find the accused guilty of one basis (e.g. culpable driving due to gross negligence), while others find the accused guilty of the alternative (e.g. culpable driving due to intoxication (*R v Beach* (1994) 75 A Crim R 447).

7. In the second type of case, there need only be unanimity as to the verdict (e.g. guilty of manslaughter). The basis upon which the accused is found guilty (e.g. due to having committed an unlawful or dangerous act or having been grossly negligent) is irrelevant (*R v Clarke and Johnstone* [1986] VR 643; *R v Isaacs* (1997) 41 NSWLR 374).

8. Cases in which the prosecution has argued that the accused could be liable as either a principal or an accessory are an example of the second type of case. The jury therefore does not need to be in unanimous agreement about the capacity in which the accused committed the crime. They merely need to unanimously agree that s/he caused the result, and had the relevant *mens rea* (*R v Giannetto* [1997] 1 Cr App 1; *R v Leivers and Ballinger* [1997] 1 Qd R 649).

9. The key issue in determining which category a case falls into seems to be whether or not the alternative bases involve materially different issues or consequences:

    i) If the bases do involve materially different issues or consequences, the jury must be unanimously satisfied that the requirements of at least one of the bases have been met.

    ii) If the bases do not involve materially different issues or consequences, the jury need only be unanimously satisfied of the verdict: (*R v Leivers and Ballinger* [1999] 1 Qd R 649; *R v Cramp* (1999) 110 A Crim R 198).

10. However, the precise application of this principle in Victoria is unclear. For a detailed discussion of this area, see *R v Walsh* (2002) 131 A Crim R 299.

Multiple Discrete Acts

11. When a number of discrete acts are committed, any of which would entitle a jury to convict, the jury may need to be unanimous in its view about at least one of those acts (*R v Walsh* (2002) 131 A Crim R 299; *KBT v The Queen* (1997) 191 CLR 417; *R v Klamo* (2008) 18 VR 644).

12. This will depend on whether those discrete acts go to the proof of an essential ingredient of the crime charged, or merely provide a route by which the jury can find the accused guilty of the crime (*R v Walsh* (2002) 131 A Crim R 299; *R v Klamo* (2008) 18 VR 644).

13. If the acts go to the proof of an essential ingredient of the crime, then the jury must be directed that they cannot convict unless they are unanimously agreed upon an act which, in their opinion, constitutes that essential ingredient (*R v Klamo* (2008) 18 VR 644).

14. By contrast, if the acts do not go to the proof of an essential ingredient of the crime, but merely provide a route by which the jury can find the accused guilty of the crime, then the jury only needs to unanimously agree that the crime was committed (*R v Walsh* (2002) 131 A Crim R 299).

15. Determining whether the acts go to the proof of an essential ingredient of the crime charged will depend upon the precise nature of the charge, the nature of the prosecution's case and the defence, and what the live issues are at the conclusion of the evidence (*R v Walsh* (2002) 131 A Crim R 299).

16. In determining whether acts are relevantly discrete, the judge must look at whether the acts are separated in time or circumstance. In the case of a violent assault measured in second, or even minutes, all of which occurs in the same area, the jury would be entitled to treat the assault as a single transaction and would not need to be unanimous about the parts of the assault which caused the harm alleged (*Zandipour v R* [2017] VSCA 179; *R v McCarthy* (2015) 124 SASR 190; *R v Heaney* (2009) 22 VR 164; *Dookhea v R* [2016] VSCA 67; *Hope v The Queen* [2018] VSCA 230, [31]–[33]).

17. Even where the jury can treat an event as a continuous transaction, there may be evidence that the harm alleged was caused by a particular part of that transaction. In that situation, individual jurors may have two paths to verdict which do not require unanimity. First, a juror may be satisfied beyond reasonable doubt that the harm was caused by a particular part of the transaction, and that the necessary fault element existed at the moment of that part. Second, a juror may be satisfied that the harm was caused by the transaction as a whole, in which case the juror must find that the fault element existed for the whole of the transaction. The need for a direction on this issue will depend, in part, on whether the accused may have had a different state of mind at different stages of the transaction (see, e.g. *Zandipour v R* [2017] VSCA 179).

Cases Requiring Unanimity about Particular Acts

18. Where the accused is charged with persistent sexual abuse of a child under 16 (*Crimes Act 1958* s 49J), the prosecution must prove at least 3 separate sexual offences of the relevant kind (see Persistent Sexual Abuse of a Child (From 1/7/17). In such cases, if the prosecution provides evidence of more than 3 acts upon which the accused can be convicted, the jurors must unanimously agree that at least 3 particular acts were committed. It is not sufficient for each juror to find that the accused committed 3 of the alleged acts, if the 3 selected acts differ from juror to juror (see *KBT v The Queen* (1997) 191 CLR 417).
19. Where the accused is charged with manslaughter by an unlawful and dangerous act, and the prosecution relies on two discrete acts, each of which is capable of constituting the crime charged, the jury must unanimously agree upon which act constitutes the crime (*R v Klamo* (2008) 18 VR 644).
20. In a case of fraudulently inducing investments, where the issue of whether the accused made a false statement (as identified in the particulars) as an inducement to invest was seen to be essential, it was held that the jury had to unanimously agree on a particular false statement (amongst several presented) in order to convict (*R v Brown* (1984) 79 Cr App R 115).
21. In cases involving fraud (including obtaining financial advantage by deception), it will usually be necessary to direct the jury about the need for unanimity about the acts of fraud if the prosecution particularises multiple discrete acts of fraud (*Ardrey v WA* [2016] WASCA 154. See also *R v Holmes* [2006] VSCA 73; *Magnus v R* (2013) 41 VR 612).
22. However, where there is only one relevant deception for each separate charge, a unanimity direction is not necessary (*Magnus v R* (2013) 41 VR 612).

Cases Not Requiring Unanimity About Particular Acts

23. In relation to a charge of stalking (*Crimes Act 1958* s 21A), the jury does not need to be unanimous as to the particular acts which constituted the "course of conduct". The requirement for unanimity will be met as long as the jury unanimously agrees that the accused engaged in a course of conduct which included any of the matters set out in the section (*R v Hoang* (2007) 16 VR 369).
24. In relation to a charge of conspiracy to defraud, there does not need to be unanimous agreement about the particular representations the conspirators agreed to make. The agreement to make any particular representation is not an essential element of the crime, but merely a path to arriving at the objective of the conspirators – obtaining an advantage by fraud (*R v Hancock* [1996] 2 Cr App R 554; *R v Walsh* (2002) 131 A Crim R 299).
25. In a case of procuring an advantage by deception by means of a fraudulent claim, where the essential issue was whether the accused made the fraudulent claim (and the particulars of the fraud were simply a matter of evidence), it was held that the jury only had to unanimously agree on the verdict and not on the particulars. Issues such as whether the accused had been fraudulent as to the amount of wages paid, the people employed or the hours worked, were seen to be only incidental, doing no more than providing the jury with alternative routes of arriving at the same result (*R v Agbim* [1979] Crim LR 171).

Last updated: 25 November 2019

3.11.1 Charge: Unanimous and Majority Verdicts

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In almost all criminal cases, a verdict of guilty or not guilty must be unanimous. That is, whatever decision you make, you must all agree on it.

So if, for example, you are to find NOA guilty of [*insert charge 1*], then you must all agree that [he/she] is guilty of that offence. In exactly the same way, if you are to find NOA not guilty of [*insert charge 1*], then you must all agree that [he/she] is not guilty of that offence.

However, this requirement does not mean that you must all reach your verdict for the same reasons. Indeed, you may each rely on quite different reasons for making your decision. For example, you may each rely upon different parts of the evidence, or you may each emphasise different aspects of the evidence.

What is important is that, no matter how you reach your verdict, you all agree. Your verdict of guilty or not guilty [in relation to each charge/for each person charged] must be unanimous, the agreed decision of you all.

You may have noted that I said that a verdict must be unanimous in "almost all" criminal cases. There are some circumstances in which a jury is allowed to give a majority verdict instead of a unanimous verdict. However, this is not yet one of those cases and may never be. I will tell you if the situation changes. Until I do, you should consider that your verdict[s] of guilty or not guilty must be unanimous.[69]

[*If the case involves alternative bases of responsibility for a particular offence, insert the relevant* Additional Charge.]

Last updated: 17 May 2019

3.11.2 Additional Charge: Materially Different Issues or Consequences

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This charge may be added if evidence has been presented which shows possible alternative bases of responsibility for a particular offence, and the bases involve materially different issues or consequences. For example, culpable driving causing death due to gross negligence or culpable driving causing death due to intoxication: See 3.11 Unanimous and Majority Verdicts.

Because of the nature of this case, I need to give you some more directions about how this requirement for unanimity works in relation to [*insert relevant offence*].

The prosecution has argued that there are two different bases upon which you can find NOA guilty of this offence.

Firstly, the prosecution has argued that NOA is guilty of [*insert offence*] because [he/she] [*insert summary of one basis for guilty*].

Alternatively, the prosecution has argued that NOA is guilty of [*insert offence*] because [he/she] [*insert summary of alternative basis*].

[69] This paragraph should be excluded in cases of murder, treason, offences against sections 71 or 72 of the *Drugs, Poisons and Controlled Substances Act 1981*, or offences against a law of the Commonwealth, as majority verdicts are not permitted in relation to such offences (*Juries Act 2000* s 46).

In order to find NOA guilty of [*insert offence*], you only need to find that one of these two alternatives has been proven beyond reasonable doubt.

However, all twelve of you must agree that the same alternative has been proven. For example, all of you must agree that NOA was guilty because [*insert one basis*]. Or all of you must agree that NOA was guilty because [*insert alternative basis*].

If some of you find NOA guilty due to [*insert basis one*], and others find [him/her] guilty due to [*insert alternative basis*], then you have not reached a unanimous verdict.

Last updated: 1 February 2006

3.11.3 Additional Charge: No Materially Different Issues or Consequences

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This charge should be added if evidence has been presented which shows possible alternative bases of responsibility for a particular offence, and the bases do not involve materially different issues or consequences. For example, manslaughter by unlawful and dangerous act or manslaughter by gross negligence.

It should also be added if the prosecution has argued that the accused could be liable as either a principal or an accessory: See 3.11 Unanimous and Majority Verdicts.

Because of the nature of this case, I need to give you some more directions about how this requirement for unanimity works in relation to [*insert relevant offence*].

The prosecution has argued that there are two different bases upon which you can find NOA guilty of this offence.

Firstly, the prosecution has argued that NOA is guilty of [*insert offence*] because [he/she] [*insert summary of one basis for guilty*].

Alternatively, the prosecution has argued that NOA is guilty of [*insert offence*] because [he/she] [*insert summary of alternative basis*].

Although you must all reach the same decision in relation to this offence – either guilty or not guilty – you do not need to all rely on the same basis in reaching that decision. For example, seven of you might find NOA guilty of [*insert offence*] due to [*insert one basis*], while the other five of you might find NOA guilty due to [*insert alternative basis*]. That does not matter – as long as you all reach the same verdict in relation to [*insert offence*]. In such a situation, your verdict is still considered to be unanimous, despite your different reasoning.

What is important is that you all agree on the final decision. Your verdict of guilty or not guilty in relation to [*insert offence*] must be unanimous.

Last updated: 1 February 2006

3.11.4 Additional Charge: Multiple Discrete Acts

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This charge may be added if evidence has been presented of multiple acts on the basis of which guilt can be found, but there must be unanimity as to at least one [or a specified number] of those acts having been committed.

This requirement has mostly arisen in relation to a charge of maintaining a sexual relationship with a child under 16, under which the jury must agree on (at least) the same three acts having been committed from amongst all of the acts presented by the prosecution. For this reason, this charge has been drafted in relation to the requirement for agreement on three acts. If necessary, this can be amended to instead require agreement on a different number of acts.

Because of the nature of this case, I need to give you some more directions about how this requirement for unanimity works in relation to [*insert relevant offence*].

In attempting to prove NOA's guilt in relation to this offence, the prosecution has presented evidence of a number of different acts which it alleges provide the basis for you to find [him/her] guilty.

The prosecution has alleged that [*insert summary of the different acts relied upon by the prosecution*].

You do not need to find that [he/she] committed all of these acts. In order for you to find NOA guilty, you must be satisfied beyond reasonable doubt that [he/she] committed at least three of these acts.

However, before you can find NOA guilty of [*insert offence*], all twelve of you must agree that the same three acts have been proven beyond reasonable doubt. If some of you find NOA guilty on the basis of three particular acts [*identify example*], and others find [him/her] guilty on the basis of a different three acts [*identify example*], then you have not reached a unanimous verdict.

Last updated: 1 February 2006

3.12 Taking Verdicts

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Alternative Charges

1. Unless expressly provided for by law, an accused must not be punished more than once for the same act or omission (*Interpretation of Legislation Act 1984* (Vic) s 51; *R v Sessions* [1998] 2 VR 304).
2. This means that when alternative charges are left to the jury, the accused must not be convicted of the lesser offence if found guilty of the major offence (*R v Sessions* [1998] 2 VR 304; *R v Weeding* [1959] VR 298. See also *Crimes Act 1958* s 421(2)).
3. When alternative charges of differing gravity are left to the jury, the verdicts should be taken in descending order of gravity. The judge should discharge the jury from returning a verdict on the lesser offence once the jury has returned a verdict of guilty of the major offence (*R v Sessions* [1998] 2 VR 304; *R v Weeding* [1959] VR 298).
4. Where the alternative charges are of equal gravity or are inconsistent (e.g. theft or receiving stolen goods), the jury should be asked whether they have found the accused guilty on any charge. If they have, the charge should be identified, the verdict taken, and the jury discharged without verdict on the other charge (*R v Seymour* (1954) 38 Cr App R 68).

Multiple Accused

5. If multiple accused are tried jointly, it is usual for the judge to charge the jury in respect of all of the accused and all of the charges at the one time, before allowing the jury to deliberate about all of the matters together (*R v Houssein* (1980) 70 Cr App R 267; *R v Wooding* (1980) 70 Cr App R 256).
6. However, in a trial of unusual complexity it is open to the trial judge to vary the procedure. For example, a judge may:
    - Direct and take a verdict in respect of each accused separately; or
    - Direct and take a verdict in respect of each charge separately in respect of each accused (see, e.g. *R v Newland* (1953) 37 Cr App R 154; *R v Mitchell* [1971] VR 46).
7. Although the trial judge has a discretion to adopt such alternative procedures, the risk to a fair trial is such that this course should not be adopted unless the case really demands it (*R v Houssein* (1980) 70 Cr App R 267; *R v Wooding* (1980) 70 Cr App R 256).

8. If the trial judge is contemplating adopting an alternative procedure, it would be desirable to discuss the matter with counsel as soon as possible. The discussions should include submissions about whether the jury is to be kept together throughout their deliberations or permitted to separate under s 50 of the *Juries Act 2000* (Vic).

Persistent sexual abuse of a child under 16

9. In *Chiro v R* [2017] HCA 37, the High Court held that for offences such as persistent sexual abuse of a child (see *Crimes Act 1958* s 49J) where there is an extended unanimity requirement concerning proof of constituent acts, the judge should ask the jury to specify the acts proved.
10. When sentencing, a judge must sentence consistently with the jury's verdict. For this kind of offence, that requires information from the jury on the basis for its verdict. Without that information, the judge must sentence on the assumption that the jury were satisfied of the minimum number and the least serious offences that were available to prove the offence charged.
11. For information on asking the jury to identify the basis for its verdict, see Persistent sexual abuse of a child (From 1/7/17).

Last updated: 23 October 2019

3.12.1 Charge: Taking a Unanimous Verdict

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Once you have reached a unanimous verdict on [all of] the charge[s], you should push the buzzer in the jury room and tell my tipstaff. [S/he] will then arrange for us all to return to court.

When you have taken your places in the jury box, my associate will ask you whether you have agreed on a verdict, and what your verdict is [in relation to each charge in turn]. You, [Mr/Madam] foreman, will answer "guilty" or "not guilty", according to the decision the jury has reached.

My associate will then read your verdict back to you, to confirm that what [he/she] has recorded is correct. If any of you think that what my associate has recorded is wrong in any way, you should say so immediately. The record of your verdict[s] can then be corrected.

Last updated: 17 May 2019

3.12.2 Charge: Taking a Majority Verdict

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I told you earlier what you should do once you reach a unanimous verdict. The procedure is slightly different if you reach a majority verdict.

My associate will first ask you, [Mr/Madam] foreman, whether the jury has reached a verdict, and what your verdict is. Once you have told [him/her] your verdict [in relation to each charge], my associate will ask you whether you have reached the verdict unanimously, or by a majority of eleven [10 or 9] of you. It is your job, [Mr/Madam] foreman, to answer that question.

You need only tell my associate if your verdict was reached unanimously or by a majority. The identity of the minority juror is irrelevant. You will not be asked for that information, and you should not reveal it.

Last updated: 1 February 2006

3.12.3 Charge: Alternative Charges on the Indictment

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In this case, charges [*insert principal charge*] and [*insert alternative charge*] relate to the same alleged event, and are alternatives. The prosecution does not suggest that the accused should be convicted of both of these charges, but of one or the other.

When you are delivering your verdict[s], you will first be asked for your verdict on [*insert principal offence*], which is the more serious charge.[70] If you reach a verdict of guilty in relation to that charge, you will not be asked for a verdict on [*insert alternative charge*].

It is only if you unanimously reach a verdict of not guilty in relation to [*insert principal offence*] that you will be asked to deliver a verdict on [*insert alternative charge*].

I remind you that the accused is entitled to a separate trial of each charge, and that you must not reach your verdict by compromising between them.

Last updated: 27 March 2013

3.12.4 Charge: Alternative Charges Not on the Indictment

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In this case, the accused has been charged with [*insert principal offence*]. The law says that when a person is charged with this offence, you are entitled to find him/her guilty of the offence of [*insert alternative offence*] instead.

When you are delivering your verdict[s], you will first be asked for your verdict on [*insert principal offence*]. If you are satisfied, beyond reasonable doubt, that NOA is guilty of that offence, then you will not be asked to return a verdict on [*insert alternative offence*].

However, if you all agree that NOA is not guilty of [*insert principal offence*], you will be asked for your verdict on whether or not the prosecution have proved, beyond reasonable doubt, all the elements of [*insert alternative offence*].

I remind you that the accused is entitled to a separate trial of each charge, and that you must not reach your verdict by compromising between them.

Last updated: 27 March 2013

3.13 Perseverance and Majority Verdict Directions

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1. This topic addresses two separate directions which may be appropriate where the jury is having difficulty reaching a verdict. The first is an instruction to persevere in attempting to reach a unanimous verdict. The second is a direction allowing the jury to return a majority verdict. Each of these are discussed in more detail below.

Effect of Jury Directions Act 2015

2. Jury directions relating to perseverance and majority verdicts have been significantly changed by the *Jury Directions Act 2015* following amendments which commenced on 1 October 2017 by the *Jury Directions and Other Acts Amendment Act 2017*.

3. The Act:

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[70] This charge is based on the assumption that the charges are of differing gravity. If the charges are of the same gravity, it will need to be modified accordingly.

- prohibits the judge from directing the jury to persevere to reach a unanimous verdict at the same time as or immediately before or after giving a majority verdict direction (*Jury Directions Act 2015* s 64B);
- abolishes any common law rule or practice to direct the jury to persevere to reach a unanimous verdict before giving a majority verdict direction (*Jury Directions Act 2015* s 64C).

4. The effect of these amendments are also explained below.

Perseverance (*Black*) Directions

5. If it appears that the jury has been deliberating for an extended period without reaching a verdict, it may be appropriate to ask counsel to make submissions about whether the jury should be recalled and given further directions, or should continue to be given uninterrupted time to deliberate (see *R v K* (1997) 68 SASR 405).
6. If the jury is recalled, the judge should ask the jury whether it desires more time to deliberate, or whether it is experiencing difficulty in reaching a unanimous verdict (*R v K* (1997) 68 SASR 405).
7. If the jury indicates that it is having difficulty reaching a unanimous verdict, the judge should decide whether to give the jury a direction to persevere, or a direction that it may return a majority verdict (See *Jury Directions Act 2015* ss 64C, 64D; *Black v R* (1993) 179 CLR 44; *R v Muto & Eastey* [1996] 1 VR 336; *R v K* (1997) 68 SASR 405). For information on when to direct the jury that it may return a majority verdict, see Exercising the Discretion to Take a Majority Verdict below.
8. If the jury asks a question, the question should be answered and the jury given further time to resolve their differences (in light of that answer) before giving a perseverance or majority verdict direction. To do otherwise may put the jury under pressure to reach a verdict, without satisfying themselves about matters which seem important to them (see *R v De Simone* [2008] VSCA 216).
9. Following the commencement of *Jury Directions Act 2015* s 64B on 1 October 2017, a judge must not direct the jury to persevere to reach a unanimous verdict at the same time as, or immediately before or immediately after, the judge gives a majority direction.

Majority Verdict Directions

What is a Majority Verdict?

10. The meaning of "majority verdict" varies depending on the size of the jury at the time the verdict is returned:
    - If the jury consists of 12 jurors, a majority verdict is a verdict on which 11 of them agree;
    - If the jury consists of 11 jurors, a majority verdict is a verdict on which 10 of them agree;
    - If the jury consists of 10 jurors, a majority verdict is a verdict on which 9 of them agree (*Juries Act 2000* (Vic) s 46(1)).

Preconditions for Taking a Majority Verdict

11. A judge may decide to take a majority verdict if:
    - the jury has been deliberating for a period of time that the court thinks is reasonable, having regard to the nature and complexity of the trial and has not reached a unanimous verdict; and
    - the accused is not charged with murder, treason, an offence against sections 71 or 72 of the *Drugs, Poisons and Controlled Substances Act 1981*, or an offence against a law of the Commonwealth (*Juries Act 2000* (Vic) s 46).

12. Prior to the amendment of the *Juries Act 2000* by s 22 of the *Jury Directions and Other Acts Amendment Act 2017* on 1 October 2017, the jury was required to have deliberated for at least six hours, not including discrete and substantial breaks from the performance of the jury's task. The six hour requirement was removed by the *Jury Directions and Other Acts Amendment Act 2017* s 22.

Exercising the Discretion to Take a Majority Verdict

13. Before the judge gives the jury a majority verdict direction, the judge should invite submissions about the appropriateness of allowing a majority verdict in the circumstances (*R v Muto & Eastey* [1996] 1 VR 336; *R v Ahmet* (2009) 22 VR 203). This may include submissions about whether, having regard to the nature and complexity of the trial, a reasonable period of time for deliberation has passed.

14. At common law, it was considered that a judge should usually give a perseverance direction before giving a majority verdict direction, so as to provide the jury with a further opportunity to reach a unanimous verdict. However, *Jury Directions Act 2015* s 64C provides that a judge may give a majority direction regardless of whether he or she has previously provided a perseverance direction (*Jury Directions 2015* s 64C).

15. *Jury Directions Act 2015* s 64B provides that a judge must not give a majority direction at the same time as, or immediately before or immediately after, they give a perseverance direction. This abolishes the common law rule of practice that a jury should be encouraged to persevere towards unanimity even if the judge permits a majority verdict (*R v Ahmet* (2009) 22 VR 203).

16. If the judge decides to exercise his or her discretion to allow a majority verdict to be given, this should be made clear (*R v Di Mauro* (2001) 3 VR 62).

17. At common law, a modified perseverance direction was used where the judge had exercised his or her discretion to allow a majority verdict to be given (*Black v R* (1993) 179 CLR 44; *R v Muto & Eastey* [1996] 1 VR 336). *Jury Directions Act 2015* s 64C requires a clear distinction between the two, as judges giving a majority direction must not refer to the perseverance direction.

Other Directions Concerning Jury Deliberations

18. If the jury asks what happens if they fail to reach a unanimous verdict, the judge should answer the question (*Coulson v R* [2010] VSCA 146).

19. If that question arises before the judge has exercised their discretion to allow a majority verdict, he or she may wish to seek submissions as to whether it would now be appropriate to do so. If so, a majority verdict direction could be given in response to the question.

20. There is no obligation to mention the potential to discharge the jury without verdict at the time of permitting a majority verdict. It is up to the trial judge to decide whether and when to give this information, provided the judge does not place pressure on the jury to reach a verdict. One form of pressure on a jury is if the judge gives the impression that the deliberations must continue until the jury reaches a verdict (*Aulsebrook v The Queen* [2019] VSCA 238, [39]–[47]; *Millar v The Queen* [2003] WASCA 211).

21. Historically, judges have told the jury about the option to discharge the jury as part of a perseverance direction given before allowing the jury to return a majority verdict. As explained above, *Jury Directions Act 2015* ss 64B and 64C have abolished that practice.

22. If the judge does not consider it appropriate to exercise his or her discretion to take a majority verdict, the judge's answer could encourage the jury to persevere with their deliberations, and inform them that while in some circumstances a majority verdict may be allowed, those circumstances have not yet arisen. This answers the jury's question and complies with the requirement that the two directions may not be given at the same time (*Jury Directions Act 2015* s 64B, as amended in 2017).

23. In some cases it may be appropriate for a trial judge to make suggestions as to what might be a convenient way for the jury to approach their deliberations, so that they can reach a unanimous verdict (*Gassy v R* (2008) 236 CLR 293).
24. If a judge makes such suggestions, he or she must be especially careful to maintain a proper balance between the prosecution case and the defence case (*Gassy v R* (2008) 236 CLR 293).
25. This means that if the judge suggests a "way forward" that leads to conviction, s/he must balance that suggestion with a reminder of the paths that lead to the opposite outcome (*Gassy v R* (2008) 236 CLR 293).
26. This reminder of the countervailing considerations must be given contemporaneously with the suggested "way forward". It is not sufficient to assume that the jury will keep in mind any counter-balancing directions given earlier (*Gassy v R* (2008) 236 CLR 293).
27. The judge should also emphasise the fact that he or she is merely making suggestions, which the jury are free to accept or reject as they see fit (*Gassy v R* (2008) 236 CLR 293).

Last updated: 25 November 2019

3.13.1 Charge: Unanimous Verdict Required

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I have been told that you have not yet been able to reach a verdict. Although I have the power to dismiss you without a verdict having been reached, I should only do this if I am satisfied that you will not be able to agree on a verdict even if you are given more time for discussion. I am not yet satisfied that this is the case.

What I urge you to do is to return to the jury room and try to resolve your differences. Experience has shown that juries can often agree if given more time to consider and discuss the issues.

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

You also have a duty to listen carefully and with an open mind to the views of every other juror. You should calmly weigh up each other's opinions about the evidence, and test them by discussion. Calm and rational discussion of the evidence often leads to a better understanding of the differences of opinion which juries may have. This discussion may convince you that your original opinion was wrong.

That said, you must always reach your own decision, according to your own view of the evidence. If, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with their conclusions, then you should not change your mind simply to reach a unanimous verdict. Indeed, you must not agree to a verdict if you do not honestly and genuinely think that it is the correct one. To do that would breach your duty to this court.

But, as I said earlier, experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters that they disagree about, and make a further attempt to reach a verdict. That is what I am asking you to do here. Please return to the jury room and consult with one another. Express your own views. Listen to the views of others. Discuss your differences with an open mind. Try your best to reach a unanimous verdict.

Last updated: 5 September 2022

3.13.2 Charge: Majority Verdict Allowed No Perseverance Direction

Click here to download a Word version of this charge

This charge can be used when a judge has exercised their discretion to allow a majority verdict, and no perseverance direction has been given. Judges must not give a perseverance direction at the same time as, or immediately before or immediately after, giving a majority direction (*Jury Directions Act 2015* ss 64B–64C, as amended in 2017).

I have been told that you have not yet been able to reach a verdict. Although I have the power to dismiss you without a verdict having been reached, I should only do this if I am satisfied that you will not be able to agree on a verdict even if you are given more time for discussion. I am not yet satisfied that this is the case.

However, I am satisfied that you should now be allowed to give a majority verdict.[71] This means that if you cannot all agree on a verdict, I will accept a verdict that is agreed upon by eleven [10 or 9] of you.

Please return to the jury room and consult with one another. Express your own views. Listen carefully to the views of others jurors. Discuss your differences with an open mind. Calmly weigh up each other's opinions about the evidence, and test them by discussion.

If eleven of the twelve [10/11 or 9/10] of you – reach agreement on a verdict, then you can decide to return a majority verdict.

Last updated: 2 October 2017

3.14 Intermediaries and Ground Rules Explained

This chapter contains two directions for use where the case involved an intermediary or modifications to questioning practices due to ground rules hearings.

For information about these procedures, see the Victorian Criminal Proceedings Manual.

3.14.1 Charge: Explaining Intermediaries and Adaptations

Click here for a Word version of this document for adaptation

I now want to direct you about the evidence of NOC.

Before NOC gave evidence, NOI[72] was sworn/took an affirmation. NOI is an intermediary. Because NOC [was a child/had a cognitive impairment], the law allows an intermediary to be appointed to help the parties question NOC. NOI is an independent person who was here to assist the court by providing advice on how NOC should be questioned.

As a [child/person with a cognitive impairment], NOC's language skills are not as developed as those of many other witnesses.

NOI's role was to ensure NOC was questioned using language that [he/she] could understand. Giving evidence in court can be a stressful process, especially for a [child/person with a cognitive impairment]. At an earlier hearing, NOI, [*insert name of prosecution counsel*] and [*insert name of defence counsel*] and I discussed how NOC would be asked questions.

[*If necessary, give an example of how questioning was adapted*.]

[71] A majority verdict is not permitted in relation to charges of murder, treason, offences against sections 71 or 72 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), or offences against a law of the Commonwealth (*Juries Act 2000* s 46).

[72] Name of Intermediary.

This was to ensure the questions were formulated in such a way that NOC could understand what was being asked of him/her.

[*If the judge or intermediary interrupted to reinforce ground rules, add the following shaded section.*]

As part of this, NOI/I interrupted the barristers a few times during the questioning to make sure the barristers framed their question in language that NOC could understand.

This included: [*Identify interventions by the intermediary, such as*:

- suggesting the barrister rephrase questions;
- asking the witness whether [he/she] understood the question;
- asking the witness whether [he/she] needed a break.]

You would appreciate that, as a matter of fairness, these adjustments [and interruptions] were necessary to ensure that NOC was able to understand the questions and that NOC was able to answer those questions without being overwhelmed by complex language or by other stressors or pressures that might affect his/her evidence.

It is also important to understand that ordinarily cross examination is the method that lawyers use to test evidence. However in the case of a [child/person with cognitive impairment] cross-examination cannot proceed in the same robust manner that it might for an adult witness. The form of questions, the tone of the questions and the content of the questions must be adapted to accommodate the age and understanding of the child. The law requires that this be done.

Taking those matters into account, you must not form the view that because a less confrontational approach was taken in the cross examination of NOC, that the allegations are any less challenged or less strenuously denied.

Ultimately, it is for you to decide what parts of NOC's evidence you accept, if any, and whether the prosecution has proved its case beyond reasonable doubt. You must base your decision on the evidence you hear in court and must not allow a different process of questioning witnesses to distract you from the issues in the case and the need to assess the evidence.

Last updated: 23 October 2019

3.14.2 Charge: Adaptations at Ground Rules Hearings

Click here for a Word version of this document for adaptation

I now want to make a few comments about how NOC gave evidence.

[*If other witnesses were questioned in a conventional way, add the following shaded section.*]

You may also have noticed that NOC was questioned in a different way from other witnesses. Generally, the questions were simpler, and more direct.

As a [child/person with a cognitive impairment], NOC's language skills are not as developed as many other witnesses. [*insert name of prosecution counsel*] and [*insert name of defence counsel*] therefore had to adapt their questions to match NOC's language ability. Otherwise, there was a risk that NOC would have become tired, stressed or confused, and might have given answers that [he/she] didn't mean to give. This would not have been fair to NOC and would have made your task of assessing the evidence more difficult than it should be.

Despite the different style and tone of [*insert name of defence counsel's*] questions, the defence say that you should not accept NOC's evidence. The defence say [*refer to relevant aspects of defence case in relation to NOC]*. The prosecution argues that [*refer to relevant aspects of prosecution case in relation to NOC*].

Ultimately, it is for you to decide what parts of NOC's evidence you accept, if any, and whether the prosecution has proved its case beyond reasonable doubt.

Last updated: 17 October 2018

3.15 Concluding Remarks

3.15.1 Charge: Concluding Remarks

Click here to download a Word version of this charge

Questions

If, at any stage of your discussions, you would like me to repeat or explain any directions of law I have given you, please do not hesitate to ask. It is fundamental that you understand the principles you are required to apply. If you have any doubt about those principles, then you are not only entitled to ask for further assistance, but you should ask for it.

You should do this by handing a note to my tipstaff indicating what your question is. S/he will pass it to me, and after discussing the matter with counsel, we will reassemble in court to assist you.

There is really only one thing that you must not include on any note, and that is the numbers involved in any part of your discussions such as any vote within the jury. That matter must remain completely confidential to you and that includes even telling me about it in a note. Please in any note leave the numbers out.[73]

Transcripts

[*If the jury has not been provided with a transcript, add the following shaded section:*]

I also want to remind you that all of the evidence in this trial has been recorded and transcribed. If at any time during your discussions you wish to have a certain section of the evidence replayed to you, or have a section of the transcript [read back/provided] to you, please let me know. You can do this by providing a note to my tipstaff, outlining the part of the evidence you wish to hear.

Conclusion

I have now completed my summing-up. With a final reminder that any verdict[s] you reach must be unanimous, I ask you to go to the jury room to consider your verdict[s]. When you have reached a verdict or if you have a question, please send a note to the court through the tipstaff.

Last updated: 27 March 2019

3.16 Consolidated Final Directions

Click here for a downloadable version of this document

Note: This document replicates the directions in 3.2–3.9, 3.11, 3.12 and 3.15. If the case involves an intermediary, the direction in 3.14 should be added at an appropriate point.

[73] In *MRJ v R* (2011) 33 VR 306; [2011] VSCA 374, the Court of Appeal stated that jurors should be instructed to omit any information on the outcome of discussions when asking for further directions or assistance.

Overview of Final Directions

Members of the jury, before you leave the court to consider your verdict, I must give you instructions on the law and the evidence. There are three parts to these instructions.

First, I will remind you of several important principles of law which apply to this case. While I have already told you some of these principles at different times during the trial, it is important that I tell them to you again – not only to remind you of what I said earlier, but also to place those principles in the context of the trial which has now taken place. You must apply these instructions carefully.

Secondly, I will tell you the issues that you need to decide, and will refer you to the evidence that relates to those issues and the arguments from prosecution and defence counsel. In doing this, I will have to be selective. The mere fact that I don't mention certain evidence does not mean that that evidence is not important. Similarly, the fact that I include certain evidence does not make that evidence more important than other evidence. You must consider all of the evidence, not just the parts of it that I mention. Which parts of that evidence are important or not important is a matter for you to determine.

Thirdly, I will explain what verdict[s] you may return in this case, and how you may wish to approach your discussion of the case in the jury room.

Remember, if at any time you have a question about anything I say, you are free to ask me by passing a note to my tipstaff.

Review of the Role of the Jury

In this case, it is alleged by the prosecution that NOA committed the offence[s] of [*insert offences*].[74] S/he has pleaded "not guilty", and so it is for you, and you alone, to decide whether s/he is guilty or not guilty of [this/these] crime[s].

You do that by deciding what the facts are in this case. As I have told you, you are the only ones in this court who can make a decision about the facts. You make that decision from all of the evidence that has been given during the trial.

You then apply the law to the facts that you have found, and decide whether the accused is guilty or not guilty of the offence[s] charged.

Review of the Role of the Judge

It is my role, as the judge, to explain to you the principles of law that you must apply to make your decision. You must accept and follow all of those directions.

I want to emphasise again that it is not my responsibility to decide this case – that is your role. The verdict that you return has absolutely nothing to do with me. So while you must follow any directions I give you about the law, you are not bound by any comments I may make about the facts.

As I told you at the start of the trial, it is unlikely that I will make any comments about the evidence. If I do make a comment about the evidence, you must not give it any extra weight because I, as the judge, have made that comment. You must disregard any comment I make about the evidence, unless you agree with that view after making own independent assessment of the evidence. That is what I mean when I say that you alone are the judges of the facts in this case.

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[74] This charge is drafted for cases involving one accused. If the case involves multiple accused, it will need to be modified accordingly.

Review of the Role of Counsel

Throughout the trial, counsel have presented the prosecution and defence cases. While their comments and arguments have been designed to assist you to reach your decision, you also do not need to accept what they have said. Of course, if you agree with an argument they have presented, you can adopt it. But if you do not agree with their view, you must put it aside.

Review of the Need to Decide Solely on the Evidence

I have told you that it is your task to determine the facts in this case. In determining the facts, you must consider all of the evidence that you heard from the witness box. Remember, it is the answers the witnesses gave that are the evidence, not the questions they were asked.

You must also take into account the exhibits that were tendered. These include [*insert examples*]. When you go to the jury room to decide this case, [most of/some of] the exhibits will go with you, where you may examine them. Consider them along with the rest of the evidence and in exactly the same way.[75] [However, the following exhibits will not go with you to the jury room [*insert exhibits*]].

[*If any formal admissions were put to the jury, add the following shaded section.*]

In addition, in this case the following admissions were made: [*insert admissions*]. You must accept these admissions as established facts.

Nothing else is evidence in this case. As I have told you, this includes any comments counsel make about the facts.[76] It also includes:

[*Identify other relevant matters which do not constitute evidence in the case. See* 2.2 Providing Documents to the Jury *and associated charges. It may be appropriate to insert charges relating to these matters here*.]

It your duty to decide this case only on the basis of the witnesses' testimony, [the admissions] and the exhibits. You should consider the evidence which is relevant to a particular matter in its individual parts and as a whole, and come to a decision one way or another about the facts.

[75] Depending on the nature of the evidence, it may be necessary to warn the jury of the possible dangers of conducting experiments in the jury room: see 1.5 Decide Solely on the Evidence for further information.

[76] If the accused is unrepresented, the jury should be told that what s/he said in his/her addresses, or when questioning witnesses, is also not evidence.

As I have told you, in doing this you must ignore all other considerations, such as any feelings of sympathy or prejudice you may have for anyone involved in the case. You should not, for example, be influenced by [*insert case specific examples*].[77] Such emotions have no part to play in your decision.

Remember, you are the judges of the facts. That means that in relation to all of the issues in this case, you must act like judges. You must dispassionately weigh the evidence logically and with an open mind, not according to your passion or feelings.

Outside Information

At the start of the trial I also told you that you must not base your decision on any information you may have obtained outside this courtroom. For example, you must completely ignore anything that you have seen or heard in the media about this case, or about the people involved in it. You must consider only the evidence that has been presented to you here in court.[78]

Circumstantial Evidence and Inferences

I will now give you some directions about how you approach the evidence in this case.

Evidence comes in many forms. It can be evidence about what someone saw or heard. It can be an exhibit admitted into evidence. It can be someone's opinion.

Some evidence can prove a fact directly. For example, if a witness said that s/he saw or heard it raining outside, that would be direct evidence of the fact that it was raining.

Other evidence can prove a fact indirectly. For example, if a witness said that s/he saw someone enter the courthouse wearing a raincoat and carrying an umbrella, both dripping wet, that would be indirect or 'circumstantial' evidence of the fact that it was raining outside. You can conclude from the witness's evidence that it was raining, even though s/he didn't actually see or hear the rain.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. Although people often believe that indirect or circumstantial evidence is weaker than direct evidence, that is not true. It can be just as strong or even stronger. What matters is how strong or weak the particular evidence is, not whether it is direct or indirect.

However, you must take care when drawing conclusions from indirect evidence. You should consider all of the evidence in the case, and only draw reasonable conclusions based on the evidence that you accept. Do not guess. While we might be willing to act on the basis of guesses in our daily lives, it is not safe to do that in a criminal trial.

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[77] Some matters which it may be appropriate to point out (as they could conceivably give rise to prejudice or sympathy) include:

•The nature of the injuries suffered by the complainant;

•The race or ethnicity of the accused or the complainant;

•The sexual orientation of the accused or the complainant;

•The fact that the accused or the complainant are drug users.

In some cases, it may be appropriate to point out that although a party's behaviour does not accord with what the jury might think is morally acceptable, the jury is not a court of morals. Everyone has the right to be treated equally before the law.

[78] If there has been significant publicity about the case or the parties involved, it may be necessary to give a more detailed warning.

[*In cases involving a significant amount of circumstantial evidence, add the following shaded section.*]

In determining whether a conclusion is reasonable, you should look at all of the evidence together. It may help you to consider the pieces of evidence to be like the pieces of a jigsaw puzzle. While one piece may not be very helpful by itself, when all the pieces are put together the picture may become clear.

However, when putting all the pieces together, you must take care not to jump to conclusions. It is sometimes easy for people to be too readily persuaded of a fact, on the basis of insufficient evidence or evidence that turns out to be truly coincidental. Once convinced of that fact, they may then seek support for it in the other evidence, perhaps distorting that evidence to fit their theory or disregarding 'inconvenient' facts. You must make sure that you do not do this. You must keep an open mind, and be prepared to change your views.

You may only convict the accused if you are satisfied that his/her guilt is the only reasonable conclusion to be drawn from the whole of the evidence, both direct and indirect. If there is another reasonable view of the facts which is consistent with the accused's innocence, then the prosecution will not have proved his/her guilt beyond reasonable doubt, and you must acquit him/her.

Review of the Assessment of Witnesses

You have now listened to what each witness has said, and watched how they presented their evidence and answered the questions under cross-examination. No further evidence will be given.

To decide what the facts are in this case, you now need to assess this evidence. It is up to you to decide how much or how little of the testimony of any witness you will believe or rely on. You may believe all, some or none of a witness's evidence. No one can tell you how to approach any particular witness's evidence in this regard.

It is also for you to decide what weight should be attached to any particular evidence – that is, the extent to which the evidence helps you to determine the relevant issues.

As I mentioned at the start of the trial, in assessing witnesses' evidence, some matters which may concern you include their credibility and reliability. It is for you to judge whether the witnesses told the truth, and whether they correctly recalled the facts about which they gave evidence. This is something you do all the time in your daily lives. There is no special skill involved – you just need to use your common sense.

While you may take into account the witness's manner when he or she gave evidence, you should be careful when doing so. As I noted at the start of the case, giving evidence in a trial is not common, and may be a stressful experience. People react and appear differently. Witnesses come from different backgrounds, and have different abilities, values and life experiences. There are too many variables to make the manner in which a witness gives evidence the only, or even the most important, factor in your decision.

In making your decision, do not consider only the witnesses' testimony. Also take into account the exhibits [and admissions]. Consider all of the evidence in the case, use what you believe is true and reject what you disbelieve. Give each part of it the importance which you – as the judge of the facts – think it should be given, and then determine what, in your judgment, are the true facts.

[*This may be an appropriate point to instruct the jury about any issues relating to particular* types of witnesses *who have given evidence, such as:*

- 4.1 The Accused as a Witness*;*
- 4.2 Child Witnesses*;*
- 4.21 Unreliable Evidence Warning.

It may also be an appropriate point to instruct the jury about any issues relating to particular types of evidence *given in the case, such as:*

- 4.3 Character Evidence*;*
- 4.5 Confessions and Admissions*;*
- 4.12 Identification Evidence*;*
- 4.13 Opinion Evidence*;*
- 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements);
- 4.17 Tendency Evidence;
- 4.18 Coincidence Evidence.]

Review of the Onus and Standard of Proof

I want to emphasise again that under our justice system people are presumed to be innocent, unless and until they are proved guilty. So before you may return a verdict of guilty, the prosecution must satisfy you that [each of] the accused is guilty of the charge[s] in question. The accused does/do not have to prove anything.

The prosecution must do this by proving [each of] the accused's guilt of the charge[s] beyond reasonable doubt.

Beyond reasonable doubt is the highest standard of proof that our law demands. It is not enough for the prosecution to prove that the accused is probably guilty, or very likely to be guilty.

As I have told you, it is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so. A reasonable doubt is not an imaginary or fanciful doubt, or an unrealistic possibility.

You cannot be satisfied the accused is guilty if you have a reasonable doubt about whether the accused is guilty.

As I have told you, these words mean exactly what they say – proof beyond reasonable doubt.

The prosecution does not need to prove every fact that they allege to this standard. It is the essential ingredients or "elements" of the charge[s] that they must prove beyond reasonable doubt. I will explain these elements in detail in a moment.

[*If a defence is in issue, add the following shaded section.*]

The prosecution must also disprove any possible defences beyond reasonable doubt. In this case, that means the prosecution must prove, beyond reasonable doubt, that NOA was not [*insert relevant defence*]. I will also explain this defence in more detail shortly.

It is only if you are satisfied that the prosecution has proven all of the elements of a charge [and disproved all defences] beyond reasonable doubt that you may find the accused guilty of that charge. If you are not satisfied that the prosecution has done this, your verdict must be "Not Guilty".

Sole Evidence Direction

[*If there is a single piece of evidence relied on to prove one or more elements, add the following shaded section*.]

In this case, the only evidence that [*identify relevant elements or facts in issue*] is the evidence that [*describe relevant single piece of evidence, e.g.* "NOA confessed to NOW"]. It follows that you cannot be satisfied

beyond reasonable doubt that [*identify relevant elements or facts in issue*] unless you are satisfied, beyond reasonable doubt, that the evidence of [*describe relevant single piece of evidence*] is true and proves [*identify relevant elements or facts in issue*].

Liberato Direction

[*If the case turns on a conflict between the evidence of a prosecution witness and a defence witness, and there is a reasonable likelihood that the jury will think that they must believe the defence evidence to be true before they can acquit the accused, add the following shaded section.*]

In this case, there is a clear conflict between the evidence of [*insert name of prosecution witness*] and the evidence of [*insert name of defence witness*].

It is not necessary for you to accept [*insert name of defence witness's*] evidence in order to find the accused "not guilty". In keeping with the requirement that the prosecution must prove their case beyond reasonable doubt, you must acquit NOA if [*insert name of defence witness's*] evidence gives rise to a reasonable doubt.

This is the case even if you prefer the evidence of [*insert name of prosecution witness*] to the evidence of [*insert name of defence witness*]. It is not sufficient for you merely to find the prosecution case to be preferable to the defence case. Before you can convict NOA, you must be satisfied that the prosecution have proven their case beyond reasonable doubt.

So even if you do not think [*insert name of defence witness*] is telling the truth, but are unsure where the truth lies, you must find the accused "not guilty".

In fact, even if you are convinced that [*insert name of defence witness's*] evidence is not true, it is not the case that you must convict NOA. In such circumstances, you should put [*insert name of defence witness's*] evidence to one side, and ask yourself whether the prosecution have proved the accused's guilt beyond reasonable doubt on the basis of the evidence you do accept.

Review of Separate Consideration – Multiple Accused

[*If the case involves multiple accused, add the following shaded section.*]

As you know, in this trial there are really [*insert number*] trials [all] being heard together for convenience.

I want to remind you that you must be careful not to allow convenience to override justice. The accused and the prosecution are entitled to have the case against each accused considered separately.

You must consider the case against each accused separately, in light only of the evidence which applies to that accused. You must ask yourselves, in relation to each accused, whether the evidence relating to that accused has satisfied you, beyond reasonable doubt, that s/he is guilty of the offence s/he has been charged with. If the answer is yes, then you should find him/her guilty. If the answer is no, then you should find him/her not guilty.

You will note that I said you must consider the case against each accused "in light only of the evidence which applies to that accused". This is because some of the evidence you have heard in this case is only relevant to the case against one accused or another. If a particular piece of evidence is only relevant to one accused, you may only use it when deciding whether or not that accused is guilty. You must not consider it in relation to [any of] the other accused.

In this case [*instruct jury about which evidence is or is not admissible in relation to each accused*].

Review of Separate Consideration – Multiple Charges

[*If the case involves multiple charges, add the following shaded section.*]

As you know, in this trial the prosecution has brought [*insert number*] charges against the accused. As I explained earlier, while these are separate matters, they are [all] being dealt with in the one trial for convenience.

I want to remind you that you must be careful not to allow convenience to override justice. Both the prosecution and the accused are entitled to have each charge considered separately.

It would therefore be wrong to say that simply because you find the accused guilty or not guilty of one charge, that s/he must be guilty or not guilty, as the case may be, of another.

[*If logic dictates that a finding in relation to one charge is material to another charge, this should be clearly explained to the jury here. For example, the jury should be told if an acquittal on one charge would require an acquittal on another*.]

Each charge must be considered separately, in light only of the evidence which applies to it. You must ask yourselves, in relation to each charge, whether the evidence relating to that charge has satisfied you, beyond reasonable doubt, that the accused is guilty of that particular crime. If the answer is yes, then you should find the accused guilty of that charge. If the answer is no, then you should find the accused not guilty of it.

You will note that I said you must consider each charge "in light only of the evidence which applies to it". This is because some of the evidence you have heard in this case is only relevant to one charge or another. If a particular piece of evidence is only relevant to one charge, you may only use it when deciding whether or not the accused is guilty of that charge. You must not consider it in relation to [any of] the other charge[s].

In this case [*instruct jury about which evidence is or is not admissible in relation to each charge*].

Judge's Summary of Issues and Evidence

I am now going to take you to the issues you need to decide, and remind you of some of the evidence that has been given in relation to those issues. Before doing so, I want to remind you again that the mere fact that I may leave out a part of a particular witness's evidence does not mean that that evidence is not important.

Similarly, the fact that I include evidence from a particular witness does not make that evidence more important than the evidence of other witnesses. You must consider all of the evidence, not just the parts of it that I mention. Which parts of that evidence are important or not important is a matter for you to determine.

I also want to emphasise again that it is not my responsibility to decide this case – that is your role. So while you must follow any directions I give you about the law, you are not bound by any comments I may make about the facts. If I happen to express any views upon questions of fact, you must disregard those views, unless they happen to agree with your own assessment of the evidence.

[*Insert directions on relevant offences, incorporating references to the evidence, parties' arguments and evidentiary directions. Judges should only refer to so much of the evidence as is relevant to the real issues in the case, clearly relating the evidence to the issues*.]

Unanimous and Majority Verdicts

I will now turn to the third part of my directions – The verdicts you can return and how you reach them.

In almost all criminal cases, a verdict of guilty or not guilty must be unanimous. That is, whatever decision you make, you must all agree on it.

So if, for example, you are to find NOA guilty of [*insert charge 1*], then you must all agree that [he/she] is guilty of that offence. In exactly the same way, if you are to find NOA not guilty of [*insert charge 1*], then you must all agree that [he/she] is not guilty of that offence.

However, this requirement does not mean that you must all reach your verdict for the same reasons. Indeed, you may each rely on quite different reasons for making your decision. For example, you may each rely upon different parts of the evidence, or you may each emphasise different aspects of the evidence.

What is important is that, no matter how you reach your verdict, you all agree. Your verdict of guilty or not guilty [in relation to each charge/for each person charged] must be unanimous, the agreed decision of you all.

You may have noted that I said that a verdict must be unanimous in "almost all" criminal cases. There are some circumstances in which a jury is allowed to give a majority verdict instead of a unanimous verdict. However, this is not yet one of those cases and may never be. I will tell you if the situation changes. Until I do, you should consider that your verdict[s] of guilty or not guilty must be unanimous.[79]

Materially Different Issues or Consequences

[*The following shaded section may be added if evidence has been presented which shows possible alternative bases of responsibility for a particular offence, and the bases involve* materially different issues or consequences*. For example, culpable driving causing death due to gross negligence or culpable driving causing death due to intoxication*.]

Because of the nature of this case, I need to give you some more directions about how this requirement for unanimity works in relation to [*insert relevant offence*].

The prosecution has argued that there are two different bases upon which you can find NOA guilty of this offence.

Firstly, the prosecution has argued that NOA is guilty of [*insert offence*] because [he/she] [*insert summary of one basis for guilty*].

Alternatively, the prosecution has argued that NOA is guilty of [*insert offence*] because [he/she] [*insert summary of alternative basis*].

In order to find NOA guilty of [*insert offence*], you only need to find that one of these two alternatives has been proven beyond reasonable doubt.

However, all twelve of you must agree that the same alternative has been proven. For example, all of you must agree that NOA was guilty because [*insert one basis*]. Or all of you must agree that NOA was guilty because [*insert alternative basis*].

If some of you find NOA guilty due to [*insert basis one*], and others find [him/her] guilty due to [*insert alternative basis*], then you have not reached a unanimous verdict.

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[79] This paragraph should be excluded in cases of murder, treason, offences against sections 71 or 72 of the *Drugs, Poisons and Controlled Substances Act 1981*, or offences against a law of the Commonwealth, as majority verdicts are not permitted in relation to such offences (*Juries Act 2000* s 46).

No Materially Different Issues or Consequences

[*The following shaded section should be added if evidence has been presented which shows possible alternative bases of responsibility for a particular offence, and the bases* do not involve materially different issues or consequences*. For example, manslaughter by unlawful and dangerous act or manslaughter by gross negligence.*

It should also be added if the prosecution has argued that the accused could be liable as either a principal or an accessory.]

Because of the nature of this case, I need to give you some more directions about how this requirement for unanimity works in relation to [*insert relevant offence*].

The prosecution has argued that there are two different bases upon which you can find NOA guilty of this offence.

Firstly, the prosecution has argued that NOA is guilty of [*insert offence*] because [he/she] [*insert summary of one basis for guilty*].

Alternatively, the prosecution has argued that NOA is guilty of [*insert offence*] because [he/she] [*insert summary of alternative basis*].

Although you must all reach the same decision in relation to this offence – either guilty or not guilty – you do not need to all rely on the same basis in reaching that decision. For example, seven of you might find NOA guilty of [*insert offence*] due to [*insert one basis*], while the other five of you might find NOA guilty due to [*insert alternative basis*]. That does not matter – as long as you all reach the same verdict in relation to [*insert offence*]. In such a situation, your verdict is still considered to be unanimous, despite your different reasoning.

What is important is that you all agree on the final decision. Your verdict of guilty or not guilty in relation to [*insert offence*] must be unanimous.

Multiple Discrete Acts

[*The following shaded section may be added if evidence has been presented of multiple acts on the basis of which guilt can be found, but there must be unanimity as to at least one* [*or a specified number*] *of those acts having been committed.*

This requirement has mostly arisen in relation to a charge of maintaining a sexual relationship with a child under 16, under which the jury must agree on (at least) the same three acts having been committed from amongst all of the acts presented by the prosecution. For this reason, this charge has been drafted in relation to the requirement for agreement on three acts. If necessary, this can be amended to instead require agreement on a different number of acts.]

Because of the nature of this case, I need to give you some more directions about how this requirement for unanimity works in relation to [*insert relevant offence*].

In attempting to prove NOA's guilt in relation to this offence, the prosecution has presented evidence of a number of different acts which it alleges provide the basis for you to find [him/her] guilty.

The prosecution has alleged that [*insert summary of the different acts relied upon by the prosecution*].

You do not need to find that [he/she] committed all of these acts. In order for you to find NOA guilty, you must be satisfied beyond reasonable doubt that [he/she] committed at least three of these acts.

However, before you can find NOA guilty of [*insert name of offence*], all twelve of you must agree that the same three acts have been proven beyond reasonable doubt. If some of you find NOA guilty on the basis of three particular acts [for example …], and others find [him/her] guilty on the basis of a different three acts [such as …], then you have not reached a unanimous verdict.

Taking a Unanimous Verdict

Once you have reached a unanimous verdict on [all of] the charge[s], you should push the buzzer in the jury room and tell my tipstaff. [He/she] will then arrange for us all to return to court.

When you have taken your places in the jury box, my associate will ask you whether you have agreed on a verdict, and what your verdict is [in relation to each charge in turn]. You, [Mr/Madam] foreperson, will answer "guilty" or "not guilty", according to the decision the jury has reached.

My associate will then read your verdict back to you, to confirm that what [he/she] has recorded is correct. If any of you think that what my associate has recorded is wrong in any way, you should say so immediately. The record of your verdict[s] can then be corrected.

Alternative Charges on the Indictment

[*If there are alternative charges on the indictment, add the following shaded section.*]

In this case, charges [*insert principal charge*] and [*insert alternative charge*] relate to the same alleged event, and are alternatives. The prosecution does not suggest that the accused should be convicted of both of these charges, but of one or the other.

When you are delivering your verdict[s], you will first be asked for your verdict on [*insert principal offence*], which is the more serious charge.[80] If you reach a verdict of guilty in relation to that charge, you will not be asked for a verdict on [*insert alternative charge*].

It is only if you unanimously reach a verdict of not guilty in relation to [*insert principal offence*] that you will be asked to deliver a verdict on [*insert alternative charge*].

I remind you that the accused is entitled to a separate trial of each charge, and that you must not reach your verdict by compromising between them.

Alternative Charges Not on the Indictment

[*If there are alternative charges not on the indictment, add the following shaded section.*]

In this case, the accused has been charged with [*insert principal offence*]. The law says that when a person is charged with this offence, you are entitled to find him/her guilty of the offence of [*insert alternative offence*] instead.

When you are delivering your verdict[s], you will first be asked for your verdict on [*insert principle offence*]. If you are satisfied, beyond reasonable doubt, that NOA is guilty of that offence, then you will not be asked to return a verdict on [*insert alternative offence*].

However, if you all agree that NOA is not guilty of [*insert principle offence*], you will be asked for your verdict on whether the prosecution has proved, beyond reasonable doubt, all the elements of [*insert alternative offence*].

I remind you that the accused is entitled to a separate trial of each charge, and that you must not reach your verdict by compromising between them.

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[80] This charge is based on the assumption that the charges are of differing gravity. If the charges are of the same gravity, it will need to be modified accordingly.

Concluding Remarks

Questions

If, at any stage of your discussions, you would like me to repeat or explain any directions of law I have given you, please do not hesitate to ask. It is fundamental that you understand the principles you are required to apply. If you have any doubt about those principles, then you are not only entitled to ask for further assistance, but you should ask for it.

You should do this by handing a note to my tipstaff indicating what your question is. S/he will pass it to me, and after discussing the matter with counsel, we will reassemble in court to assist you.

There is really only one thing that you must not include on any note, and that is the numbers involved in any part of your discussions such as any vote within the jury. That matter must remain completely confidential to you and that includes even telling me about it in a note. Please in any note leave the numbers out.[81]

Transcripts

[*If the jury has not been provided with a transcript, add the following shaded section.*]

I also want to remind you that all of the evidence in this trial has been recorded and transcribed. If at any time during your discussions you wish to have a certain section of the evidence replayed to you, or have a section of the transcript [read back/provided] to you, please let me know. You can do this by providing a note to my tipstaff, outlining the part of the evidence you wish to hear.

Conclusion

I have now completed my summing-up. With a final reminder that any verdict[s] you reach must be unanimous, I ask you to go to the jury room to consider your verdict[s]. When you have reached a verdict or if you have a question, please send a note to the court through the tipstaff.

Last updated: 1 January 2023

4 Evidentiary Directions

4.1 The Accused as a Witness

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Warning! The law relating to directions on the accused giving evidence was modified by the *Jury Directions and Other Acts Amendment Act 2017*. There has not yet been appellate guidance on the operation of these provisions. This information should be used with caution. Further information about the *Jury Directions and Other Acts Amendment Act 2017* is available in the Department of Justice and Regulation report, 'Jury Directions: A Jury-Centric Approach Part 2'

1. This topic addresses the general directions that may be given when the accused has chosen to give evidence. It does not address any specific directions that may be required where the accused is cross-examined about matters such as his or her character. Those issues are addressed in other chapters in Part 4 of the Charge Book (see, e.g. 4.3 Character Evidence).

[81] In *MRJ v R* [2011] VSCA 374, the Court of Appeal stated that jurors should be instructed to omit any information on the outcome of discussions when asking for further directions or assistance.

When Can the Accused Give Evidence?

2. As the accused is a competent, but not compellable, witness for the defence (*Evidence Act 2008* ss 12, 17), in every criminal trial the accused will have a choice about whether or not to give evidence.

3. While the accused's evidence should usually be given before the evidence of any other defence witnesses (as this will prevent the jury from thinking that the accused tailored his or her evidence to fit with the other evidence in the case: *RPS v R* (2000) 199 CLR 620), this is not mandatory (*Criminal Procedure Act 2009* s 231(4)).

Effect of Jury Directions Act 2015

4. The law on jury directions about an accused giving evidence has been changed by the *Jury Directions Act 2015* following amendments by the *Jury Directions and Other Acts Amendment Act 2017*, which commenced on 1 October 2017.

5. The Act:

    - Prohibits the trial judge, prosecution and defence from saying or suggesting to the jury:
        - That an interest in the outcome of the trial is a factor to take into account when assessing the evidence of witnesses generally; or
        - That the evidence of an accused is less credible, or requires more careful scrutiny, because any person who is on trial has an interest in the outcome of that trial (*Jury Directions Act 2015* s 44H);
    - Provides that the defence may request that the judge direct the jury on the accused giving evidence or the accused's interest in the outcome of the trial; and specifies what the judge must explain in such directions (*Jury Directions Act 2015* s 44I);
    - In relation to the accused's evidence, prohibits directions about:
        - Whether the accused is under more stress than any other witness; or
        - that the accused gave evidence because a guilty person who gives evidence will more likely be believed; or
        - that the accused gave evidence because an innocent person can do nothing more than give evidence (*Jury Directions Act 2015* s 44J); and
    - Abolishes any rule of common law that:
        - prohibits a judge from directing a jury on the interest a witness or an accused may have in the outcome of a trial; and
        - requires or permits a judge to direct a jury about whether the accused is under more stress than any other witness; or that the accused gave evidence because a guilty person who gives evidence will more likely be believed, or an innocent person can do nothing more than give evidence (*Jury Directions Act 2015* s 44K).

Content of Directions

6. The need for any direction about the accused as a witness depends on whether a direction is sought or whether there are substantial and compelling reasons for giving a direction in the absence of any request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

7. *Jury Directions Act 2015* s 44I, as amended in 2017, sets out two types of directions about an accused giving evidence:

(a) A direction about the giving of evidence by the accused (Jury Directions Act 2015 s 44I(1)(a)); and

(b) A direction about the interest the accused has in the outcome of the trial (Jury Directions Act 2015 s 44I(1)(b)).

8. While s 44I(2) sets out four directions that must be given when the defence requests a direction "referred to in subsection (1)", the approach adopted in this Charge Book is that the directions in s 44I(2)(a)–(c) are relevant when the defence requests a direction about the accused giving evidence under s 44I(1)(a), while the direction in s 44I(2)(d) is only relevant when the defence requests a direction under s 44I(1)(b).

9. Therefore, where the defence has requested a direction about the accused giving evidence, the judge must explain that:

   - The accused is not required to give evidence; and
   - The fact that the accused has given evidence does not change the prosecution's obligation to prove that the accused is guilty; and
   - The jury must assess the evidence of the accused in the same way that the jury assesses the evidence of any other witness (see 1.6 Assessing Witnesses for information about the assessment of other witnesses' evidence) (*Jury Directions Act 2015* s 44I(2)(a)–(c));

10. When the defence requests a direction about the accused's interest in the outcome of the trial, the judge must explain that:

    - The jury must not give less weight to the evidence of the accused just because any person who is on trial has an interest in the outcome of that trial (*Jury Directions Act 2015* s 44I(2)(d)).

11. The directions provided by s 44I(2) largely reflect the common law (see *Robinson v R (No 2)* (1991) 180 CLR 531; *R v D'Arcy* (2001) 122 A Crim R 268; *R v Goldman* [2007] VSCA 25).

12. Under common law, a direction that the jury must not give less weight to the accused's evidence just because a person who is on trial has an interest in the outcome of the trial would only be given in exceptional circumstances, to correct an improper prosecution argument. Alternatively, the direction was sometimes necessary as a corrective measure when it was appropriate to invite the jury to consider the interest of a witness other than the accused in the outcome of the case and it was necessary to ensure the jury did not apply the same reasoning to the accused's evidence (*De Rosa v Western Australia* (2006) 32 WAR 136, [44], [56]; *R v Rezk* [1994] 2 Qd R 321; *R v Parsons & Brady* [2015] SASCFC 183).

13. While the direction may now be requested by defence counsel in accordance with Part 3 of the *Jury Directions Act 2015*, judges should exercise caution before giving this direction due to the risk of the direction backfiring and giving emphasis to the accused's interest in the outcome of the trial.

14. Given that the prosecution, defence counsel and the judge are prohibited from making a general statement that an interest in the outcome of the trial is a factor to take into account when assessing the evidence of witnesses (see *Jury Directions Act 2015* s 44H, discussed below), there will be a reduced need for a curative direction that interest in the outcome is a factor that can be relevant to witnesses, but not the accused.

Other General Direction Potentially Relevant to the Accused

15. At common law, the judge was not prohibited from reminding the jury that people often attempt to make excuses for their wrongful conduct, if it was be relevant to do so in a particular case. Such a statement did not single out the evidence of the accused or undermine the presumption of innocence (*R v Franco* (2006) 168 A Crim R 322; *Rowbottom v R* (2003) 13 NTLR 197). Section 44J does not appear to preclude this type of direction. See also 4.6 Incriminating Conduct (Post Offence Lies and Conduct) and *Jury Directions Act 2015* Part 4, Division 1.

Prohibited directions

16. *Jury Directions Act 2015* s 44J prohibits three directions which were usually given at common law about the evidence of an accused person:

    - That in assessing the evidence of the accused, the jury should bear in mind that the accused may be under more pressure than other witnesses;
    - That the accused may have given evidence because a guilty person who gives evidence is more likely to be believed; and
    - That the accused may have given evidence because an innocent person can do nothing more than give evidence (compare *R v Haggag* (1998) 101 A Crim R 593; *R v Buckley* (2004) 10 VR 215).

Prohibited statements

17. *Jury Directions Act 2015* s 44H, as amended in 2017, provides that the trial judge, the prosecution and defence counsel must not say or suggest to the jury that:

    (a) An interest in the outcome of the trial is a factor to take into account in assessing the evidence of witnesses generally; or

    (b) The evidence of an accused is less credible, or requires more careful scrutiny, because any person who is on trial has an interest in the outcome of that trial.

Interest in the Outcome of the Case

18. The judge, prosecution and defence must not suggest that an interest in the outcome of the trial is a factor to take into account in assessing the evidence of witnesses generally (*Jury Directions Act 2015* s 44H(a), as amended in 2017).

19. While the judge, prosecution and defence counsel must not suggest that an interest in the outcome of the trial is a general factor relevant to assessing witnesses, they may suggest that a witness has a particular interest in the outcome of that trial, and that particular interest does or may affect the witness' credibility (Note to *Jury Directions Act 2015* s 44H).

20. *Jury Directions Act 2015* s 44H Note 2 also mentions the accused. It is likely that an accused's particular interest in the outcome of a case will only be relevant in exceptional cases where the accused may have a motive to lie which could operate independently of the outcome of the case. For example, an interest in protecting a co-accused family member, or a fear of the true offenders. Where it is suggested than an accused has such a particular interest, the judge should invite submissions from the parties on the appropriate direction to be given.

21. While care must be taken in construing s 44H(a) with reference to its common law predecessors, particularly given s 44K(1) and its first Note, the experience of the common law may provide guidance on the meaning of particular interest.

22. At common law, it was recognised that when a jury was assessing the evidence of any witness, including an accused, the jury was entitled to consider whether "some particular interest or purpose … will be served or promoted in giving evidence in the proceeding" (*Robinson v R (No 2)* (1991) 180 CLR 531).

23. However, it was not permitted for a judge to direct the jury that it should "evaluate evidence on the basis of the interest of witnesses in the outcome" because "[e]xcept in the most exceptional case, such a direction inevitably disadvantages the evidence of the accused when it is in conflict with the evidence for the Crown" (*Robinson v R (No 2)* (1991) 180 CLR 531).

24. The rationale for this prohibition was that it undermined the presumption of innocence and distracted the jury from its function of assessing whether the prosecution had proved its case beyond reasonable doubt (*Hargraves & Stoten v R* (2011) 245 CLR 257).

25. A direction to the jury to consider the accused's interest in the outcome undermined the presumption of innocence and risked circular reasoning because it invited the jury to assume that the accused was guilty and so had a motive to lie as a basis for giving the accused's evidence less weight and to use that as a stepping stone to a conclusion of guilt (*R v Haggag* (1998) 101 A Crim R 593. See also *R v FAR* [1996] 2 Qd R 49).

26. Under the common law, a judge could invite the jury to consider a witness' interest in the outcome of the proceeding as a factor that could affect the witness' credibility, provided it was made clear that this consideration could not be applied to the accused (*R v Parsons & Brady* [2015] SASCFC 183; *De Rosa v WA* (2006) 32 WAR 136).

27. In light of this history, it is likely that *Jury Directions Act 2015* s 44H(a) prohibits any general invitation by the prosecution, defence counsel or the judge to consider a witness' interest in the outcome as a factor relevant to the witness' credibility. However, parties remain able to invite the jury to give less weight to a witness' evidence due to identified considerations specific to that individual (see *Jury Directions Act 2015* s 44H Note 2). Where the identified consideration could also apply to the accused, the judge should invite submissions from the parties on whether any direction quarantining this consideration from applying to the accused is necessary, such as a direction under s 44I(2)(d).

Credibility of Accused and Need for Careful scrutiny

28. The judge, prosecution and defence also must not suggest that the accused's evidence is less credible, or requires more careful scrutiny, because any person who is on trial has an interest in the outcome of that trial (*Jury Directions Act 2015* s 44H(b), as amended in 2017).

29. This is consistent with common law principles, which held that it was impermissible for a judge to single out the accused as a person whose evidence required greater scrutiny for no reason other than that he or she was the accused. Such a direction had the effect of treating the accused as a class of suspect witness like an accomplice (see *Robinson v R (No 2)* (1991) 180 CLR 531; *Hargraves & Stoten v R* (2011) 245 CLR 257; *R v Stafford* (1993) 67 ALJR 510; *R v Ramey* (1994) 68 ALJR 917; *R v Osland* [1998] 2 VR 636).

30. Under common law, it was permissible for the accused to be listed as one of a number of witnesses whose evidence must be carefully examined due to its importance in deciding the issues in the trial. Such an approach did not undermine the presumption of innocence and was not prejudicial to the accused, as it placed the accused's evidence in the same category as the evidence given by all other crucial witnesses (*Martinez v Western Australia* (2007) 172 A Crim R 389). The issue has not yet been considered in relation to *Jury Directions Act 2015* s 44H.

31. At common law, the judge could tell the jury to "carefully consider" an issue that has arisen in the trial, even if the accused is the only witness who has given evidence about that issue, as long as the warning attaches to the issue itself, rather than the fact that it is the accused who has given evidence about that issue (*R v Goodman* [2007] VSCA 25; *R v Franco* (2006) 168 A Crim R 322).

32. While it has not been decided, it appears likely that *Jury Directions Act 2015* s 44H(b) operates in the same manner as the common law prohibition. As such, it does not prevent directions about the need for scrutiny based on the importance of evidence on an issue. As at common law, it is likely that the provision only prohibits directions which state that there is a need for scrutiny of the accused because of his or her status as an accused.

Joint Trials

33. In trials of two or more accused, the judge must carefully consider the competing demands of justice, especially where one accused gives evidence and another accused stands mute (*R v Webb* (1994) 181 CLR 41).

34. At common law, it was suggested that the judge might:

    - Omit or modify the standard direction about evaluating the evidence of an accused (because such a direction risks prejudicing any accused who did not give evidence);

- Warn the jury not to attach too much significance to the election of one accused to stand mute; and
- Tell the jury to make sure that they approach the evidence of the other accused in a balanced and appropriate fashion (*R v Phillips* [1997] 1 VR 558).

35. Under the *Jury Directions Act 2015*, as amended in 2017, the judge will need to consider whether the statutory directions in s 44I(2) pose any risk of prejudice to an accused who stands mute. The judge should invite submissions from both parties about whether any directions need to be modified to ensure fairness to both accused.
36. The judge should also take into account *Jury Directions Act 2015* s 42, which prohibits the judge, prosecution and defence counsel from suggesting that, because an accused did not give evidence, the jury may conclude that the accused is guilty or is more likely to be guilty, or would not have given evidence that would have assisted his or her case. See 4.10 Defence Failure to Call Witnesses for further information.
37. Particular care must also be taken in relation to accomplice warnings. See 4.21 Unreliable Evidence Warning and 4.22 Criminally Concerned Witness Warnings for further information.

Last updated: 2 October 2017

4.1.1 Charge: Accused Giving Evidence

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This charge may be given when the accused gives evidence, and defence counsel have requested a direction on the giving of evidence by the accused under s 44I(1)(a).

In this case, NOA chose to give evidence. S/he did not have to do that, as an accused person has the right to remain silent in court. As I have told you, it is the prosecution who must prove NOA's guilt beyond reasonable doubt. It is not for NOA to prove his/her innocence. This has not changed because NOA chose to give evidence.

In choosing to give evidence, NOA undertook to tell the truth. S/he also submitted him/herself to cross-examination, which is the way lawyers test a witness' credibility and truthfulness. In this respect, NOA is no different to any other witness. You must assess his/her evidence in the same way as you assess the evidence of any other witness.

In this case, there is a clear conflict between the evidence of [*insert name of prosecution witness*] and NOA's evidence.[82]

There are four broad conclusions you might reach about NOA's evidence. If you think it is true, then you will find him/her not guilty.

If you are not sure whether NOA's evidence is true, but think it might be, then you will have a reasonable doubt about the prosecution's case, and again, you will find the accused not guilty. Similarly, if you merely prefer the evidence of [*insert names of prosecution witnesses*] to NOA's evidence, then you must find NOA not guilty. It is not sufficient for you to merely find the prosecution case to be preferable to the defence case. In other words, it is not a question of simply balancing one case against the other. The prosecution must establish NOA's guilt beyond reasonable doubt.

[82] If the judge has already given a *Liberato* direction, this paragraph and the following paragraphs should be revised to refer back to that direction.

Finally, if you reject NOA's evidence, that does not mean you must find him/her guilty. Instead, if you reject his/her evidence, put it aside and ask whether the prosecution has proved NOA's guilt beyond reasonable doubt, on the basis of the evidence you do accept.

Last updated: 2 October 2017

4.1.2 **Charge: Accused's** Interest in Outcome

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This charge may be given when the accused gives evidence, and defence counsel have requested a direction on the interest that the accused has in the outcome of the trial under s 44I(1)(b).

In relation to the accused giving evidence, I must give you the following direction of law. When you are considering NOA's evidence, you must not give his/her evidence less weight just because s/he is the accused, and any person on trial has an interest in the outcome of the trial.

You will remember that at the start of the trial I told you that it is a critical part of our justice system that people are presumed to be innocent unless and until they are proved guilty. It would therefore be unfair to the accused and wrong to give his/her evidence less weight because s/he is the accused and so wants to be acquitted. If you did that, you would not be giving effect to the presumption of innocence.

Last updated: 2 October 2017

4.2 Child Witnesses

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Overview

1. The *Jury Directions Act 2015* contains two sets of provisions concerning the evidence of children.
2. First, *Jury Directions Act 2015* s 44N contains a mandatory direction about the evidence of children, to be given in a case where a child's credibility or reliability is in issue, unless there are good reasons not to give the direction.
3. Second, *Jury Directions Act 2015* s 33 prohibits certain statements or directions about the evidence of children.
4. Section 33 expands upon the former *Evidence Act 2008* ss 165(6) and 165A, which were implemented in response to the finding of the Australian, Victorian and New South Wales Law Reform Commissions that although research shows that children's evidence is not inherently less reliable than adults' evidence, juries and the community often underestimate it (*Uniform Evidence Law: Report*, ARLC 102 (2005), [18.64]).

Mandatory Direction about Child Witnesses (s 44N direction)

5. *Jury Directions Act 2015* s 44N was introduced by the *Victims and Other Legislation Amendment Act 2018* and commenced operation on 29 October 2018. It applies to all trials that commence on or after that date (*Jury Directions Act 2015* Schedule 1, clause 5).
6. Under s 44N, if the trial judge considers that the reliability or credibility of a child witness is likely to be in issue, the judge must direct the jury in accordance with s 44N(4), unless there are good reasons for not doing so (*Jury Directions Act 2015* s 44N(1), (2)).
7. The Act identifies that good reasons may include that the child is 17 years old and the judge considers the direction is unnecessary because the child has well developed language and cognitive skills (*Jury Directions Act 2015* s 44N(1)(a)).

8. The s 44N direction must be given before the child gives evidence if the judge forms the necessary view before hearing any evidence and after hearing submissions from the prosecution and defence. Otherwise, the judge must give the direction as soon as practicable if the judge considers the child's credibility or reliability is in issue at any other time (*Jury Directions Act 2015* s 44N(1), (2)).

9. The Act states that in giving a direction under s 44N(4), the judge must inform the jury that:

(a) children can accurately remember and report past events; and

(b) children are developing language and cognitive skills, and this may affect–

(i) whether children give a detailed, chronological or complete account; and

(ii) how children understand and respond to the questions they are asked; and

(c) experience shows that, depending on a child's level of development, they-

(i) may have difficulty understanding certain language, whether because that language is complicated for children or complicated generally; and

Examples

1 Hypothetical, ambiguous, repetitive, multi-part or yes/no questions.

2 The use of the passive voice, negatives and double negatives.

(ii) may have difficulty understanding certain concepts, whether because those concepts are complicated for children or complicated generally; and

Example

Relative concepts such as time, duration, measurement or frequency.

(iii) may not request the clarification of a question they do not understand; and

(iv) may not clarify an answer they have given that has been misunderstood.

Prohibited Statements and Directions

10. The judge, prosecution and defence must not say or suggest in any way that:

- children as a class are unreliable witnesses;
- the evidence of children as a class is inherently less credible or reliable, or require more careful scrutiny, than the evidence of adults;
- a particular child's evidence is unreliable solely on account of the age of the child;
- it would be dangerous to convict on the uncorroborated evidence of a witness because that witness is a child (*Jury Directions Act 2015* s 33).[83]

[83] Following amendments introduced by the *Jury Directions Act 2015*, a judge must not warn a jury that it is dangerous to convict on the uncorroborated evidence of any witness, except in proceedings for perjury or a similar or related offence (*Evidence Act 2008* s 164).

11. The judge must correct any statement or suggestion by prosecution or defence counsel that is contrary to the above prohibition, unless there are good reasons not to (*Jury Directions Act 2015* s 7).

12. Section 33 preserves the statutory abolition of the common law rules that children are an unreliable class of witness and that judges must warn the jury about the danger of acting on the uncorroborated evidence of a child (compare *Hargan v R* (1919) 27 CLR 13; *DPP v Hester* [1973] AC 296; *R v Pahuja* (1987) 49 SASR 191; *B v R* (1992) 175 CLR 599).

13. Where a child gives sworn evidence, and the judge has ruled that the child is competent, the issue having been raised, the judge must not tell the jury that he or she has found that child capable of understanding the obligation to give truthful evidence, and therefore able to give sworn evidence. Such a direction may suggest that the judge has determined that the child is a credible witness, which may improperly influence the jury's decision making (*R v Caine* (1993) 68 A Crim R 233). If a party attacks a witness' competence (which a party should not do), rather than a witness' reliability, the judge will need to address the issue by an appropriate direction or comment.

Other Permissible Directions and Comments

General directions

14. The language and policy of *Jury Directions Act 2015* s 33 precludes judges from expressing generalised concerns about the reliability of children's evidence (see *Clarke v R* [2013] VSCA 206).

15. At common law and under the *Evidence Act 2008*, courts held that where a party argues that the jury should give less weight to the evidence of a child witness because of the general qualities of children, the judge could direct the jury, as a matter of law, that the experience of the court is that the age of a witness is not determinative of his or her ability to give truthful and accurate evidence. However, a judge could not put evidence before the jury in the guise of directions of law, or make comments about controversial subject matter (*CMG v R* [2011] VSCA 416; *R v Barker* [2010] EWCA Crim 4; *RGM v R* [2012] NSWCCA 89; *KRI v R* [2012] VSCA 186).

16. The need for directions about how the age of a witness is relevant may be more limited now, because the *Jury Directions Act 2015* s 44N authorises general directions about the evidence of children and s 33 prohibits an argument that the evidence of children is inherently less credible or reliable. However, s 44N(5) states the section does not limit what the trial judge may include in any other direction about the evidence of a child witness.

Comments

17. A judge may comment on the evidence in a way that does not express any generalised concerns about the reliability of children's evidence. In making such remarks, the judge must make it clear that the jury are not bound by the comments (*KRI v R* [2012] VSCA 186; *Clarke v R* [2013] VSCA 206).

18. A judge must be careful in making any comments that he or she does not trespass on the prohibitions in *Jury Directions Act 2015* s 33. These prohibitions apply to both directions, comments and suggestions.

19. In some cases, judges may choose to remind the jury that children think and speak differently to adults and that the jury should not expect adult standards from a child. Jurors should use their own experiences and common sense when evaluating the evidence of a child (*R v Muller* [1996] 1 Qd R 74; *R v B(G)* [1990] 2 SCR 30; *R v F(C)* [1997] 3 SCR 1183; *R v W(R)* [1992] 2 SCR 122).

20. In the case of sexual offending against children where there has been a delay in complaint, any comment on possible reasons for delay should be based on the particular child's evidence in the trial, rather than on generalised assumptions about the behaviour of children. See also Section 53 direction in Effect of Delayed Complaint on Credit.

Directions about unreliability

21. Under *Jury Directions Act 2015* s 32(2)(b), counsel may seek a direction that the evidence of a child is unreliable, and must identify the significant matters, other than solely the age of the child, that may make that evidence unreliable. See also 4.21 Unreliable Evidence Warning.

22. Where a party requests such a direction, the judge must:

    (a) Warn the jury that the evidence may be unreliable;

    (b) Inform the jury of the significant matters, other than solely the age of the child, that the trial judge considers may make the evidence unreliable; and

    (c) Warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it (Jury Directions Act 2015 s 32(3)).

23. Circumstances that may indicate that a particular child's evidence is potentially unreliable include:

    - Behaviour by the child that seems inconsistent with the truth of the matters alleged; and
    - Questioning practices by investigating officials and others that may have heightened the risks of suggestibility (see, e.g. *Robinson v R* (1999) 197 CLR 162; *Seen and Heard: Priority for Children in the Legal Process* ALRC 84, [14.19]–[14.24]; *Knowles v R* [2015] VSCA 141).[84]

24. Counsel's inability to meaningfully cross-examine a child witness may also be a circumstance that justifies a s 32 unreliability direction (see *R v NRC* [1999] 3 VR 537; *R v Hart* (1999) 135 CCC (3d) 377).[85]

25. The fact that a particular child has not experienced full cognitive development is unlikely, by itself, to provide a reason for giving a s 32 unreliability direction. Children who are not fully cognitively developed may be able to give reliable evidence if questions are tailored to their level of cognitive development. The impact of cognitive development is addressed by the s 44N directions. In addition, s 33 prohibits any generalised direction or suggestion that a child's evidence is unreliable, such as an assertion that children are unable to distinguish between fact and fantasy (see *R v FAR* [1996] 2 Qd R 49; *Reference of a Question of Law pursuant to the Criminal Code s 693A (Reference No 1 of 1999)* [1999] WASCA 53).

26. As with other s 32 directions, the judge should only inform the jury about matters that are outside their common sense and experience (see *R v Stewart* (2001) 52 NSWLR 301; *R v ReIc* (2006) 167 A Crim R 484; *R v Baartman* [2000] NSWCCA 298. See also *TN v R* [2005] QCA 160; *Tully v R* (2006) 230 CLR 234 (Crennan J); *R v Tichowitsch* [2007] 2 Qd R 462).

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[84] Children can be more suggestible than adults and they may be especially vulnerable to leading questions in police interviews or while giving evidence. This means that they may give answers designed to please the questioner. They also may not be able to distinguish between original memory and a later–acquired suggestion (*R v FAR* [1996] 2 Qd R 49. See also Myers J, Saywitz K, Goodman G, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony* 28 Pacific Law Journal 3 (1996–1997) and compare Ceci S and Friedman R, *Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell Law Review 33 (2000–2001)).

[85] While a child witness's evidence may be excluded if he or she cannot be effectively cross-examined, there is no inflexible rule requiring the exclusion of such evidence (*R v NRC* [1999] 3 VR 537).

27. At least in the case of children, the fact that evidence is unsworn is not a basis for finding that the evidence may be unreliable. The *Evidence Act 2008* and the *Jury Directions Act 2015* do not treat unsworn evidence as a kind that may be unreliable. There was also no requirement or rule of practice under the common law that judges warn the jury to take into account the differences between sworn and unsworn evidence when assessing reliability (*R v GW* (2016) 258 CLR 108, [55]–[57]).

Related Directions

28. In cases where a child gives evidence, a judge may also need to direct the jury about the following issues:

    - 4.13 Opinion Evidence;[86]
    - 2.3.3 Pre-recorded evidence;[87]
    - 4.14 Previous representations (Hearsay, Recent Complaint and Prior Statement).[88]

Last updated: 29 October 2018

4.2.1 Charge: Child Witnesses (s 44N Direction)

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This direction should be given before a child witness gives evidence, if it is identified that the reliability or credibility of a child witness is likely to be in issue.

This direction is drafted to be given just before the child gives evidence. If it is given at any other time, it must be modified accordingly.

Members of the jury, before NOW gives evidence, there are some general matters I must tell you, to help you assess NOW's evidence. Some of you may know these matters from your own experiences with children. But for others, some of these ideas may be new.

First, children can accurately remember and report past events.

Second, the language and mental skills of children develop as they get older. This may affect whether a child can give a detailed or complete account and whether their accounts correctly record the order in which different events occurred.

Third, children's language and mental skills also affect how they understand and respond to questions.

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[86] A court may receive opinion evidence based on specialised knowledge of child development and child behaviour, including the impact of sexual abuse on children and child development (*Evidence Act 2008* s 79).

[87] The prosecution may lead pre-recorded evidence of a complainant in a sexual offence case if the complainant was under 18 at the time the recording was made (see Division 5 of Part 8.2 of the *Criminal Procedure Act 2009*). In addition, the whole of the complainant's evidence must be pre-recorded at a special hearing if the complainant was a child when the proceedings were commenced, unless the court otherwise orders (see Division 6 of part 8.2 of the *Criminal Procedure Act 2009*).

[88] A court may receive evidence of a complainant's previous representations where he or she is available to give evidence and was under 18 when he or she made the representation (*Evidence Act 2008* s 66(2)).

Experience shows that a child's level of development affects whether they have difficulty understanding certain words or phrases. These may be words or phrases that are hard for everyone to understand, or are only hard for children.

For example, some children have difficulty understanding hypothetical questions, repetitive questions, multi-part questions and questions that require a single yes or no answer. Some children also have difficulty with questions or statements that use negatives and double negatives.

A child's level of development also affects whether the child understands certain concepts. These can be concepts that are difficult for everyone, or concepts that are only difficult for children.

For example, experience shows that children often have difficulty with concepts that involving comparing two things, such as time, duration, measurement or frequency.

Because of a child's level of development, they may not ask someone to clarify a question they do not understand and may not clarify an answer which has been misunderstood.

You should take these directions into account when you are listening to NOW giving evidence, and when you are assessing NOW's credibility and reliability.

Last updated: 29 October 2018

4.3 Character Evidence

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What is Character Evidence?

1. Character evidence addresses a person's inherent moral character (*R v Rowton* (1865) 169 ER 1497; *Melbourne v R* (1999) 198 CLR 1; *Attwood v R* (1960) 102 CLR 353).
2. The relevance and admissibility of character evidence, as well as the need for a direction and the content of that direction, depend on whether the evidence is of the accused's good character or bad character.
3. Directions about character evidence are directions about "the evidence in the trial relevant to the matters in issue". Part 3 of the *Jury Directions Act 2015* applies (*Jury Directions Act 2015* s 10).

Evidence of Good Character

What is "Good Character" Evidence?

4. "Good character" evidence includes:
    - Evidence of the accused's general good reputation; and
    - Evidence of the accused's favourable disposition (*Eastman v R* (1997) 76 FCR 9; *Stirland v Director of Public Prosecutions* [1944] AC 315; *Attwood v R* (1960) 102 CLR 353).
5. The expression "good character" in s 110 of the *Evidence Act 2008* has the same meaning as it does at common law (*Eastman v R* (1997) 76 FCR 9).
6. The accused's good character can be proved in a variety of ways. Evidence of good character does not simply consist of evidence that the accused has not previously been convicted of a crime (*Melbourne v R* (1999) 198 CLR 1).

Relevance of Good Character Evidence

7. Evidence that the accused is of good character may be relevant for two purposes:
    i) It may make it more likely that the accused's evidence is credible; and

ii) It may make it less likely that the accused committed the offence (*Melbourne v R* (1999) 198 CLR 1; *R v Baran* [2007] VSCA 66; *R v Zecevic* [1986] VR 797; *R v Murphy* [1985] 4 NSWLR 42; *R v Trimboli* (1979) 21 SASR 577; *R v Warasta* (1991) 54 A Crim R 351; *Attwood v R* (1960) 102 CLR 353; *Eastman v R* (1997) 76 FCR 9).

8. Good character evidence can only make it "unlikely", rather than "improbable", that the accused committed the offence (*R v Stalder* [1981] 2 NSWLR 9).

9. Evidence that the accused is of good character may be relevant to the credibility of evidence given in court and statements made out of court (*R v Vollmer & Ors* [1996] 1 VR 95; *R v Vye* [1993] 1 WLR 471; *Melbourne v R* (1999) 198 CLR 1).

10. In some cases the two uses of good character evidence will entirely overlap, and will function as a single idea rather than as two discrete issues (*R v Trimboli* (1979) 21 SASR 577).

11. The court may limit the use to be made of good character evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party, or might be misleading or confusing (*Evidence Act 2008* s 136). However, this will be rare (see, e.g. *R v Lawrence* [1984] 3 NSWLR 674; *R v Murphy* (1985) 4 NSWLR 42; *R v Hamilton* (1993) 68 A Crim R 298).

Admissibility of Good Character Evidence

12. The defence may adduce evidence to prove that the accused is a person of good character (*Evidence Act 2008* s 110(1)).

13. The evidence may be used to prove that the accused is a good person generally, or in a particular respect (*Evidence Act 2008* s 110(1)). This differs from the common law, which treats character as indivisible (with people considered to be either of good character or bad character) (*Melbourne v R* (1999) 198 CLR 1; *Bishop v R* (2013) 39 VR 642).

14. Good character evidence may consist of opinion evidence from a witness concerning the character of the accused, or evidence from a witness about the reputation of the accused within the community, or a part of the community (*Bishop v R* (2013) 39 VR 642; *R v Chapman* [2002] NSWCCA 105).

Probative Value of Good Character Evidence

15. The probative effect of good character evidence on the accused's credibility, and on the likelihood that he or she committed the offence charged, will vary depending on the circumstances of the case.

16. For example, the probative effect of good character evidence on the accused's credibility may be diminished where he or she does not give evidence in court, instead relying on out-of-court statements (*R v Zecevic* [1986] VR 797; *R v Arundell* [1999] 2 VR 228).

17. The probative value of good character evidence may also be affected by:

- The nature of the offence charged (*R v Trimboli* (1979) 21 SASR 577);[89]

[89] For some offences, good character evidence will not establish that the accused is the kind of person who would be unlikely to commit that crime. For example, it has previously been held that the fact that a person is of good character may not materially affect the likelihood that s/he would cultivate cannabis (see, e.g. *R v Trimboli* (1979) 21 SASR 577).

- The relationship between the type of character established and the type of offence charged (*R v Arundell* [1999] 2 VR 228; *Braysich v R* (2011) 243 CLR 434);[90] and
- The strength of the other evidence supporting the charge (*Simic v R* (1980) 144 CLR 319).

18. In some cases, the only evidence of the accused's good character will be his or her lack of prior convictions. The probative value of the character evidence in such cases is usually extremely limited (*R v Cumberbatch (No 5)* [2002] VSC 289; *Melbourne v R* (1999) 198 CLR 1).

Need for a Direction About Good Character Evidence

19. At common law, it was recognised that a judge was not required to direct the jury about the uses of good character evidence in all cases where that evidence was led (*Melbourne v R* (1999) 198 CLR 1; *Benbrika v R* (2010) 29 VR 593; *R v DD* (2007) 19 VR 143; *Gallant v R* [2006] NSWCCA 339; *R v Arundell* [1999] 2 VR 228).

20. The need for a direction depends on whether a direction is sought or whether there are substantial and compelling reasons to give a direction in the absence of a request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

21. Under the *Jury Directions Act 2015*, the judge should consider the significance of the good character evidence in the context of the trial when deciding whether to give the direction despite the absence of a request.

22. Prior to the *Jury Directions Act 2015*, the recommended practice in Victoria was that judges would give directions on good character evidence almost without exception (see *R v Warasta* (1991) 54 A Crim R 351). In *Bishop v R* (2013) 39 VR 642, which was decided after the commencement of the *Jury Directions Act 2013*, this practice was endorsed as continuing to provide guidance to trial judges. However, the court in *Bishop* did not refer to the effect of sections 13 and 15 of the *Jury Directions Act 2013* (see now *Jury Directions Act 2015* ss 14–16).

23. In determining whether to give a direction, a judge should pay close attention to the relevance of the evidence to the offence, and to the issues to which the evidence relates (*Stanoevski v R* (2001) 202 CLR 115; *R v Szabo* [2000] NSWCCA 226).

24. A judge should consider the probative value of the evidence when determining whether or not to give a direction (*Melbourne v R* (1999) 198 CLR 1; *Benbrika v R* (2010) 29 VR 593; *R v DD* (2007) 19 VR 143).

25. A good character direction must be given where the evidence has an immediate and obvious connection with an issue in the case (*Melbourne v R* (1999) 198 CLR 1).

26. In deciding whether to direct the jury about good character evidence, a judge must separately consider the probative effect of the evidence on the accused's credibility *and* on the likelihood that he or she committed the offence charged (*Melbourne v R* (1999) 198 CLR 1*; Benbrika v R* (2010) 29 VR 593).

27. Where the evidence of good character comes from the accused him or herself there is generally less need for a direction on the uses of such evidence, as this will usually be self-explanatory (*R v Mackrae–Bathory* [2006] VSCA 179; *R v TSR* (2002) 5 VR 627).

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[90] For example, evidence of honesty is not likely to be highly probative where the accused is charged with a violent crime (*R v Arundell* [1999] 2 VR 228).

Content of the Direction on Good Character Evidence

28. No particular form of words is required for a direction on good character evidence (*R v Trimboli* (1979) 21 SASR 577; *R v Arundell* [1999] 2 VR 228; *R v RJC* 18/8/98 NSW CCA; *R v Telfer* (2004) 142 A Crim R 132; *Fung v R* [2007] NSWCCA 250).

29. The judge will need to consider whether the parties have sought a direction about the two permissible uses of good character evidence, and whether it is appropriate to direct on both uses. For example, the judge may have good reasons to direct on only one of the permissible uses of such evidence (*Melbourne v R* (1999) 198 CLR 1; *R v Arundell* [1999] 2 VR 228; *R v Zecevic* [1986] VR 797; *Sindoni v R* [2011] VSCA 195).

30. If the evidence relates to a particular aspect of the accused's character (rather than his or her character generally), the directions must be limited to that aspect (see, e.g. *R v Zurita* [2002] NSWCCA 22).

31. This may affect which of the two possible uses of the evidence the jury should be told about. For example, if the evidence has no bearing on truthfulness, and thus no relevance to credibility, the jury should not be directed that the accused's good character should be taken into account in assessing his or her credibility (*R v Zurita* [2002] NSWCCA 22).

32. Where the judge directs the jury about the relevance of the evidence to the issue of *guilt*, the direction should convey to the jury that they should bear in mind the accused's good character when considering whether they are prepared to draw from the evidence the conclusion of the accused's guilt. They should bear it in mind as a factor affecting the likelihood that the accused committed the crime charged (*R v RJC* 18/8/98 NSW CCA).

33. It is permissible to direct the jury that a person of good character is less likely to have committed the offence than a person not of good character (*Fung v R* [2007] NSWCCA 250; *Kanbut v The Queen* [2022] NSWCCA 259, [35]–[37]).

34. Where the judge directs the jury about the relevance of the evidence to the issue of *credibility*, the judge should convey to the jury that they should consider the accused's previous good character in assessing the credibility of any explanation he or she has given and, if he or she has given evidence in court, his or her credibility as a witness (*R v RJC* 18/8/98 NSW CCA).

35. The judge may remind the jury that people commit crimes for the first time, and that evidence of good character cannot alter proven facts or provide a defence in itself. Character evidence can only affect the jury's assessment of whether certain facts have been proven beyond reasonable doubt (*R v Arundell* [1999] 2 VR 228; *Melbourne v R* (1999) 198 CLR 1; *R v Trimboli* (1979) 21 SASR 577; *R v Zecevic* [1986] VR 797; *R v RJC* 18/8/98 NSW CCA; *Bishop v R* (2013) 39 VR 642).

36. Judges must exercise care when warning the jury about the need for caution in acting on good character evidence other than the standard directions that people commit crimes for the first time and the evidence cannot alter proven facts or provide a defence in itself (*Bishop v R* (2013) 39 VR 642).

37. In particular, where character evidence is led in a sexual offence case, the judge must not give a limiting direction that good character evidence is of less weight (or no weight) because sexual offences are committed in private and the evidence only addresses the accused's conduct in the presence of others (*Bishop v R* (2013) 39 VR 642; *R v MWL* (2002) 137 A Crim R 282).

38. Judges should exercise great care in departing from the traditional directions into directions which have not previously received curial approval (*Bishop v R* (2013) 39 VR 642).

39. Where good character evidence can be used both in assessing guilt and credibility, the judge must not direct the jury that the evidence cannot be used for one of these two purposes (*R v Zecevic* [1986] VR 797; *R v Murphy* [1985] 4 NSWLR 42).

40. In such cases, if the prosecution tells the jury that the evidence may not be used for one of the two permissible purposes, the judge must raise with the parties the need for a direction to ensure the jury is not misled (see *Jury Directions Act 2015* s 16 and *R v Schmahl* [1965] VR 745).

41. A person who has a prior conviction that was overturned on appeal must be treated as a person without any prior convictions. Any direction on good character must not be qualified by reference to the quashed conviction (*R v Lapuse* [1964] VR 43).

Evidence of Bad Character

42. Evidence of the accused's bad character is generally inadmissible on the basis that it is unfairly prejudicial (*Melbourne v R* (1999) 198 CLR 1; *R v Thomas* [2006] VSCA 167; *Donnini v R* (1972) 128 CLR 114; *Perry v R* (1982) 150 CLR 580).[91]

43. However, under the *Evidence Act 2008* there are three circumstances in which bad character evidence may be admissible:

    i) If evidence has been adduced to prove an accused's good character (either generally or in a particular respect), a co-accused or the prosecution may respond by leading evidence to prove that the accused is not a person of good character (either generally or in that respect) (ss 110(2)–(3)).

    ii) An accused may adduce opinion evidence about the character of a co-accused, where it is evidence of the opinion of a person who has specialised knowledge based on his or her training, study or experience, and the opinion is wholly or substantially based on that knowledge (*Evidence Act 2008* s 111(1)); and

    iii) Evidence that reveals the accused's bad character may also be admissible under a provision of Part 3.7 concerned with credibility evidence.

44. Leave is required to cross-examine an accused about matters arising out of character evidence (*Evidence Act 2008* s 112).[92] See *Gabriel v R* (1997) 76 FCR 279 for a discussion of relevant considerations.

Use of Bad Character Evidence

45. At common law, bad character evidence can only be used to negate evidence of good character. It cannot be used as directly relevant to the issue of guilt (see, e.g. *BRS v R* (1997) 191 CLR 275).

46. At first glance, the *Evidence Act 2008* appears to make bad character evidence admitted under s 110 usable for tendency purposes.[93] This is because:

    - This evidence is not subject to the tendency rule (s 110);

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[91] While evidence is generally inadmissible for the purpose of proving the accused's bad character, evidence that is relevant for another purpose is not rendered inadmissible solely because it also happens to show the bad character of the accused. Such evidence may be admitted for a limited, probative, purpose. In such cases, the judge must direct the jury to use the evidence only for the admissible purpose, and may need to warn the jury not to use the evidence for an irrelevant or prejudicial purpose (see, e.g. *R v Thompson* [2001] VSCA 208; *Orman v R* [2010] VSCA 246R).

[92] See *R v El–Azzi* [2004] NSWCCA 455 and *Stanoevski v R* (2001) 202 CLR 115 for a discussion of the meaning of "matters arising out of" this kind of evidence.

[93] In explaining the rationale behind the proposal on which s 110 is based, the Australian Law Reform Commission ("ALRC") noted that this restriction seems incapable of enforcement, and implied that it should not be adopted in the UEA (ALRC 26, vol.1, para 83).

- It is also exempted from the further restrictions on tendency evidence in s 101, because that extension "does not apply to tendency evidence that the prosecution adduces to explain or contradict evidence adduced by the defendant" (s 101(3)).

47. However, in NSW it has been held that the common law position remains unchanged, and that bad character evidence can only be used to negate good character evidence (*R v OGD (No 2)* (2000) 50 NSWLR 433; *R v El-Kheir* [2004] NSWCCA 461. See also *Eastman v R* (1997) 76 FCR 9 for a brief discussion of this issue).
48. The court may limit the use to be made of bad character evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party, or might be misleading or confusing (*Evidence Act 2008* s 136).

Content of the Direction on Bad Character Evidence

49. Where evidence of bad character is admitted and the prosecution or counsel for the accused seeks a direction, the judge must explain to the jury that:
    - They may use the evidence when assessing the accused's credibility; and
    - They must not use the evidence to infer that the accused is more likely to have committed the offence because he or she is a person of bad character (*R v Perrier (No 1)* [1991] 1 VR 697; *R v Thomas* [2006] VSCA 167; *Donnini v R* (1972) 128 CLR 114; *BRS v R* (1997) 191 CLR 275; *R v Stalder* [1981] 2 NSWLR 9; *R v Rihia* [2000] VSCA 235).
50. At common law, there was seen to be a high degree of risk that a jury would use bad character evidence to engage in impermissible propensity reasoning. Judges were therefore required to clearly direct the jury on both the permissible and impermissible uses of bad character evidence (*Donnini v R* (1972) 128 CLR 114). This will continue to guide the content of directions on bad character evidence under the *Jury Directions Act 2015*.
51. The permissible uses of bad character evidence are not the converse of the permissible uses of good character evidence. The jury is allowed to use good character evidence to engage in a form of propensity reasoning that is not permitted for bad character evidence. This anomaly is deeply rooted in the law (*Melbourne v R* (1999) 198 CLR 1).

Last updated: 22 March 2023

4.3.1 Charge: General Good Character Evidence

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This charge may be given where evidence that the accused is of good character generally has been adduced. It includes additional directions to be used where another party has led bad character evidence in rebuttal. See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

In this case you have heard evidence that NOA is a person of good character. [*Describe good character evidence.*]

[*If bad character evidence has also been given, add the following shaded section.*]

You have also heard evidence that NOA is a person of bad character. [*Describe bad character evidence.*] It is for you to determine whether NOA is of good character, bad character, or neither.

Good Character

If you accept that NOA is a person of good character, there are two ways in which you can use this fact.

First, you can use it when assessing the credibility of NOA's evidence and his/her denials of the prosecution case.[94] As a person of good character is generally thought to be more trustworthy than other people, you may be less willing to accept the prosecution's evidence than if NOA was not a person of good character.

Second, you can use it when determining the likelihood that NOA committed the offence[s] charged. As it is generally believed that a person of good character is unlikely to commit a criminal offence, you may be less willing to accept the prosecution's allegation that NOA committed [that offence/those offences] than you would be if s/he was not a person of good character.

Of course, this does not mean that you must find NOA not guilty if you accept that s/he is a person of good character. The mere fact that a person is of good character cannot alter proven facts – it can only help you to determine whether or not those facts have been proven. In addition, you should keep in mind the fact that a person who has previously been of good character can commit a crime for the first time.

[*If bad character evidence has also been given, add the following shaded section.*]

By contrast, if you find that NOA is a person of bad character, you can only use this fact when assessing the credibility of [*describe sources of NOA's evidence, e.g.* "the evidence NOA gave in court" or "the statement NOA made to the police"].[95] As a person of bad character is generally thought to be less trustworthy than other people, you may be less willing to accept that evidence than you would be if NOA was not a person of bad character.

Unlike the situation where you find the accused to be of good character, a finding that the accused is of bad character cannot be used when determining the likelihood that NOA committed the offence[s] charged.[96] In particular, you must not reason that, because NOA is a person of bad character, s/he is more likely to have committed the offence[s] charged. That kind of reasoning is prohibited. Findings of guilt must be based only on the evidence given in the trial, not on assumptions about the kinds of people who commit crimes.

Last updated: 1 July 2013

4.3.2 Charge: Specific Good Character Evidence

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This charge may be given where evidence that the accused is of good character in a particular respect. It includes additional directions to be used where another party has led bad character evidence in rebuttal. See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

In this case you have heard evidence that NOA is a person of good character in relation to [*describe respect in which it is alleged that the accused is of good character*]. [*Describe good character evidence.*]

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[94] If the accused has given no evidence in court, and made no out-of-court statements, this paragraph should be omitted and the charge modified accordingly.

[95] If the accused has given no evidence in court, and made no out-of-court statements, this paragraph should be omitted and the charge modified accordingly.

[96] This aspect of the charge is based on the assumption that the NSW interpretation of *Evidence Act 2008* s 110 is correct. If it is not, then this paragraph will need to be modified accordingly. See 4.3 Character Evidence for further information.

[*If bad character evidence has also been given, add the following shaded section.*]

You have also heard evidence that NOA is a person of bad character in that respect. [*Describe bad character evidence.*] It is for you to determine whether NOA is of good or bad character in relation to [*describe respect*], or is of neither good nor bad character in that respect.

Good Character

If you accept that NOA is a person of good character in relation to [*describe respect*], there are two ways in which you can use this fact.

First, you can use it when assessing the credibility of NOA's evidence and his/her denials of the prosecution case.[97] As a person who is of good character in that respect is generally thought to be more trustworthy than other people, you may be less willing to accept the prosecution's evidence than if NOA was not a person of good character in that respect.

Second, you can use it when determining the likelihood that NOA committed the offence[s] charged.[98] As it is generally believed that a person who is of good character in relation to [*describe respect*] is unlikely to commit a criminal offence, you may be less willing to accept the prosecution's allegation that NOA committed [that offence/those offences] than you would be if s/he was not a person of good character in that respect.

Of course, this does not mean that you must find NOA not guilty if you accept that s/he is a person of good character in relation to [*describe respect*]. The mere fact that a person is of good character in that respect cannot alter proven facts – it can only help you to determine whether or not those facts have been proven. In addition, you should keep in mind the fact that a person who has previously been of good character can commit a crime for the first time.

[*If bad character evidence has also been given, add the following shaded section.*]

By contrast, if you find that NOA is a person of bad character you can only use this fact when assessing the credibility of [*describe sources of NOA's evidence, e.g.* "the evidence NOA gave in court" or "the statement NOA made to the police"].[99] As a person who is of bad character is generally thought to be less trustworthy than other people, you may be less willing to accept that evidence than you would be if NOA was not a person of bad character in that respect.

Unlike the situation where you find the accused to be of good character, a finding that the accused is of bad character in that respect cannot be used when determining the likelihood that NOA

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[97] This paragraph should be omitted, and the charge modified accordingly, if:

- The respect in which it is alleged that the accused is of good character is not of relevance to the issue of credibility; or
- The accused gave no evidence in court, and made no out-of-court statements.

[98] This paragraph should be omitted, and the charge modified accordingly, if the respect in which it is alleged that the accused is of good character is not of relevance to the issue of guilt.

[99] This paragraph should be omitted, and the charge modified accordingly, if:

- The respect in which it is alleged that the accused is of bad character is not of relevance to the issue of credibility; or
- The accused gave no evidence in court, and made no out-of-court statements.

committed the offence[s] charged.[100] In particular, you must not reason that, because NOA is a person of bad character, s/he is more likely to have committed the offence[s] charged. That kind of reasoning is prohibited. Findings of guilt must be based only on the evidence given in the trial, not on assumptions about the kinds of people who commit crimes.

Last updated: 1 July 2013

4.3.3 Charge: Bad Character Evidence

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This charge may be given where evidence that the accused is not of good character has been adduced under an exception to the credibility rule (and not as rebuttal evidence under s 110). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

In this case you have heard evidence that NOA is a person of bad character.[101] [*Describe bad character evidence.*]

If you accept that NOA is a person of bad character, you can use this fact when assessing the credibility of [*describe sources of the accused's evidence, e.g.* "the evidence NOA gave in court" or "the statement NOA made to the police"].[102] As a person of bad character is generally thought to be less trustworthy than other people, you may be less willing to accept that evidence than you would be if NOA was not a person of bad character.

However, you must not reason that, because NOA is a person of bad character, s/he is more likely to have committed the offence[s] charged. That kind of reasoning is prohibited. Your decision must be based only on the evidence given in the trial, not on assumptions about the kinds of people who commit crimes.

Last updated: 1 July 2013

4.4 Prosecution Witness's Motive to Lie

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Warning! The law relating to directions on a prosecution witness' motive to lie was modified by the *Jury Directions and Other Acts Amendment Act 2017*. There has not yet been appellate guidance on the operation of these provisions. This information should be used with caution. Further information about the *Jury Directions and Other Acts Amendment Act 2017* is available in the Department of Justice and Regulation report, 'Jury Directions: A Jury-Centric Approach Part 2'.

[100] This aspect of the charge is based on the assumption that the NSW interpretation of *Evidence Act 2008* s 110 is correct. If it is not, then this paragraph will need to be modified accordingly. See 4.3 Character Evidence for further information.

[101] This charge is drafted for use in cases where the character evidence relates to the accused. If the character evidence relates to a different witness the charge will need to be modified.

[102] If the accused has given no evidence in court, and made no out-of-court statements, this paragraph should be omitted and the charge modified accordingly.

Effect of Jury Directions Act 2015

1. Jury directions relating to whether a prosecution witness has a motive to lie have been significantly changed by the *Jury Directions Act 2015* following amendments by the *Jury Directions and Other Acts Amendment Act 2017* which commenced on 1 October 2017.
2. Under the Act, if the issue of whether a prosecution witness has a motive to lie is raised in a trial, the defence may request that the judge explain to the jury:
    - The prosecution's obligation to prove that the accused is guilty; and
    - That the accused does not have to prove that the witness had a motive to lie (*Jury Directions Act 2015* s 44L).
3. The need for any direction about a prosecution witness' motive to lie depends on whether a direction is sought or whether there are substantial and compelling reasons for giving a direction in the absence of any request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.
4. Except as provided by s 44L, read in the context of the rest of the *Jury Directions Act 2015*, including ss 12–16, the judge is not required or permitted to direct the jury on the issue of whether a prosecution witness has a motive to lie. Any common law rule to the contrary is abolished (*Jury Directions Act 2015* s 44M).
5. While the *Jury Directions Act 2015* s 44L applies to any prosecution witness, in practice, the issue is most often raised in relation to the complainant.

Relevance of the Complainant's Motive

6. If the complainant has a motive to make and persist in false allegations about the accused (a "motive to lie"), this may be a relevant factor in judging his or her credit and testing the acceptability of the accusation giving rise to the charges (*Palmer v The Queen* (1998) 193 CLR 1; R v Uhrig NSW CCA 24/10/96).
7. However, there is no onus on the accused to prove a motive for the complainant's allegations (*Jury Directions Act 2015* s 44L; see also *R v Costin* [1998] 3 VR 659; *Palmer v The Queen* (1998) 193 CLR 1; *R v Cherry (No.2)* [2006] VSCA 271).
8. The failure of the accused to identify a motive to lie is entirely neutral in relation to the assessment of the credibility of the complainant. A complainant's account gains no legitimate credibility from the absence of evidence of a motive to lie (*Palmer v The Queen* (1998) 193 CLR 1; *R v PLK* [1999] 3 VR 567; *R v SAB* (2008) 20 VR 55).
9. The fact that the accused has no knowledge of any fact from which it can be inferred that the complainant had a motive to lie is therefore generally irrelevant. In most cases, the fact that the accused lacks knowledge about the complainant's motive to lie will simply mean that his or her evidence cannot assist in determining whether the complainant has such a motive (*Palmer v The Queen* (1998) 193 CLR 1; *R v PLK* [1999] 3 VR 567; *R v Hilsey* [1998] VSCA 143).

Raising the Issue of the Complainant's Motive to Lie

10. As the fact that the complainant has a motive to lie is relevant, it is permissible for the defence to cross-examine the complainant about whether s/he has a motive to lie (*Palmer v The Queen* (1998) 193 CLR 1; *R v Uhrig* NSW CCA 24/10/96; *R v PLK* [1999] 3 VR 567).
11. It is also permissible for the defence to lead other evidence from which it can be inferred that the complainant has a motive to lie (*Palmer v The Queen* (1998) 193 CLR 1; *R v Uhrig* NSW CCA 24/10/96).
12. Where the accused alleges in his or her evidence that the complainant has a motive to lie, it is permissible for the prosecution to cross-examine the accused about the alleged motive (*Palmer v The Queen* (1998) 193 CLR 1; *R v Uhrig* NSW CCA 24/10/96; *R v PLK* [1999] 3 VR 567; *R v Davis* [2007] VSCA 276; *R v SAB* (2008) 20 VR 55).

13. However, any cross-examination of the accused must be conducted within the limits of relevant and admissible evidence. Thus, while s/he may be questioned about the factual basis of any allegations made, s/he should not be directly asked to give evidence on the motives of the complainant. Such evidence could only be speculative and a matter of opinion upon which the accused could have no expertise (*Palmer v The Queen* (1998) 193 CLR 1 (Kirby J); *R v SAB* (2008) 20 VR 55).

14. In cases where the defence alleges that a complainant has a motive to lie, it is also open to the prosecution to put arguments to the jury relating to the validity of that motive (*Palmer v The Queen* (1998) 193 CLR 1; *R v Uhrig* NSW CCA 24/10/96; *R v PLK* [1999] 3 VR 567; *Schroder v The King* [2024] VSCA 42, [37]–[38]).

15. While the prosecution may properly seek to rebut any motive put forward by the defence, they should not suggest that rejecting the suggested motive means accepting that the complainant has no motive to lie and is telling the truth. There may be other reasons, unknown to the accused, for the complainant making a false allegation (*R v Hewitt* [1998] 4 VR 862).

16. For the accused to be cross-examined about the complainant's motive to lie, s/he must have made an allegation about the complainant lying in his or her direct evidence. The fact that defence counsel made such an allegation in his or her arguments is not sufficient (*R v Davis* [2007] VSCA 276).

17. If no direct evidence has been given of a specific motive to lie, and there is no evidence from which a specific motive to lie could reasonably be inferred, the accused should not be cross-examined about the matter. This is because, as noted above, the fact that the accused cannot provide a possible motive for the complainant to lie is generally irrelevant (*Palmer v The Queen* (1998) 193 CLR 1; *R v Uhrig* NSW CCA 24/10/96; *R v Davis* [2007] VSCA 276).

18. As well as being irrelevant, it is objectionable to ask the accused why the complainant would lie (when the aim of the question is to show that the complainant had *no* such motive), because:

    - There is a risk that the jury will reason that the absence of evidence of a motive for lying is proof that there was no motive for lying. This method of reasoning, and conclusion, is impermissible;
    - Asking the question is to invite the jury to accept the complainant's evidence unless the accused gives a positive answer to that question. This risks reversing the onus of proof, as it implies that unless the jury is satisfied that the complainant is a liar, they should accept his or her evidence and convict the accused;
    - Such a question is unfair to the accused, who cannot be expected to see into the mind of the complainant and be held accountable for failing to discern his or her motives;
    - Asking why the complainant would lie is to invite the jury to speculate as to what might be possible motives for lying and to assess their likelihood. That is not trying the case on the evidence, but speculating concerning unproven facts;
    - Focusing on the complainant's motive to lie may distract the jury from the critical question in a criminal trial – whether the prosecution has proved the guilt of the accused beyond reasonable doubt (see *Palmer v The Queen* (1998) 193 CLR 1; *R v PLK* [1999] 3 VR 567; *R v RC* [2004] VSCA 183; *R v E* (1996) 39 NSWLR 450; *R v F* (1995) 83 A Crim R 502; *R v Davis* [2007] VSCA 276; *R v SAB* (2008) 20 VR 55).

19. Similar dangers can arise even if the accused is not specifically asked about the complainant's motive to lie – for example, if prosecuting counsel rhetorically asks the jury "why would the complainant lie?" in his or her address, or if the complainant asks "why would I lie?" when giving evidence and the jury are forcefully reminded of those words in the prosecutor's final address (*R v RC* [2004] VSCA 183).

20. It is therefore usually inappropriate for the prosecution to raise the question "why would the complainant lie?" in their final address, no matter how the issue of motive has arisen (*R v RC* [2004] VSCA 183).

When to Give a Direction

21. Under the *Jury Directions Act 2015*, the need for a direction depends on whether a direction is sought or whether there are substantial and compelling reasons for giving a direction in the absence of a request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

22. *Jury Directions Act 2015* s 44L, as amended in 2017, provides that defence counsel may request a direction under s 12 of the Act on the issue of whether a witness for the prosecution has a motive to lie, if that issue is raised during a trial.

23. Unlike some sections of the *Jury Directions Act 2015* which refer to requests for directions by either the prosecution or defence (see, e.g. s 32(1)), s 44L refers only to requests by defence counsel. This suggests the prosecution cannot request a direction on the issue. However, a judge has the power to give a direction under s 16 of the *Jury Directions Act 2015* if the judge considers there are substantial and compelling reasons for doing so, and after hearing submissions.

24. If the prosecution believes that a direction under s 44L is necessary, then the prosecution should first invite defence counsel to ask for the direction. If the defence declines that invitation, the prosecution may invite the judge to form the view under s 16 that there are substantial and compelling reasons for the direction.

25. One circumstance in which the prosecution may believe that a s 44L direction is warranted is where the prosecution has cross-examined its own witness in accordance with Evidence Act 2008 s 38. However, it is unclear whether the s 44L direction is well-suited to this scenario. See "Section 44L and unfavourable prosecution witnesses" below.

26. Although s 44M(2) abolishes any rule of common law in relation to when a judge is required or permitted to direct the jury on the issue of a prosecution witness' motive to lie, common law cases may provide guidance as to what could constitute a substantial and compelling reason to provide the direction.

Common law authorities on the need for a motive to lie direction

27. At common law, judges could consider the prominence of the issue of motive to lie. If the complainant only refers to an absence of a motive to lie once in a lengthy cross-examination, a direction may not be required. However, if that comment was referred to again in counsel's address, it would assume greater significance and could require a direction (see, e.g. *R v RC* [2004] VSCA 183).

28. At common law, in most cases where the accused is asked "why would the complainant lie?", a firm and clear direction was usually necessary to overcome the dangers outlined above (*Palmer v The Queen* (1998) 193 CLR 1; *R v PLK* [1999] 3 VR 567; *R v RC* [2004] VSCA 183).

29. As these dangers were not limited to cases in which the prosecution had directly raised the question when cross-examining the accused, a direction could be required in other contexts as well. For example, it may have been necessary to give a direction if the issue of the complainant's motive to lie was raised by the complainant in his or her own evidence or in counsel's addresses (*R v RC* [2004] VSCA 183; *R v PLK* [1999] 3 VR 567).

30. Due to the many possible dangers posed by this issue (see above), where the question of motive for lying was raised by way of rhetorical questions in the prosecution's address, judges were encouraged to assume that the jury may have been misled or diverted from their true task, and to give a direction (*R v RC* [2004] VSCA 183).

31. It was generally appropriate to give a direction if the complainant's evidence was uncorroborated, and the question whether s/he had a motive to lie was a significant issue in the case (e.g. due to cross-examination of the complainant on the issue and/or a focus on the issue in counsel's address) (see, e.g. *R v PLK* [1999] 3 VR 567).

32. However, where there was more than the uncorroborated evidence of the complainant, motive to lie would assume a less significant role, and a direction may not have been necessary (*R v PFG* [2006] VSCA 130).

33. In many cases where the jury was invited to reject the motive to lie put forward by the defence, it was appropriate to give a direction. This was because there was a risk that, by accepting the prosecution's invitation, the jury would mistakenly think that, as no other motive to lie has been suggested, the complainant's credibility was thereby enhanced (*Palmer v The Queen* (1998) 193 CLR 1; *R v Uhrig* NSW CCA 24/10/96; *R v PLK* [1999] 3 VR 567). However, under *the Jury Directions Act 2015*, the motive to lie direction does not expressly contain a warning that the jury must not treat the rejection of a motive to lie as supporting a complainant's credibility. Judges should therefore consider whether this risk remains relevant when assessing whether to give a motive to lie direction which has not been sought.

34. A direction may not have been required if the prosecution did not challenge the fact that the complainant had a motive to lie (e.g. if they instead sought to convince the jury that, despite having such a motive, the complainant was telling the truth) (*R v Cherry (No.2)* [2006] VSCA 271).

35. Where police gave the accused an opportunity, in the record of interview, to suggest a motive to lie, the admission of the record of interview into evidence would not automatically require a *Palmer* direction to be given (*R v Arundell* [1999] 2 VR 228). It may, however, be appropriate to excise the parts of the record of interview which relate to the complainant's motive to lie (*Graham v R* (1998) 195 CLR 606).

Content of the direction

36. The content of the direction on a prosecution witness' motive to lie is specified in *Jury Directions Act 2015* s 44L(2), as amended in 2017. It substantially modifies the common law direction, and will be the same regardless of whether or not the accused has directly alleged that the complainant had a specific motive to lie.

37. The prescribed direction requires the judge to explain:

    - The prosecution's obligation to prove that the accused is guilty; and
    - That the accused does not have to prove that the witness had a motive to lie.

Abolition of common law and prohibited directions

38. *Jury Directions Act 2015* s 44M, as amended in 2017, states:

(1) Except as provided by this Division, a trial judge is not required or permitted to direct the jury on the issue of whether a witness for the prosecution has a motive to lie.

(2) Any rule of common law to the contrary of subsection (1) is abolished.

Notes

1 Subsection (2) abolishes directions based on *Palmer v The Queen* [1998] HCA 2; 1993 CLR 1.

2 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

39. Like many *Jury Directions Act 2015* provisions, this abolishes the relevant common law and makes the statutory provisions the sole source of obligation to direct on this topic. However, most equivalent provisions in the *Jury Directions Act 2015* do not include the words "or permitted" (see *Jury Directions Act 2015* ss 24, 30, 34, 37, 44, 44E, 54, 62. But c.f. *Jury Directions Act 2015* ss 40, 44G, 44M, 64D).

40. At common law, directions on motive to lie included:

- Where a motive to lie is suggested: telling the jury that, even if they reject a motive to lie put forward by the accused, that does not mean the witness is telling the truth and does not enhance the witness's credibility in any way. It simply removes one reason for rejecting the witness's evidence (compare *Palmer v The Queen* (1998) 193 CLR 1; *R v PLK* [1999] 3 VR 567; *R v SAB* (2008) 20 VR 55); and
- Where a motive to lie is not suggested: telling the jury that there are many reasons why people may lie; that it is not for the accused to identify a motive for the witness to lie; that it is unfair to expect the accused to identify a motive; that the jury must not speculate about the witness' motive to lie (if any); that the jury must not reason that because there is no apparent motive to lie then there is no reason for the witness to lie and so the witness must be telling the truth; and that an inability to identify a motive to lie cannot be used to enhance the witness's credibility (compare *R v Costin* [1998] 3 VR 659; *R v PLK* [1999] 3 VR 567; *R v RC* [2004] VSCA 183).

41. In Jury Directions: A Jury-Centric Approach Part 2, the Department of Justice identified the following problems with common law directions on motive to lie which the 2017 amendments were designed to address:

> The content of the [common law] directions may further reinforce the assumption that complainants frequently lie about sexual assault. Although the accused is often responsible for raising the complainant's motive to lie in the first place, the directions are designed to ensure that there is no disadvantage to the accused, even if he or she raises a 'spurious allegation of fabrication'. Even if the complainant can refute the allegation of motive to lie this does not operate to his or her benefit.
> In particular, the problematic Palmer direction provides that if the jury rejects the alleged motive of the witness to lie (for example, because the jury accepts the evidence given by the witness in rebuttal of the allegation raised by defence counsel) or decides that the witness did not have a motive to lie, this cannot enhance the credibility of the witness. Such a direction is unfair to the witness and unfairly advantageous to the accused. It suggests to the jury that even if it rejects the alleged motive to lie, the complainant should be regarded with suspicion. It may also suggest to the jury that a complainant has hidden motives.
> ...
> Also, the directions limit how the jury may use the absence of a motive to lie. For example, the jury may be told that if it rejects the defence's assertion of a motive to lie and accepts the prosecution submission, this cannot be relied on to show that the complainant is telling the truth or to enhance the credibility of the complainant's evidence. Likewise, if the prosecution raises the motive to lie, the jury may be told that it should not speculate on motives that the complainant might have for lying. Research shows that limiting directions of this nature are often ineffective. There is a

> risk that they may backfire and have the opposite effect intended, leading jurors to speculate.
>
> Finally, the number of matters that need to be covered in the directions makes appeals and retrials on the adequacy of directions more likely. The length and complexity of these directions also makes them more difficult for jurors to understand and apply (at 16–17).

42. The Department's report further explains the purpose of ss 44L and 44M as follows:

> To clarify and simplify this area of the law, and to ensure that directions are fair to both the accused and the complainant (or witness), the Bill will set out what trial judges must include in a direction. These requirements are much shorter and simpler than the common law directions. The Bill will also provide that the trial judge must not otherwise direct on the issue of whether a prosecution witness has a motive to lie. This will abolish the Palmer direction and leave it to the jury to decide how motive to lie (or lack of such a motive) affects the witness's credibility, as is appropriate (at 17).

43. These passages indicate that s 44L should be viewed as a complete statement of what the judge needs to tell the jury about motive to lie and that features of the common law directions should not be read into the section.

44. When giving a s 44L direction, the judge should not comment on the plausibility of a suggested motive to lie, or suggests reasons why a jury might reject a possible motive to lie, beyond any obligation to remind the jury of the prosecution and defence arguments (see *Briggs v The King* [2024] VSCA 80, [128]–[134]).

Section 44L and unfavourable prosecution witnesses

45. As explained above, s 44L only explicitly allows the defence to request the direction. Where the prosecution believes the direction should be given, the prosecution must persuade the judge to exercise the discretion to give a direction under s 16 on the basis that there are substantial and compelling reasons for giving the direction.

46. One scenario which may cause difficulties is where the prosecution cross-examines a witness under *Evidence Act 2008* s 38 on the basis that the witness gave evidence that is not favourable to the prosecution. See also 4.20 Unfavourable Witnesses.

47. By its terms, *Jury Directions Act 2015* s 44L specifies the content of any direction where "the issue of whether a witness for the prosecution has a motive to lie is raised during a trial". By s 44M, a trial judge is not "required or permitted" to direct the jury on this issue other than as provided by Division 10 of Part 4 (ss 44L and 44M).

48. Where the prosecution cross-examines its own witness and suggests that the witness has a motive to lie (such as for loyalty to the accused, or out of fear of the accused), it is possible that the directions in s 44L(2) (that it is the prosecution's obligation to prove guilt and that the accused does not have to prove that the witness had a motive to lie) do not engage with the real issues in the case.

49. Trial judges will need to consider whether:

    (a) Division 10 of Part 4 can be read down to permit a judicial direction about the relevance of the motive identified by the prosecution and how it interacts with the burden and standard of proof; or

    (b) Division 10 of Part 4 prohibits any other directions about a prosecution witness' motive to lie, and so no relevant direction is possible. In that case, the judge will remain able to remind the jury of the evidence and arguments of the parties (*Jury Directions Act 2015* ss 65, 66), and may make a comment about how the prosecution arguments interact with the burden and standard of proof.

Last updated: 14 May 2024

4.4.1 Charge: Motive to Lie

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In this case, [*identify how issue of whether the witness has a motive to lie has been raised*]. The [suggestion/implication] is that NOW has a motive to give false evidence.

If you accept that NOW [*identify relevant motive*], or might have [*identify relevant motive*], then you will need to consider whether that affected the evidence s/he gave.

On the other hand, if you reject the idea that NOW [*identify relevant motive*], then you will ignore that argument when you are deciding what weight to give his/her evidence.

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused is guilty. You can only convict NOA of [*insert offence*] if, on the basis of all the evidence, you are satisfied of his/her guilt beyond reasonable doubt.

The accused does not have to prove that NOW had a reason for giving false evidence.

[*Refer to relevant evidence and arguments of the parties.*]

Last updated: 2 October 2017

4.4.2 Charge: No Motive to Lie

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In this case, [*identify how issue of whether the witness has a motive to lie has been raised*]. The [suggestion/implication] is that NOW had no reason to give false evidence.

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused is guilty. You can only convict NOA of [*insert offence*] if, on the basis of all the evidence, you are satisfied of his/her guilt beyond reasonable doubt.

The accused does not have to prove that NOW had a reason for giving false evidence.

It would therefore be wrong to think that unless you can find a reason for NOW to give false evidence, then NOW must be telling the truth. If you did that, you would be expecting NOA to prove his/her innocence. And that would be contrary to the rule that the prosecution must prove the accused's guilt beyond reasonable doubt.

Last updated: 2 October 2017

4.5 Confessions and Admissions

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Terminology

1. At common law, a distinction is drawn between a "confession" and an "admission".[103] This is not the case under the Evidence Act 2008, which uses the term "admission" to refer to both types of evidence.

[103] At common law, in a "confession" the accused directly discloses his or her guilt of an offence, while in an "admission" the accused merely discloses incriminatory facts. Despite this differentiation, at common law the same legal principles apply to both types of evidence (see *R v DD* (2007) 19 VR 143; [2007] VSCA 317).

2. Consequently, although this topic is titled "Confessions and Admissions" (to make clear the fact that they cover both types of evidence), in the remainder of this commentary, only the term "admission" is used.

What is an Admission?

3. The Dictionary to the *Evidence Act 2008* defines an "admission" as a previous representation by a party to a proceeding that is adverse to the person's interest in the outcome of proceedings.

4. This definition (which must be read in conjunction with the definition of "previous representation") covers both express admissions and implied admissions by conduct.[104] It includes statements that may rebut a possible defence, such as intoxication. However, conduct such as producing a writing sample, or a refusal to take part in an identification parade, is not an "admission" (See *R v Fowler* (2003) 151 A Crim R 166; *R v Esposito* (1998) 45 NSWLR 442; *R v Horton* (1998) 104 A Crim R 306; *Re A (a Child)* (2000) 115 A Crim R 1; *R v Knight* (2001) 120 A Crim R 381).

5. Admissions can be made to police or to other witnesses (*R v Robertson* [1998] 4 VR 30; *R v Buckley* (2004) 10 VR 215).

6. One way in which an accused may admit his or her involvement in a crime is by pleading guilty at a committal hearing. Such a plea amounts to a solemn confession of every element of the offence (*R v D'Orta-Ekenaike* [1998] 2 VR 140; R v Rustum [2005] VSCA 142).

Admissibility of Admissions

7. The admissibility of admissions is governed by Part 3.4 of the *Evidence Act 2008.*

8. Where a statement contains both inculpatory and exculpatory elements (a "mixed statement"), the exculpatory elements will be admissible if reasonably necessary in order to explain the admission (*Evidence Act 2008* s 81(2))

9. This topic does not address the admissibility of admissions. The focus is solely on the directions to be given when an admission is admitted.

Issues to be Addressed in the Charge

10. Depending on the circumstances of the case, a judge may need to:

    i) Direct the jury about the pre-requisites for using an admission;

    ii) Warn the jury that evidence of an admission may be unreliable.

    These directions are addressed in turn below.

Prerequisites for Using an Admission

The prerequisites

11. The jury may only use an alleged admission if they are satisfied that:

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[104] Implied admissions by conduct include exculpatory statements that are relied upon as lies, or other post–offence conduct, that can be used as 'incriminating conduct' within the meaning of *Jury Directions Act 2015* s 18.

i) It was made by the accused;[105] and

ii) Its substance is truthful (*Burns v R* (1975) 132 CLR 258).

12. It is essential that the issues of whether the alleged admission was made, and whether it was truthful, are kept strictly separate. The presence of truthful facts in the alleged admission must not be allowed to distract the jury from the possibility that the admission was fabricated by a person aware of the underlying facts (*Burns v R* (1975) 132 CLR 258; *R v Gay* [1976] VR 577).

13. In some cases, it will also be necessary to direct the jury of the need to be satisfied that an alleged admission related to the acts charged in the indictment and not some other, uncharged, act. This is especially important where the alleged admission is made in general terms, such as agreeing that general allegations of sexual misconduct are true (*Payne v R* [2015] VSCA 291, [13]; *Choudhary v R* [2013] VSCA 325; *R v MMJ* (2006) 166 A Crim R 501).

14. If the jury cannot be satisfied that the admission related to specific conduct alleged in the indictment, then it can only be used to assess the nature of the relationship between the parties, such as to show the existence of a sexual relationship (see *Payne v R* [2015] VSCA 291; *Choudhary v R* [2013] VSCA 325; *R v MMJ* (2006) 166 A Crim R 501).

The Accused Must Have Made the Admission

15. Before the jury can use an admission, they must be satisfied that it was made in the terms alleged by the witness (i.e. the witness's evidence about the admission was "accurate") (*McKinney v R* (1991) 171 CLR 468).

16. The jury must assess this matter based on the whole of the relevant evidence (*Burns v R* (1975) 132 CLR 258).

17. Evidence that suggests that the content of an admission is untrue will cast doubt on the likelihood that the admission was made (*McKinney v R* (1991) 171 CLR 468).

18. Evidence concerning the circumstances of the alleged admission and the credibility of relevant witnesses may also bear on the probability that the accused made the admission (*R v Gay* [1976] VR 577).[106]

The Admission Must Have Been Truthful

19. Before the jury can use an admission, they must also be satisfied that the statement constitutes a truthful representation of the accused's involvement in the crime (*Burns v R* (1975) 132 CLR 258).

20. This requires the jury to be satisfied that the words used in the admission were intended to be an admission of guilt of the offence charged, and did not bear some other innocent meaning (*R v Buckley* (2004) 10 VR 215).

21. It also requires the jury to be satisfied that the accused was not boasting about or exaggerating his or her actions (*R v Mitchell* [2006] VSCA 289; *R v Koeleman* (2000) 2 VR 20).

22. The jury only needs to be satisfied that the statement is true in relation to the parts in which the accused implicates himself or herself in the commission of the offence. The jury does not need to be satisfied that the statement is true in all particulars (*R v Burns* [1975] VR 241).

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[105] Section 87 of the *Evidence Act 2008* allows admissions by a third party with the authority of the accused to also be taken as admissions by the accused.

[106] These factors may also be relevant to the admissibility of the admission (see *Evidence Act 2008* s 85). The fact that the judge has taken such factors into account in determining that the admission is admissible does not mean that the jury must accept the evidence as truthful and reliable (see *R v Williams* (1981) 4 A Crim R 441; *R v Blades; ex parte Attorney-General* [2001] QCA 384; *R v Basto* (1954) 91 CLR 628; *Burns v R* (1975) 132 CLR 258).

When should the jury be directed about the prerequisites?

23. The need for a direction depends on whether a direction is sought and whether, despite the absence of any request, there are substantial and compelling reasons for giving the direction (*Jury Directions Act 2015* ss 12, 14, 16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

24. Ordinarily, the jury will be able to evaluate evidence of an admission without assistance, and so a *Burns* direction will not be required (*Carr v R* (1988) 165 CLR 314; *Bromley v R* (1986) 161 CLR 315).

25. However, a direction may be necessary if the evidence is prone to misuse, or if the jury may fail to distinguish or apply the two prerequisites for using an admission (*Burns v R* (1975) 132 CLR 258; *R v Perera* [1986] 1 Qd R 211; *Cotic v R* (2000) 118 A Crim R 393; *R v D'Orta-Ekenaike* [1998] 2 VR 140).

26. Where there is no dispute that an admission, if made, was truthful, the judge may direct the jury only on the need to be satisfied that accused made the admission (*R v Brooks* (1998) 103 A Crim R 234).

27. Conversely, if there is no dispute that the admission was made, the judge should not direct the jury on the need to be satisfied that the admission was made. Such a direction would be superfluous and distracting (*De Silva v The Queen* [2019] HCA 48, [33]).

28. The need for a *Burns* direction does not depend on whether the admission was made to police or to some other witness. A direction may be required regardless of the person who witnessed the previous representation (*R v Robertson* [1998] 4 VR 30; *R v Buckley* (2004) 10 VR 215).

29. At common law, if the relevant admission consisted of a guilty plea made at a committal hearing (which has subsequently been changed), the judge was required to direct the jury about how they could use evidence of the plea (*R v D'Orta-Ekenaike* [1998] 2 VR 140; *R v Rustum* [2005] VSCA 142).

Content of a *Burns* Direction

30. The content of a *Burns* direction will depend on the circumstances of the case (*Burns v R* (1975) 132 CLR 258; *Ross v R* (1922) 30 CLR 246; *Carr v R* (1988) 165 CLR 314; *McKay v R* (1935) 54 CLR 1; *R v Mitchell* [2006] VSCA 289; *R v Lewis* (2000) 1 VR 290).

31. Where a full *Burns* direction is required, the judge must direct the jury that they may only use an alleged admission if they are satisfied that it was made by the accused and was truthful (*Burns v R* (1975) 132 CLR 258; *R v PAB* (2006) 162 A Crim R 449).

32. At common law it was customary to direct the jury that these two matters must be established beyond reasonable doubt (*R v Franklin* (2001) 3 VR 9; *R v Kotzman* [1999] 2 VR 123; *Walford v McKinney* [1997] 2 VR 353; *R v Russo* (2004) 11 VR 1; *McKinney v R* (1991) 171 CLR 468).

33. Under the *Jury Directions Act 2015*, the only matters that must be proved beyond reasonable doubt are the elements and the absence of any relevant defences (*Jury Directions Act 2015* s 61. See also *Payne v R* [2015] VSCA 291, [13]; *DPP v Roder* [2024] HCA 15, [15]).

34. However, in some cases, an admission may be substantially the only evidence of one or more elements. In such cases, it may be appropriate for the judge to clearly identify for the jury the importance of the admission. Judges should discuss the issue with counsel and hear submissions on what additional directions or comments are appropriate. One option is to refer to the evidence of the confession or admission and direct the jury that it must be satisfied that that evidence proves the element beyond reasonable doubt (*Jury Directions Act 2015* s 61, Example).The judge should identify the charge or charges in respect of which the evidence is capable of constituting an admission (*CG v R* [2011] VSCA 211).

35. In some cases, it will not be possible to link an admission, even if made, to particular charges. Where that occurs, the jury must be directed to only use the evidence to assess the general relationship between the parties, such as to show that a sexual relationship existed (*Payne v R* [2015] VSCA 291, [11]; *Choudhary v R* [2013] VSCA 325).

36. Where relevant, the jury should be told to consider whether a witness's evidence of the terms of an admission contains information which could only have come from the accused. The inclusion of such information reduces the chance that the admission was invented by the witness (*Burns v R* (1975) 132 CLR 258; *R v Georgiev* [2001] VSCA 18).

37. Conversely, in some cases the jury should be told that no conclusions can be drawn from the inclusion of information which the witness would have known even if the accused had not made an admission (*R v Gay* [1976] VR 577).

38. At common law, part of the rationale for allowing confessions and admissions to be led in evidence is that it is unlikely that an innocent person would implicate himself or herself in a crime (*Burns v R* (1975) 132 CLR 258).

39. This rationale should not be included as part of a charge on confessions or admissions. It is undesirable to give the jury general directions about what kinds of evidence are likely to be true and the direction does not help a jury decide whether to accept the evidence. Such a direction would be erroneous if it suggested that there was a legal presumption that admissions are truthful (*Burns v R* (1975) 132 CLR 258; *Tunja v R* (2013) 41 VR 208; *Mule v R* [2005] HCA 49; *Xypolitos v R (*2014) 44 VR 423).

40. If the case involves a written admission that has been altered, the jury should be told that they may only use that admission if they are satisfied that the alterations were adopted by the accused (*Walford v McKinney* [1997] 2 VR 353).

41. Where the evidence is ambiguous, the judge must also direct the jury that they need to determine whether the words used constitute an admission of the wrongdoing alleged in the case. This requires the jury to consider whether the accused effectively admitted his or her involvement in the offence charged (*Magill v R* (2013) 42 VR 616. See also *R v Ly*, NSWCCA, 25/5/1994; *R v Khalil* (1987) 44 SASR 23).

42. If the admission consists of a guilty plea made at a committal hearing (which has subsequently been changed), the direction will explain that the jury may only use the evidence of that plea if they are satisfied that the plea:

    - Was a true acknowledgment of guilt of the offence charged; and
    - Was intended to be a true acknowledgment of guilt of the offence charged (*R v D'Orta-Ekenaike* [1998] 2 VR 140; *R v Perera* [1986] 1 Qd R 211; *Cotic v R* (2000) 118 A Crim R 393).

43. In such cases, the judge should also explain the ways in which the accused disputes the evidentiary value of the plea (*R v D'Orta-Ekenaike* [1998] 2 VR 140; *R v Rustum* [2005] VSCA 142).

Mixed statements

44. In some cases, a statement will contain both an inculpatory admission and an exculpatory explanation (a 'mixed statement'). As a matter of fairness, the prosecution may not rely solely on the inculpatory parts of the statement, but must tender the whole statement (*R v Rudd* (2009) 23 VR 444).

45. When the jury receives a mixed statement, a party may request a direction on how the jury should treat the inculpatory and exculpatory parts of the statement (*R v Rudd* (2009) 23 VR 444).

46. Such a direction:

    - May tell the jury that it is for the jury to determine what weight to give the different parts of the statement;
    - Must not convey that the jury are bound as a matter of law to give less weight to some parts of the statement than others;
    - Should not state why admissions against interest are commonly regarded as reliable evidence (*R v Rudd* (2009) 23 VR 444; *R v Berry & Wenitong* (2007) 17 VR 153; *Mule v R* [2005] HCA 49).

47. It is not necessary for the jury to be asked to decide whether it accepts that the exculpatory part of a mixed statement was made. The requirement that the statement was made only applies to a disputed confessional statement (*De Silva v The Queen* [2019] HCA 48, [34]).

Unreliability of Admission Evidence

48. A judge may be required to warn the jury that evidence of an admission may be unreliable (*Jury Directions Act 2015* s 32).

49. This is a particular form of a s 32 unreliable evidence warning. This topic should therefore be read in conjunction with 4.21 Unreliable Evidence Warning.

When must a s 32 unreliability warning be given?

50. A judge must give a s 32 unreliability warning if:

    i) A party in a jury trial requests such a warning;

    ii) The evidence in question is "of a kind that may be unreliable"; and

    iii) There are no good reasons for not doing so (*Jury Directions Act 2015* s 32).

51. See 4.21 Unreliable Evidence Warning for general information concerning the first and third requirements.

52. In relation to the second requirement, s 31(a) states that evidence of an admission is evidence "of a kind that may be unreliable".

53. However, a s 32 unreliability warning is not required simply because evidence of an admission has been led (and the other requirements of s 32 have been met). Such a warning will only be necessary if the judge finds that the *specific evidence* in the case is "of a kind that may be unreliable" (see *R v Clark* (2001) 123 A Crim R 506 Heydon J, [70]).

54. While evidence of an admission may be "of a kind that may be unreliable", this will not always be the case. Even if evidence falls within the description in s 31(a), judges must always consider whether the specific evidence given in the trial in question is "of a kind that may be unreliable" (see *R v Clark* (2001) 123 A Crim R 506 Heydon J, [70]).

55. Section 32 creates a test of "possibility". The question is whether the evidence is of a kind that "may be" unreliable (*R v Flood* [1999] NSWCCA 198, [3]).

56. In determining whether to give a s 32 warning, the judge must consider the issues that were raised in the trial about the reliability of the admission evidence (*R v Fowler* (2003) 151 A Crim R 166; *Em v R* [2006] NSWCCA 336).

57. It will usually be unnecessary to give a warning if:

    - The reliability of the evidence is not in issue, or
    - The jury can safely use its common sense and experience to assess any factors that affect the reliability of the evidence (see *Em v R* [2006] NSWCCA 336; *R v Fowler* (2003) 151 A Crim R 166; *R v Stewart* (2001) 52 NSWLR 301; *R v Baartman* [2000] NSWCCA 298; *R v Kanaan* [2006] NSWCCA 109).

58. A warning will generally not be necessary where it is only the witness's honesty that is attacked, unless the witness falls into a category mentioned in s 32. In general, the court has no particular advantage over the jury in determining whether a witness is telling the truth (*R v Fowler* (2003) 151 A Crim R 166).

59. However, if the witness's honesty is attacked due to the fact that he or she falls within a special class (e.g. where he or she is a prison informer or a criminally concerned witness), a s 32 warning may be required on another ground (see *R v Fowler* (2003) 151 A Crim R 166). See 4.21 Unreliable Evidence Warning for information concerning the other grounds on which a s 32 warning may be required.

Content of an unreliable evidence warning

60. A s 32 unreliability warning must:

    i) Warn the jury that the evidence may be unreliable;

    ii) Inform the jury of the significant matters that may cause it to be unreliable; and

    iii) Warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it (*Jury Directions Act 2015* s 32).

61. See 4.21 Unreliable Evidence Warning for information concerning the first and third requirements.

62. When a party requests a s 32 warning, it must identify the significant matters that may make the evidence unreliable. The judge will need to consider which of those matters are significant and must direct the jury accordingly (see *Jury Directions Act 2015* s 32).

63. As evidence of an admission is evidence of a previous representation, a judge may need to direct the jury about any significant matters that make the evidence potentially unreliable due to its nature as a previous representation (*R v Johnston* [2004] NSWCCA 58; ALRC Report 26, Volume 1, 1985 (Interim), [753]).[107] See 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements) for further information.

64. In some cases, the following matters may also affect the reliability of admission evidence:

    - The possibility that the admission was induced in some way that undermines its reliability (see *R v Tofilau* (2006) 13 VR 28);

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[107] Some of the risks posed by evidence of previous representations include:

- That in repeating what the speaker said, the original words or their effect may not have been accurately recalled and repeated;

- That any weaknesses of perception, memory, narration skill and sincerity of the speaker and the person reciting the representation may have been compounded;

- That the representation was not made in the court environment and may have been subject to pressures that resulted in a false account being given;

- That the representation was not made on oath or affirmation, and so may not have been truthful;

- That the jury was unable to assess the credibility of the speaker at the time he or she made the representation, and so are unable to know whether or not he or she was being honest (see, e.g. *R v Harbulot* [2003] NSWCCA 141; *R v Vincent* [2002] NSWCCA 369; *R v Nemeth* [2002] NSWCCA 281; *Brown v R* [2006] NSWCCA 69).

- The possibility that the accused may have perceived that making an untrue admission would be both safe and beneficial, such as if the accused was bragging, exaggerating or fantasising (see *R v Tofilau* (2006) 13 VR 28; *R v De Martin* [2009] NSWDC 113; *R v Khalil* (1987) 44 SASR 23);
- The possibility that the accused suffered from a mental illness or operated in a mental state that could have led to him or her making a false admission (see *Mallard v R* (2005) 224 CLR 125; *Burns v R* (1975) 132 CLR 258);
- The fact that the witness giving evidence of the admission has an interest in the outcome of the proceeding, and so may be biased or have a motive to be untruthful (*Derbas v R* [2007] NSWCCA 118);
- The fact that the evidence was easy to manufacture, hard to deny and very difficult to test (*R v Robinson* [2003] NSWCCA 188).

Withdrawn Pre-trial Disclosure or Concessions

65. As part of pre-trial disclosure obligations, the defence must file a response to the summary of the prosecution opening and a defence response to the prosecution's notice of pre-trial admissions (*Criminal Procedure Act 2009* s 183). In the course of complying with these obligations, the defence may make some admissions.
66. While the defence is free to depart from any admissions made in those documents, or in the defence opening, the judge and, with leave, the prosecutor may make strong comments on that change of position (*R v Shalala* (2007) 17 VR 133; *Sumner v R* [2010] VSCA 298).
67. The judge may only grant leave to the prosecutor to comment on the departure if the comment is relevant, the comment is permitted by another Act or a rule of law and the comment is not unfairly prejudicial (*Criminal Procedure Act 2009* s 237).
68. In addition, the jury may only use admissions in a pre-trial document if the judge allows the admissions to be received in evidence. This may depend on whether the prosecution can establish that it is reasonably open to find that the admission was made by a person who had authority on behalf of the accused to make such an admission (see *Evidence Act 2008* s 87 and *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* (2008) 167 FCR 314).

Timing of the Direction

69. A direction about admission evidence may be given at the time the evidence is received and/or in the judge's final charge (*Burns v R* (1975) 132 CLR 258).
70. A direction that is given when the evidence is received does not always need to be repeated in the final charge (*Burns v R* (1975) 132 CLR 258).

Last updated: 14 May 2024

4.5.1 Charge: Confessions and Admissions

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In this case, you heard evidence that NOA admitted that s/he had [*describe the content of the admission*]. The prosecution says that this evidence is relevant to [*identify relevant charge and the way in which that admission is alleged to be relevant*].

Before you can use this evidence, you must consider two matters.

First, you must accept that the accused actually made the alleged admission in the terms alleged by NOW. That is, you must accept that NOA [*insert relevant details, e.g.* "said to NOW 'I killed NOV'"].[108]

Secondly, you must accept that the accused's alleged admission was truthful. This requires you to accept that when NOA [*insert relevant details, e.g.* "said 'I killed NOV'"], s/he meant to admit [*describe fact in issue, e.g.* "that s/he killed NOV"], and that that admission was, in fact, true.[109]

[*If a warning under Jury Directions Act 2015 s 32 is necessary, add the following shaded section*.]

In considering this evidence, I must warn you of the need for caution when considering NOW's evidence of the alleged admission.

Matters that may cause unreliability

I must give you this warning[110] because it is the experience of the law that evidence of admissions may be unreliable. This is because [*identify the significant matters that may cause the evidence to be unreliable. Some possibilities include*:

- NOW may not have *accurately recalled or repeated* NOA's admission and may have changed its meaning;
- It was not possible for you to assess *NOA's demeanour at the time s/he made the admission*, which may make it harder to assess whether the admission was true;
- The process of repeating a statement *compounds any weaknesses* of the people involved, such as imperfect perception, memory or sincerity. Errors can occur when the original statement is made, when it is heard or when it is repeated in court. This means that even if you accept NOW's evidence as truthful, it might not be an accurate representation of what happened – either because of problems in what NOW heard or remembered, or because NOA's statement itself was not accurate or truthful.
- [*Describe relevant inducement or other relevant circumstance*] may have caused NOA to make a false statement;
- NOA may have been *bragging, exaggerating or fantasising about his/her actions;*
- NOW may have *reasons* for giving untruthful evidence of an admission, such as [*describe any relevant reasons, such as bias, etc*.];
- An untruthful admission may be *easy for a witness to manufacture*, hard for an accused to deny and very difficult to test in court;
- NOA may have been subject to *pressures that caused him/her to make a false admission*, which you do not know about;
- The admission was not made in a court environment, and so NOA was not under the *same obligation to tell the truth* as s/he would have been if s/he gave evidence in court.]

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[108] This part of the charge may be deleted if the accused does not dispute making the admission, but simply disputes its truthfulness.

[109] This part of the charge may be deleted if the accused disputes making the admission, but does not dispute its content.

[110] The judge should add any other matters that may cause the evidence to be unreliable, such as if the evidence comes from an accomplice. If the evidence is given by a prison informer, use 4.23.1 Charge: Confession to Prison Informer instead.

[*The judge should also identify any* other factors *that may have a bearing on the reliability of the evidence in the case, such as any inconsistencies that exist between different admissions that have been made*.]

Warning

The law says that every jury must take this potential unreliability into account when considering evidence of an admission. You must take it into account in determining whether you accept NOW's evidence at all, and if you do accept it, in deciding what weight to give to that evidence.

In this case, the prosecution argued that NOA made the alleged admission, and that that admission was truthful. [*Describe relevant prosecution evidence and/or arguments*.]

The defence denied this, arguing [*describe relevant defence arguments, e.g.* "that NOA never made the admission" or "that while NOA did make an admission, his/her statement was not truthful because s/he was only boasting about having committed the offence" or "that while NOA made a truthful statement, it was not an admission that s/he had …"]. [*Summarise relevant defence evidence*.]

It is for you to determine, based on all of the relevant evidence, whether NOA made the statement NOW said s/he did, and whether that statement was truthful. Unless you accept that both of these matters have been proven, you must disregard the evidence of NOA's alleged admission.

[*If the admission is the only evidence of one or more elements, add the following shaded section*.]

You will remember my directions the prosecution must prove its case beyond reasonable doubt. In this case, the only evidence that [*identify relevant elements or facts in issue*] is the evidence that [*describe evidence of admission*]. You therefore cannot be satisfied that the prosecution has proved its case beyond reasonable doubt unless you are satisfied this evidence proves [*identify relevant element*] beyond reasonable doubt.

Last updated: 14 May 2024

4.5.2 Charge: Withdrawn Committal Plea

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It is not disputed that NOA initially pleaded guilty to NOO.[111]

You can use this guilty plea as an admission of guilt. However, before you can do so, you must consider two matters.

First, you must accept that the plea was a true acknowledgement of his/her guilt of NOO. That is, you must accept that when NOA pleaded guilty to NOO, s/he was admitting his/her guilt of that offence.

Secondly, you must accept that the plea was intended to be a true acknowledgment of his/her guilt. This requires you to accept that when NOA pleaded guilty, s/he meant to accept his/her responsibility for the crime of NOO, and that that admission was, in fact, true.

[*If a warning under Evidence Act 2008 s 165 is necessary, add the following shaded section*:]

In considering this evidence, I must warn you of the need for caution when considering evidence of NOA's earlier guilty plea.

Matters that may cause unreliability

[111] Name of Offence.

I must give you this warning[112] because it is the experience of the law that evidence of admissions may be unreliable. This is because [*identify all of the risks of unreliability posed by the specific evidence in the case. Some possibilities include:*

- It was not possible for you to *assess NOA's demeanour at the time s/he made the admission*, which may make it harder to assess whether the admission was true and was intended to be true;
- [*Describe relevant* inducement *or other relevant circumstance*] may have caused NOA to make a false plea;
- NOA may have been subject to *pressures that caused him/her to make a false plea*, which you do not know about.]

Warning

The law says that every jury must take this potential unreliability into account when considering evidence of an admission. You must take it into account in deciding whether NOA's plea was a true acknowledgement of his/her guilt of NOO and whether it was intended to be a true acknowledgement of guilt.

The prosecution invite you to use NOA's earlier guilty plea as evidence of his/her guilt. [*Describe relevant prosecution evidence and/or arguments.*]

The defence argued that you should not use the evidence in this way. They say [*describe relevant defence evidence and/or arguments, e.g.* "that NOA only pleaded guilty to bring an end to the matter" or "that NOA was not aware that s/he had a valid defence".]

It is for you to determine, based on all of the relevant evidence, whether NOA's guilty plea was, and was intended to be, a true acknowledgment of his/her guilt of NOO. Unless you accept that both of these matters have been proven, you must disregard the evidence of NOA's alleged admission.

Last updated: 9 March 2017

4.6 Incriminating Conduct (Post Offence Lies and Conduct)

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Introduction

1. Division 1 of Part 4 of the *Jury Directions Act 2015* regulates the admission and use of evidence of 'incriminating conduct'. The Part applies to "conduct" and "incriminating conduct" which are defined as:

[112] The judge should add any other matters that may cause the evidence to be unreliable, such as if the evidence comes from an accomplice. If the evidence is given by a prison informer, use 4.23.1 Charge: Confession to Prison Informer instead.

Conduct means the telling of a lie by the accused, or any other act or omission of the accused, which occurs after the event or events alleged to constitute an offence charged;

Incriminating conduct means conduct that amounts to an implied admission by the accused-

(a) of having committed an offence charged or an element of an offence charged; or

(b) which negates a defence to an offence charged (*Jury Directions Act 2015* s 18).

2. These provisions replace the common law principles that were developed in relation to 'consciousness of guilt' and 'post offence conduct' (see *Jury Directions Act 2013* s 28 and *Jury Directions Act 2015* s 24).
3. Incriminating conduct falls into two broad categories: lies, and other post-offence behaviour (including acts such as flight or omissions). Similar principles apply to both areas *(Jury Directions Act 2015* s 18; *R v Renzella* [1997] 2 VR 88 (CA); *R v Boros* [2002] VSCA 181).
4. Evidence of incriminating conduct can be used in only two ways:
   i) to attack the accused's credit where he or she gives an account either in a record of interview or in evidence; and/or
   ii) as an implied admission of having committed an offence of an element of an offence or which negates a defence to an offence charged (*Edwards v R* (1993) 178 CLR 193; *R v Akkus* [2007] VSCA 287; *R v GVV* (2008) 20 VR 395).
5. There are a number of specific inferences that can be drawn from post-offence conduct. Depending on the conduct, the jury may be able to infer that, by committing the relevant conduct, the accused impliedly admitted that:
   - s/he committed an offence charged or an alternative offence;
   - s/he had committed part of the *actus reus* of an offence;
   - s/he had a particular intention or *mens rea* when s/he engaged in particular conduct; or
   - s/he was not acting in a way consistent with possible legal defences or justifications (e.g. self-defence, duress or sudden extraordinary emergency) (*R v Ciantar* (2006) 16 VR 26; *R v Jakimov* [2007] VSCA 9; *Jury Directions Act 2015* s 18).
6. The *Jury Directions Act 2015* sets out the following three directions:
   - a section 21 direction, to be given whenever evidence is relied on as incriminating conduct;
   - a section 22 direction, which may be requested when evidence is relied on as incriminating conduct; and
   - a section 23 direction, which may be requested when there is a risk of the jury improperly using evidence as incriminating conduct.
7. These provisions substantially replicate the former Part 6 of the *Jury Directions Act 2013.*
8. Conduct which only provides support for other circumstantial evidence (such as post-offence conduct used to prove a sexual interest in the complainant, or as context evidence) is not an implied admission of a specific charge. The need for directions on such evidence will depend on how the evidence is relevant (see, e.g. *PDI v R* [2011] VSCA 446).
9. If evidence of conduct is only used to attack credit, the judge will generally not need to warn the jury about the use of that evidence unless defence counsel requests a direction to address the risk of the jury misusing the evidence as an implied admission (*Jury Directions Act 2015* s 23).

10. Previously, incriminating conduct was sometimes called evidence of "consciousness of guilt". This term is potentially misleading, and its use with juries is discouraged (Zoneff v R (2000) 200 CLR 234 (Kirby J); R v Nguyen (2001) 118 A Crim R 479; R v Franklin (2001) 3 VR 9; R v Chang (2003) 7 VR 236).

Admissibility of incriminating conduct – notice and leave requirements

11. The prosecution must not rely on evidence as incriminating conduct unless:
    - at least 28 days before the trial is listed the commence, the prosecution has served on the accused and filed in court:
        - a notice of intention to rely on evidence of incriminating conduct; and
        - a copy of the evidence the prosecution intends to rely upon; and
    - the trial judge finds that the evidence is reasonably capable of being used by the jury as evidence of incriminating conduct (Jury Directions Act 2015 ss 19, 20).[113]
12. A judge may dispense with the need to give notice of an intention to rely on evidence of incriminating conduct if the prosecution first becomes aware of the relevant conduct during the trial, the prosecution gives oral notice of its intention to rely on that conduct as incriminating conduct and it is in the interests of justice to dispense with the requirements (*Jury Directions Act 2015* s 20).
13. One situation in which the prosecution might only become aware of the alleged conduct during the trial is where the prosecution invites the jury to draw an inference about the content of the accused's instructions to counsel on the basis of the content of cross-examination. While it can be permissible to invite the jury to draw such an inference, a submission that the accused invented those instructions because the truth would implicate the accused is an invitation to treat the instructions as incriminating conduct. Such a submission requires compliance with the Post-offence conduct provisions of the *Jury Directions Act 2015* (*Ritchie v The Queen* [2019] VSCA 202, [109]).
14. When assessing whether the evidence is reasonably capable of being used as incriminating conduct, the judge must consider the case as a whole. It is not necessary to assess whether a piece of evidence, standing alone, is capable of being used as an implied admission (*Jury Directions Act 2015* s 20).
15. The following sections describe the circumstances in which lies and other post-offence conduct may be capable of being used as incriminating conduct.
16. If an innocent explanation of the post-offence conduct is so inherently likely that a jury could not properly regard the conduct as evidence of guilt, the judge must not allow the prosecution to rely on the conduct as evidence of incriminating conduct (*R v Ciantar* (2006) 16 VR 26).

Post-offence lies

17. One form of conduct which may be capable of constituting incriminating conduct is evidence that the accused told a lie (*Edwards v R* (1993) 178 CLR 193; *R v Renzella* [1997] 2 VR 88 (CA)).
18. Only post-offence lies which are told because the accused perceives that the truth is inconsistent with his or her innocence provide evidence probative of guilt (*Edwards v R* (1993) 178 CLR 193).

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[113] The incriminating conduct notice requirement does not apply in summary hearings. While *Jury Directions Act 2015* s 4A requires magistrate conducting a summary hearing to reason in a manner consistent with *Jury Directions Act 2015* ss 21–23 (as the case may be), the Act does not require parties in non-trial hearings to comply with the notice requirements (*DPP v Dyke* (2020) 61 VR 207, [13]–[17]).

19. Where the accused tells the same lie on multiple occasions, the prosecution should consider how it proposes to treat those multiple lies. Where it relies only on one instance of the lie as incriminating conduct and other instances as going to credit, there is a risk that the jury will be unable to draw that distinction and will instead rely on all instances of the lie as incriminating conduct. In such cases, it may be necessary to refuse leave to rely on the lie as incriminating conduct (*R v Robb* [2015] VSC 481).

20. The probative value of a lie depends on its nature and the use sought to be made of it. It will rarely be strong enough to prove guilt directly. It will usually form part of the body of circumstantial evidence from which the jury is asked to infer the guilt of the accused (*R v Nguyen* (2001) 118 A Crim R 479; *R v Ciantar* (2006) 16 VR 26).

21. It is possible for a lie to be the only evidence of guilt – if the only reasonable inference to be drawn from the fact that the accused had lied was that s/he was confessing his/her guilt. However, this will be very rare (*R v Zheng* (1995) 83 A Crim R 572 (NSW CCA); *Edwards v R* (1993) 178 CLR 193).

22. Finding that the accused lied due to a belief in their own guilt is not the same as finding that s/he is guilty of the offence. It is merely one piece of evidence that can be used in the ultimate determination of guilt. The judge must tell the jury that even if they find that the accused believed that he or she committed the offence, the jury must still decide on the whole of the evidence whether the prosecution has proved the accused's guilt beyond reasonable doubt (*Jury Directions Act 2015* s 21; *R v Camilleri* (2001) 119 A Crim R 106; *R v Franklin* (2001) 3 VR 9).

23. In most cases lies are not used as an implied admission. Post-offence lies are generally used to discredit a witness, or simply in the context of providing contradictory evidence (*Edwards v R* (1993) 178 CLR 193; *R v Renzella* [1997] 2 VR 88 (CA)).

24. If lies are not used as an implied admission, it is a misdirection to tell the jury that they form part of the prosecution's circumstantial case, or to prove the accused's guilt (*R v Renzella* [1997] 2 VR 88 (CA); *R v Benfield* [1997] 2 VR 491 (CA); *R v Russo* (2004) 11 VR 1; *R v Hartwick* (2005) 14 VR 125).

Relevant types of lies

25. At common law, untrue assertions and false denials are only capable of being used as an implied admission if the accused perceives that the truth is inconsistent with innocence. As a result, a lie could only be used as incriminating conduct if:

    - the lie was deliberate;
    - the lie related to a material issue;
    - the telling of the lie showed knowledge of the offence and was told because the truth would implicate the accused;
    - there was no other explanation for the telling of the lie consistent with innocence (*R v Edwards* (1993) 178 CLR 193; *R v Renzella* [1997] 2 VR 88).

26. At common law, the jury was required to consider these matters before using evidence as an implied admission. Under the *Jury Directions Act 2015*, it is likely that these matters will remain relevant to determining whether a judge should grant leave to allow the prosecution to rely on evidence as incriminating conduct (see *Jury Directions Act* 2015 s 20).

27. There must be evidence that a statement is a lie before it can be left to the jury as a possible implied admission. If the only way to establish a statement as a lie is by finding the accused guilty ("bootstraps reasoning"), it cannot be used in this way (*R v Laz* [1998] 1 VR 453; *R v Russo* (2004) 11 VR 1; *R v Sirillas* [2006] VSCA 234).

28. A mere denial of guilt (which can only be shown to be a lie by proving the prosecution case) cannot be used as an implied admission (*R v Gionfriddo and Faure* (1989) 50 A Crim R 327 (Vic FC)).

29. For a lie to be used as an implied admission, it must relate to a material issue (*Edwards v R* (1993) 178 CLR 193; *R v Gionfriddo and Faure* (1989) 50 A Crim R 327 (Vic FC)).

30. The logic of incriminating conduct evidence depends on the accused's knowledge that he or she committed the offences and that the truth would implicate the accused. The fact that the applicant was not provided with the detail of the complainant's allegations before the accused made a statement said to contain a lie does not inform the question of the applicant's belief (*Di Giorgio v R* [2016] VSCA 335, [28]).

31. If a lie is not inconsistent with the prosecution's account of the alleged crime (i.e. even if the accused had told the truth, it would not have implicated him or her in the crime), it is unlikely to be material (see, e.g. *R v Sutton* (1986) 5 NSWLR 697).

32. A lie by an accused about why s/he failed to mention a fact can be used as an implied admission (*R v Russo* (2004) 11 VR 1).

33. It may be inappropriate to leave lies to the jury as evidence of guilt if the accused disavowed the lies within a short period of time (*R v Lee* (2005) 12 VR 249).

34. Pre-offence lies cannot be used as an implied admission. They can, however, be used as an implied admission of an intention to commit an offence, or that one is actually in the course of committing an offence (*R v Appleby* (1996) 88 A Crim R 456; *R v Kotzmann* [1999] 2 VR 123).

Other post-offence behaviour

35. Although lies have generally been given special treatment in the case law, they are just one instance of potentially incriminating conduct. Evidence of other post-offence behaviour, such as fleeing from the police or concealing evidence, is equally capable of being regarded as an implied admission (*R v Gionfriddo and Faure* (1989) 50 A Crim R 327 (Vic FC); *R v Boros* [2002] VSCA 181; *R v McCullagh (No 2)* [2005] VSCA 109).

36. Some examples of other post-offence behaviour which have been used as evidence probative of guilt include:

    - fleeing (*R v McKenna* (1956) 73 WN (NSW) 345 (CCA); *R v Gay* [1976] VR 577 (FC); *R v Porter* (2003) 85 SASR 581).
    - concealing evidence (*R v Rice* [1996] 2 VR 406; *R v Chang* (2003) 7 VR 236).
    - suborning witnesses (*R v Liddy* (2002) 81 SASR 22).
    - remaining silent when speech could have been expected (*R v Salahattin* [1983] 1 VR 521 (FC); *R v Gallagher* [1998] 2 VR 671. See also *R v MMJ* [2006] VSCA 226 (Warren CJ)).
    - modifying behaviour patterns (*R v Gallagher* [1998] 2 VR 671).
    - laying a false trail (*R v Chang* (2003) 7 VR 236; *R v Loader* (2004) 89 SASR 204).

37. Where a person is alleged to have committed an offence as part of a group, conduct such as concealing evidence may be directly relevant to the accused's participation in the group, without any obligation to use the evidence as an implied admission. The prosecution, the defence and the judge will need to consider whether the evidence is relevant as circumstantial evidence or as an implied admission and, if the prosecution does not seek to use the evidence as an implied admission, whether a direction is necessary under s 23 about the risk of misuse (*Lowe v R* (2015) 48 VR 351, [176]–[181]).

38. As with lies, there is a distinction between cases where post-offence conduct such as flight has no probative value, and those where it is used as an implied admission (*R v Chang* (2003) 7 VR 236; *Dwyer v The King* [2023] VSCA 85).

39. Flight will not be probative where there is an equally plausible, innocent, explanation for the conduct. For example, in *Dwyer v The King* [2023] VSCA 85, the accused left the vicinity of the alleged offending after becoming aware that several people were angry with him and were looking for him. In that situation, the Court held that a rational jury could not determine that the accused fled due to his recent offending, rather than due to fear of the gathering mob, and therefore could not use the evidence of flight either as incriminating conduct, or as evidence that reflected on the credibility of the accused (*Dwyer v The King* [2023] VSCA 85, [96]–[97]). For this purpose, an 'innocent explanation' is one where the accused is not guilty of the offence charged. For example, an 'innocent explanation' for fleeing from the police in relation to one armed robbery could be that the accused was wanted for a different armed robbery (see, e.g. *R v Hartwick*, Unreported, Supreme Court of Victoria Court of Appeal, 20 December 1995).

40. The principles that apply to the treatment of other forms of post-offence behaviour are generally the same as those that apply to lies (*R v Renzella* [1997] 2 VR 88 (CA); *R v Nguyen* (2001) 118 A Crim R 479; *R v McCullagh (No 2)* [2005] VSCA 109).

41. At common law, the principles of consciousness of guilt were not limited by a strict temporal separation between conduct before or during the offence and conduct after the offence. Conduct that revealed an awareness of current or future wrongdoing could require the same directions as post-offence conduct, or modified post-offence conduct directions. For example, a destruction of evidence or the means of detection (such as listening devices or CCTV cameras), or laying a false trail, could be used as an implied admission even if it predated the completion of the offence (*La Rocca v The Queen* [2021] NSWCCA 116, [116]–[117]; *R v Appleby* (1996) 88 A Crim R 456, 459, 485–487).

42. The definition of 'conduct' in *Jury Directions Act 2015* s 18 specifically refers to conduct which "occurs after the event or events alleged to constitute the offence charged". It is likely that the abolition of the common law through *Jury Directions Act 2013* s 28 is limited to post-offence conduct, and so directions about implied admissions arising from pre-offence conduct remain governed by the common law (see also the Notes to *Jury Directions Act 2015* s 24).

Pretext conversation and incriminating conduct

43. The "pretext conversation" has become a common technique for the investigation of certain offences, especially sexual offences. A "pretext conversation" occurs where the complainant confronts the accused with an allegation of the offending. The conversation is recorded by police, and the recording may be played in the trial.

44. Where a pretext conversation produce evidence that meets the definition of incriminating conduct, the prosecution must give notice under *Jury Directions Act 2015* s 19 if it wishes to rely on the evidence for that purpose.

45. Whether a pretext call meets the definition of incriminating conduct ("an implied admission by the accused of having committed an offence charged or an element of an offence charged…") will often depend on the degree of specificity in the conversation. The evidence will most likely meet the definition where the accused demonstrates an awareness of the offences alleged, fails to deny the offending or makes a generalised admission in respect of multiple allegations (see, e.g. *WA v McBride* [2015] WASC 275; *R v LAF* [2015] QCA 130; *R v MBV* [2013] QCA 17; *Christian v R* [2012] NSWCCA 34).

46. In contrast, where the call involves a specific allegation and a specific admission, it is more likely that statements in the pretext call will be treated as express admissions, rather than implied admissions (see, e.g. *R v Cavalli* [2010] QCA 343).

47. Further, in some cases, the statements made in a pretext conversation will be non-specific and a jury cannot link those statements to any particular alleged offence. In those circumstances, the conversation may instead be relevant to support other circumstantial evidence, such as to prove a sexual interest in an individual complainant, or as context evidence. In those circumstances, the evidence will not be "incriminating conduct", as defined in the Jury Directions Act 2015 (see, e.g. *PDI v R* [2011] VSCA 446; *JWM v R* [2014] NSWCCA 248; *R v GVV* (2008) 20 VR 395).

48. The fact that the accused went to see a solicitor after a pretext conversation cannot be used as a piece of incriminating conduct, as that would involve impermissible speculation (*Meyer v R* [2018] VSCA 140, [211]–[212]).

49. In determining the status of statements made during pretext calls, the principles of silence in response to equal parties and inferring guilt from demeanour (discussed below) will often be relevant.

Silence as incriminating conduct

50. When considering whether the accused's silence in response to questioning can be used as an implied admission, a distinction is drawn between silence in response to people in authority and silence in response to equal parties.

51. In addition to the principles discussed below, there may be cases where, in the ordinary course of human affairs, it would be reasonable to expect that a person would inform others about an exceptional event. In such circumstances, a failure to inform others may be treated as an incriminating conduct, even if the person is not asked about the event. For example, in *Xypolitos v R* (2014) 44 VR 423 the accused killed his stepson, destroyed the body and failed to inform his partner or the police. This was treated as incriminating conduct in relation to whether he killed his stepson in self-defence.

Silence in response to people in authority

52. The jury may not use the accused's silence in response to a person in authority as an implied admission (*Evidence Act 2008* s 89; *R v Cuenco* (2007) 16 VR 118; *R v Barrett* (2007) 16 VR 240; *R v Russo* (2004) 11 VR 1; *R v Bruce* [1998] VR 579; *Petty v R* (1991) 173 CLR 95).

53. It is therefore not open to a jury to infer that the accused had implicitly admitted his/her guilt from the fact that s/he selectively exercised his/her right to answer questions (*R v Barrett* (2007) 16 VR 240; *R v Russo* (2004) 11 VR 1).

54. However, where the accused gives a detailed account of events to the police, the jury may be able to infer from the conscious omission of certain details that the accused had implicitly admitted his/her guilt (*R v Cuenco* (2007) 16 VR 118; *R v Russo* (2004) 11 VR 1; *De Marco* 26/6/1997 CA Vic; *Johnstone v R* (2011) 31 VR 320).[114]

55. Whether omissions of this nature can be used as incriminating conduct will depend on the other evidence in the case (*R v Cuenco* (2007) 16 VR 118; *R v De Marco* 26/6/1997 CA Vic CA; *Johnstone v R* (2011) 31 VR 320).

56. If evidence of an implied admission comes from a record of interview in which the accused has selectively answered questions, the judge should clearly direct the jury that while they may have regard to the answers given by the accused which have been identified as supporting the inference, they may not draw an inference from his or her "no comment" responses (see, e.g. *R v Barrett* (2007) 16 VR 240).

57. See 4.15 Silence in Response to People in Authority for further information.

Silence in response to equal parties

58. There may be circumstances in which the jury can infer from the accused's silence in response to a statement made by an equal party that s/he had implicitly admitted his/her guilt (*Woon v R* (1964) 109 CLR 529; *R v Thomas* [1970] VR 674; *R v Salahattin* [1983] VR 521; *R v MMJ* (2006) 166 A Crim R 501).

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[114] As long as this inference is drawn from the accused's conscious omission of details from his or her account, rather than his or her failure to answer a question or respond to a representation, it appears not to breach *Evidence Act 2008* s 89.

59. The focus here is upon whether the accused's silence, although not amounting to an admission by him or her of the specific facts stated in his or her presence, nevertheless demonstrated his or her guilt in some way (*R v MMJ* (2006) 166 A Crim R 501).

60. To infer that by remaining silent, the accused had implicitly admitted his/her guilt, the jury must find that:

    - the circumstances were such that, in ordinary experience, the accused would have been expected to respond to the statement made in his or her presence; and
    - the only reasonable explanation for the accused's silence is that the accused knew that he or she had committed the wrongful conduct which constituted the offence charged, and feared that a response would implicate him/her (*R v Salahattin* [1983] VR 521; *R v MMJ* (2006) 166 A Crim R 501).

61. See 4.16 Silence in Response to Equal Parties for further information concerning the requirement that the statement called for a response, as well as a discussion of possible reasons for a person remaining silent in response to a statement made by an equal party.

Inferring Guilt from Demeanour

62. Although evidence of the accused's demeanour or reactions to a certain event is theoretically capable of constituting an implied admission, it will be rare for a judge to leave such evidence before the jury on this basis. This type of evidence is very imprecise and unreliable, and subject to misinterpretation. It will also generally be equivocal and incapable of supporting an inference that the accused had implicitly admitted their guilt (*R v Favata* [2006] VSCA 44; *R v Barrett* (2007) 16 VR 240).

63. If the accused's demeanour is relied upon as evidence of an implied admission, additional directions about the dangers of drawing such an inference from demeanour may be necessary, including warning the jury:

    - to be cautious about placing undue weight on the demeanour of the accused as an indicator that s/he believed him or herself to be guilty of any offence;
    - to have regard to the possibility that, when interviewed, other factors (such as drugs or tiredness) may have affected the accused's demeanour;
    - not to speculate about what would be the "normal" reactions of a person subjected to the pressures of such an interview, whether the allegations be true or false; and
    - that a conclusion based on a person's demeanour in such circumstances might be very unfair, and could amount to a reversal of the onus of proof (*R v Barrett* (2007) 16 VR 240).

Need for warnings

64. There are three different types of directions that may be given in relation to post-offence conduct:

    i) a section 21 direction, telling the jury the conditions that must be satisfied before post-offence conduct can be treated as an implied admission;

    ii) a section 22 direction, warning the jury about the dangers of using evidence as incriminating conduct;

    iii) a section 23 direction, warning the jury to avoid improper use of post-offence conduct evidence which cannot be used as an implied admission (*Jury Directions Act 2015* ss 21–23).

When to give a section 21 direction and content of the direction

65. A section 21 direction must be given if the prosecution relies on evidence as "incriminating conduct" (*Jury Directions Act 2015* s 21).

66. This direction is not subject to a request process. The judge must give the direction in any case where the prosecution relies on evidence as incriminating conduct (*Jury Directions Act 2015* s 21).

67. As described above, the prosecution may only rely on evidence as "incriminating conduct" if it has given notice at least 28 days before the trial and the judge ruled that the evidence is reasonably capable of being used as "incriminating conduct" (*Jury Directions Act 2015* s 20).

68. The prosecution must precisely identify the alleged lie(s) or conduct in the notice, and that the prosecution arguments conform to the bounds set out in the notice (*Maeda v DPP (Cth)* [2015] VSCA 367, [78]).

69. Where there is a gap or deficiency in the notice, the prosecution may seek leave to extend time for filing a notice under *Jury Directions Act 2015* s 8, and seek to file over a new incriminating conduct notice under section 19.

70. If the evidence is not capable of being used as an implied admission, but there is a real risk that the jury might treat the evidence in that way, defence counsel may seek a section 23 warning (see below).

If the prosecution does not seek to use evidence as 'incriminating conduct'

71. Section 21 of the *Jury Directions Act 2015* is only engaged when the prosecution explicitly or expressly relies on the evidence as an implied admission. There is no scope for a judge to find that the prosecution has relied on evidence as incriminating conduct implicitly, despite the absence of a Notice (*Lowe v R* (2015) 48 VR 351).

72. The judge must determine, at the time it is necessary to give directions, whether the prosecution has relied on evidence as incriminating conduct giving rise to implied admissions (*Lowe v R* (2015) 48 VR 351, [144]).

73. In making this assessment, the court must consider how the case has been run as a whole. Oversight by prosecuting counsel, leading to the prosecution not mentioning incriminating conduct in the closing address, does not prevent the judge from giving an incriminating conduct direction which has been identified and discussed with the parties (see *Mercer v The Queen* [2021] VSCA 132, [42]–[44]).

74. If the prosecution does not contend that post-offence conduct is evidence of an implied admission, a section 21 direction must not be given (*Lowe v R* (2015) 48 VR 351, [142]).

75. In determining whether the prosecution has relied on evidence as 'incriminating conduct' it is not important whether the term "consciousness of guilt" or "incriminating conduct" has been used by counsel in the trial. What is important is whether the process of reasoning towards guilt which the jury has been invited to adopt involves the use of post-offence lies or conduct as implied admissions (see *R v Lees* [2006] VSCA 115; *Rossi v R* [2012] VSCA 228; *Lowe v R* (2015) 48 VR 351; *Pompei v The King* [2023] VSCA 71, [40]–[42]).

76. At common law, in some cases the judge was required to direct the jury on the use of evidence as an implied admission even if the prosecution did not rely on it for this purpose (*R v Russo* (2004) 11 VR 1). The *Jury Directions Act 2015* has abolished this obligation (*Jury Directions Act 2015* s 24). There is no residual discretion to give a section 21 direction where the evidence has not been led as incriminating conduct.

77. If the judge is concerned about the risk of the jury using evidence as evidence of incriminating conduct even though the prosecution has not relied on the evidence for that purpose, a section 23 direction may be necessary (see *R v Cuenco* (2007) 16 VR 118; *Zoneff v R* (2000) 200 CLR 234; *Dhanhoa v R* (2003) 217 CLR 1).

78. In some cases, the judge may need to intervene where the prosecution invites the jury to use evidence in a way that amounts to treating the evidence as incriminating conduct, even though it has not obtained leave to rely on evidence for that purpose (see *R v Lees* [2006] VSCA 115; *R v Chang* (2003) 7 VR 236). A judge may also need to consider giving a section 23 direction to neutralise the prosecution's argument or otherwise discharge the jury.

Content of a section 21 direction

79. There are two limbs to a section 21 direction. Under the first limb, the judge must tell the jury that they can use the evidence to find that the accused believed that he or she:

    (a) committed the offence charged;

    (b) committed an element of the offence charged; or

    (c) negated a defence to the offence charged;

    only if they find that:

    i) the conduct occurred; and

    ii) the only reasonable explanation of the conduct is that the accused held that belief (Jury Directions Act 2015 s 21(1)(a)).

80. When deciding whether the conduct occurred and whether the only reasonable explanation is that the accused believed that s/he committed the offence charged or part of the offence charged, the jury must consider all of the evidence in the case (*R v Ciantar* (2006) 16 VR 26).

81. The second limb of the direction warns the jury that even if they find that the accused *believed* that he or she committed the offence charged, the jury must still decide on the whole of the evidence whether the prosecution has proved the accused's guilt beyond reasonable doubt (*Jury Directions Act 2015* s 21).

82. The second limb of the direction recognises that the accused may hold a mistaken belief in his or her own guilt, and that the role of the jury is to determine the accused's guilt, and not merely the accused's belief in his or her guilt.

83. It is not necessary to use any particular form of words when giving the two limbs of the section 21 direction (*Jury Directions Act 2015* s 6).

84. However, in *Maeda v DPP (Cth)*, the Court of Appeal noted the need for care when departing from the statutory language, due to the risk that any factual questions posed may not satisfy the requirements of section 21 (*Maeda v DPP (Cth)* [2015] VSCA 367, [85]).

85. The importance of the directions means it is generally unwise to deliver incriminating conduct directions extemporaneously. Judges should, instead, prepare written directions to ensure they comply with the requirements of the *Jury Directions Act* and the law generally (*Healy v The King* [2024] VSCA 81, [46]).

86. For example, in *Saddik v The Queen*, the judge had directed the jury, for the purpose of s 21(1)(a)(ii) that they must be satisfied that the only reasonable explanation for the conduct was that the accused thought it would tend to show that nothing improper had happened. The Court of Appeal held that this did not comply with s 21(1)(a)(ii). The judge should have told the jury to decide whether the accused believed he had indecently assaulted the complainant and performed the conduct to create an innocent explanation for his offending acts (*Saddik v The Queen* [2018] VSCA 249, [154]).

87. In addition, it is not appropriate for the judge to direct the jury that they can use the evidence in proof that the accused admitted guilt of some other offence. The direction must relate the evidence to an offence charged, the particular acts alleged and the way the prosecution seeks to use the evidence (*Di Giorgio v R* [2016] VSCA 335, [38], [40], [56]).

88. Section 21 removes the common law obligation to refer to each act or omission as part of the direction (*Jury Directions Act 2015* s 21; c.f. *Edwards v R* (1993) 178 CLR 193; *R v McCullagh (No 2)* [2005] VSCA 109; *R v Ciantar* (2006) 16 VR 26). However, it remains necessary for the prosecution to precisely identify the alleged lie(s) or conduct in the notice, and that the prosecution arguments conform to the bounds set out in the notice (*Maeda v DPP (Cth)* [2015] VSCA 367, [78]).

89. If the post-offence conduct includes both lies and other post-offence behaviour, the judge should make the jury aware that the direction applies to both (see *R v Nguyen* (2001) 118 A Crim R 479).

90. If the post-offence conduct could be used as an implied admission in relation to a number of different counts, the judge should relate each item of conduct to the appropriate charge or charges, and the jury should be told to examine the evidence in support of each charge separately (*R v Kalajdic* [2005] VSCA 160; *R v Finnan* [2005] VSCA 151; *R v Ciantar* (2006) 16 VR 26).

91. If a lie is to be used as corroboration, confirmation or support of another witness's evidence, the jury must also be told that the accused's statement must clearly be shown to be a lie by evidence other than that of the witness who is to be corroborated – i.e. by admission or by evidence from an independent witness (*Edwards v R* (1993) 178 CLR 193).

92. Where the defence case involves a simple denial of all the conduct alleged, it may not be necessary to explain to the jury how the incriminating conduct evidence relates to any particular element or a particular charge (*Davis v R* [2016] VSCA 272, [119]).

Conduct motivated by consciousness of other offences

93. In some cases, an issue may arise as to whether the accused committed the post-offence conduct due to a fear of being implicated in the offence for which the prosecution wishes to use the evidence of that conduct, or because s/he feared being implicated in a lesser included offence, a different offence on a multiple count presentment, or another offence disclosed by the evidence ("other offences").

94. Under the *Jury Directions Act 2015*, the definition of "incriminating conduct" refers to conduct that amounts to an implied admission of an "offence charged", an element of an "offence charged" or which negates a defence to an "offence charged". The term "offence charged" is defined as including alternative offences (*Jury Directions Act 2015* s 18).

95. The judge must determine whether it is open for the jury to use an item of post-offence conduct to prove an element of a principal offence or any available alternative offence (see also *R v Ciantar* (2006) 16 VR 26).

96. At common law, evidence which was equally consistent with two or more available offences, or was otherwise "intractably neutral", could not be used as post-offence conduct. This requirement likely continues to apply under the *Jury Directions Act 2015* (see *R v Ciantar* (2006) 16 VR 26; *R v Jakimov* [2007] VSCA 9; *R v Cuenco* (2007) 16 VR 118; *R v Dickinson* [2007] VSCA 111; *Pollard v R* (2011) 31 VR 416; *Dwyer v The King* [2023] VSCA 85, [96]).

97. Such cases will, however, be rare. In most cases, although the post-offence conduct may not be enough *in itself* to sustain an inference that the accused has impliedly admitted guilt of a particular offence rather than some other offence, when considered in the *context of the evidence as a whole* (e.g. evidence of the accused's words and conduct before and during the offence, and other forensic evidence), it will be open to the jury to infer that the accused's conduct was related to a particular offence (*R v Ciantar* (2006) 16 VR 26; *R v Jakimov* [2007] VSCA 9; *Johnstone v R* (2011) 31 VR 320; *Brooks v R* (2012) 36 VR 84).

98. In determining whether the post-offence conduct is equally consistent with two or more possible offences, or otherwise intractably neutral, the judge must consider the conduct in the context of the evidence as a whole (*R v Jakimov* [2007] VSCA 9; *R v Cuenco* (2007) 16 VR 118; *R v Dickinson* [2007] VSCA 111; *Pollard v R* (2011) 31 VR 416).

99. Despite this, it is permissible to treat particular items of post-offence conduct separately and consider whether those items are equally consistent with a lesser offence (see *DPP v Pandilovski (Ruling No 1)* [2022] VSC 552, [3]–[4]).

100. One factor the court will consider to decide if the evidence is equally consistent with two or more offences is whether the conduct is 'out of proportion' for the lesser offence (see *DPP v Ristevski (Ruling No 1)* [2019] VSC 165, [16]; *DPP v Pandilovski (Ruling No 1)* [2022] VSC 552, [12], [13], [29]).

101. It will often be helpful to explain to the jury that reference to "the offence charged" is a convenient way of saying that the accused made an implied admission of the alleged wrongful conduct which constituted the offence charged, rather than an admission of a specific crime as it is known to the law (*R v Ciantar* (2006) 16 VR 26).

Other explanations for the post-offence conduct

102. Unlike at common law, a judge is not required to identify other reasons for having committed the conduct (compare *Edwards v R* (1993) 178 CLR 193; *R v Ciantar* (2006) 16 VR 26).

103. The judge is also not required to identify possible motivations, other than a consciousness of guilt, for committing the post-offence conduct (compare *R v Nguyen* [2005] VSCA 120).

104. Other explanations may form part of a section 22 direction (see below).

Identifying the post-offence conduct

105. In charging the jury, the judge should take each offence left to the jury in turn, and by reference to that offence identify:

- the evidence of conduct upon which the prosecution relies;
- the issues which the post-offence conduct is relevant to prove. That is, whether the post-offence conduct proves part of the *actus reus* or the *mens rea* or disproves a possible defence or justification; and
- the evidence which shows that the conduct is incriminating conduct (*R v Ciantar* (2006) 16 VR 26. See also *R v Jakimov* [2007] VSCA 9; *R v Nguyen* [2005] VSCA 120; *R v McCullagh (No 2)* [2005] VSCA 109; *Osland v R* (1998) 197 CLR 316; *Johnstone v R* (2011) 31 VR 320).

106. When directing the jury about incriminating conduct, it is not necessary to refer to each act or omission (*Jury Directions Act 2015* s 21(2). Instead, the conduct may be described in general terms (c.f. *R v Dang* [2004] VSCA 38; *R v Nguyen* [2005] VSCA 120; *Johnstone v R* (2011) 31 VR 320. But see *Ellis v R* (2010) 30 VR 428).

107. A judge should not invite the jury to look for other post-offence conduct that could possibly be used as an implied admission (*R v TY* (2006) 12 VR 557; *R v Cuenco* (2007) 16 VR 118).

108. The judge must clearly identify for the jury which evidence of post-offence conduct can be used as an implied admission, and which can only be used in relation to the accused's credibility (*R v Ray* (2003) 57 NSWLR 616).

109. If there are multiple charges, the trial judge must relate the relevant lies or other acts to the appropriate count or counts (*R v Kalajdic* [2005] VSCA 160; *R v Redmond* [2006] VSCA 75; *R v Ciantar* (2006) 16 VR 26).

110. In such cases, the jury must be directed to consider the post-offence conduct in relation to each charge separately (*R v Woolley* (1989) 42 A Crim R 418 (Vic FC); *R v Ciantar* (2006) 16 VR 26).

When to give a section 22 direction and content of the direction

111. Where the judge gives or proposes to give a section 21 direction, the defence may seek a direction under *Jury Directions Act 2015* s 22 (a 'section 22 direction').

112. A section 22 direction tells the jury:

- that there are many reasons why a person might behave in a way that makes him or her look guilty;

- that the accused might have engaged in incriminating conduct even though he or she is not guilty of the offence charged;
- even if the jury thinks that the conduct makes the accused look guilty, that does not necessarily mean that the accused is guilty (*Jury Directions Act 2015* s 22)

113. This direction must be given if sought by the accused (unless there are good reasons for not giving the direction) or if there are substantial and compelling reasons to give the direction in the absence of a request (*Jury Directions Act 2015* ss 14, 16).

114. To determine whether there are substantial and compelling reasons to give a direction in the absence of a request, the judge should consider the significance of the post-offence conduct evidence and the degree of risk posed by not giving a section 22 direction. See 3.1 Directions Under Jury Directions Act 2015 for more information on when directions are necessary.

115. At common law, a trial judge was required to identify possible reasons why a person might behave in a way that makes the person look guilty, and should include any explanations raised by defence counsel in the list of possible alternatives (*R v Kalajdic* [2005] VSCA 160; *R v Spero* (2006) 13 VR 225; *R v Ciantar* (2006) 16 VR 26). It would be prudent to continue providing such information when giving a section 22 direction.

116. If the explanations advanced by the defence are the most cogent possible alternatives, there is no need to advance additional explanations (*R v Finnan* [2005] VSCA 151).

117. In cases where it is possible that the accused committed the post-offence conduct to distance him or herself from a different offence than that which the jury is considering (the "offence charged"),[115] the jury should be alerted to this possibility. They should be told that before they can use the post-offence conduct as evidence of guilt of the offence charged, they must be satisfied, having regard to all the evidence, that the desire not to be implicated in a different offence does not provide a possible reasonable explanation for the conduct. The judge must make it clear to the jury that the implied admission must be of the offence charged, rather than some other wrongdoing or unlawful behaviour (*R v Ciantar* (2006) 16 VR 26; *R v Barrett* (2007) 16 VR 240; *R v Smart* [2010] VSCA 33; *Johnstone v R* (2011) 31 VR 320. But see *Al-Assadi v R* [2011] VSCA 111; *Brooks v R* (2012) 36 VR 84).

118. It is not necessary for the judge to refer to lesser included offences which have not been left to the jury as providing a possible alternative explanation. The directions to be given must depend on the issues in the case, and a lesser included offence is not in issue unless it is left to the jury (*R v Ciantar* (2006) 16 VR 26. See also *R v Martin* [2006] VSCA 299).

When to give a section 23 direction and content of the direction

119. If the prosecution does not use evidence of post-offence conduct as an implied admission, defence counsel can seek a direction under *Jury Directions Act 2015* s 23 (a 'section 23 direction').

120. This direction tells the jury that:

- there are all sorts of reasons why a person might behave in a way that looks like he or she is guilty; and
- even if they think that accused engaged in the conduct, they must not conclude from that evidence that the accused is guilty of the offence charged (*Jury Directions Act 2015* s 23).

121. This direction replaces the common law *Zoneff* warning and is designed to address the risk of the jury misusing evidence as incriminating conduct.

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[115] I.e. Trials involving a one count indictment with lesser included offences; trials involving multiple count indictment; or cases where the evidence adduced to prove a particular charge discloses the possible commission of other offences.

122. A section 23 direction is only necessary if sought by the accused, or if the judge considers there are substantial and compelling reasons to give the direction in the absence of a request (*Jury Directions Act 2015* ss 14, 16).

123. The judge should ask defence counsel whether he or she seeks a section 23 direction where the prosecution leads evidence of post-offence conduct and does not seek to use that evidence as incriminating conduct.

124. To determine whether there are substantial and compelling reasons to give a direction in the absence of a request, the judge should consider the significance of the post-offence conduct evidence and the degree of risk posed by not giving a section 23 direction. See 3.1 Directions Under Jury Directions Act 2015 for more information on when directions are necessary.

125. At common law, the need for a direction about the misuse of evidence as incriminating conduct depended on factors such as the nature of the evidence which is said to require the direction, the purpose for which it is tendered, the use the prosecution makes of it, the existence of rational explanations for the conduct other than a consciousness of guilt, and the nature of counsel's addresses on the issue (see, e.g. *R v Dupas* [2001] VSCA 109; *R v GJ* [2008] VSCA 222; *AE v R* [2011] VSCA 168). Similar factors will inform the decision of whether there is a need for a section 23 direction (see *Lowe v R* (2015) 48 VR 351).

126. Even if the content of a particular lie is not highly probative, a section 23 direction may be required if there is little other evidence that supports the prosecution case. In such circumstances the mere fact that the accused told a lie may be treated as significant by the jury (*AE v R* [2011] VSCA 168).

127. It may be prudent to give a section 23 direction even if there is only a small risk that the jury will use the accused's lies or conduct as an implied admission, as this will remove all danger of the jury engaging in an impermissible reasoning process (see, e.g. *R v Brdarovksi* [2006] VSCA 231). However, in *Dhanhoa v R* (2003) 217 CLR 1, Gleeson CJ and Hayne J warned against giving this kind of direction too readily. This warning should be taken into consideration when deciding whether or not to give such a direction (*R v Mitchell* [2006] VSCA 289. See also *Lowe v R* (2015) 48 VR 351).

128. A section 23 direction is not required simply because there is a risk that a jury may treat the accused as a liar and thereby conclude that s/he is guilty. This will happen in most cases – juries will assess the evidence, and conclude that the accused is a liar at the same time as determining that s/he is guilty beyond reasonable doubt. A section 23 direction is only required if the jury is likely *first* to resolve that the accused is a liar, and then to conclude that, because s/he is a liar, s/he has committed the offence (*R v Erdei* [1998] 2 VR 606 (CA)).

129. If it is alleged that the accused told a number of lies, it may be inadvisable to give a section 23 direction in relation to only one of those lies. Such a direction would likely invite the jury to improperly consider what use should be made of the accused's other lies. Depending on the circumstances, the judge should either give a section 23 direction in relation to lies in general, or not give such a direction at all (see, e.g. *R v Mitchell* [2006] VSCA 289).

Post-offence lies as corroboration

130. A lie can provide corroboration of the evidence of another witness if it is capable of supporting an inference that the evidence of the witness is probably correct. This can occur only if the jury can infer that the telling of the lie was an implied admission (*R v Heyde* (1990) 20 NSWLR 234 (CCA)).

131. Great care must be taken in using lies as corroboration – it is fraught with the risk of a miscarriage of justice (*R v Sutton* (1986) 5 NSWLR 697; *R v Heyde* (1990) 20 NSWLR 234 (CCA); *R v De Lam* (1999) 108 A Crim R 440).

132. If the prosecution seeks to rely on a lie to provide corroboration, the usual criteria for using a lie as an implied admission (see above) must be established. The trial judge must also determine whether the lie is capable of providing corroboration. If so, the question of whether it does corroborate the evidence of a witness is to be left to the jury (*R v Heyde* (1990) 20 NSWLR 234 (CCA)).

133. In determining whether a lie is capable of providing corroboration, the trial judge must (*R v Heyde* (1990) 20 NSWLR 234 (CCA); *Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410):

    i) decide whether it could be held to be a deliberate lie; and

    ii) decide whether there is evidence of conduct by the accused from which an inference can be drawn, which supports the evidence of the witness whom it is sought to corroborate in a material particular. A deliberate lie will be capable of doing this if it is rationally open to the jury to draw an inference that it was told because the accused perceived that the truth was inconsistent with his or her innocence.

134. Lies cannot be treated as corroborative of the evidence of a witness if it is necessary to rely on the evidence of that witness to establish the falsity of what the accused has said. In such circumstances the witness would be corroborating him or herself (*Edwards v R* (1993) 178 CLR 193; *Green v R* (1999) 161 ALR 648; *R v Ciantar* (2006) 16 VR 26).

135. There are three ways in which a lie can be sufficiently proven so that it is capable of amounting to corroboration (*R v Heyde* (1990) 20 NSWLR 234 (CCA); *R v Russo* (2004) 11 VR 1):

    i) if conflicting evidence is given by a witness other than the one whose evidence is to be corroborated;

    ii) if conflicting evidence is given by the accused (either directly, or due to internal inconsistencies in his or her evidence); or

    iii) if the lie is seen to be inherently improbable.

136. It will only be in rare cases that a lie is capable of affording corroboration. In many cases it will not be so capable, due to factors such as it not being possible to infer that a deliberate lie was told; the lie not relating to a material issue; or the inference not being open that the lie was an implied admission (*R v Heyde* (1990) 20 NSWLR 234 (CCA)).

137. When discussing the issue of corroboration with the jury, use of the language of "confirmation" or "support" rather than "corroboration" may be appropriate, depending on the use to which the evidence is being put (*R v Miletic* [1997] 1 VR 593; *R v Benfield* [1997] 2 VR 491 (CA)).

Standard of proof

138. *Jury Directions Act 2015* s 61 specifies that unless there is an enactment to the contrary, the only matters that need to be proved beyond reasonable doubt are the elements of the offence and the absence of any relevant defences. The common law obligation to direct the jury not to use incriminating conduct evidence unless satisfied that the evidence is "incriminating conduct" beyond reasonable doubt has been abolished (see also *Jury Directions Act 2015* s 62).

139. In rare cases, where evidence of post-offence conduct is the only evidence of guilt, the judge may refer to the evidence of incriminating conduct and direct the jury that it must be satisfied that the evidence proves the elements of the offence beyond reasonable doubt (see *Jury Directions Act 2015* s 61 Examples).

Last updated: 14 May 2024

4.6.1 Charge: Lies as Incriminating Conduct (s 21 Direction)

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This charge should only be given if:

i) The judge has given leave for the prosecution to rely on evidence as incriminating conduct;

ii) The evidence of incriminating conduct consists of lies; and

iii) The prosecution relies on the evidence as incriminating conduct.

If the evidence of incriminating conduct consists of lies and other conduct, this charge must be modified.

If defence counsel requests a warning about the dangers of relying on evidence of incriminating conduct, also give 4.6.3 Charge: Additional direction on incriminating conduct (Section 22 direction).

Introduction

In this trial, the prosecution alleged that NOA told certain lies after the crime was committed. I now need to give you some directions about the way in which you can use evidence of lies. By lies, I mean that the accused told deliberate untruths.

Lies going to credibility

The law says that you may use the accused's lies to help you to assess his/her credibility.[116] If you find that the accused lied about something [when giving evidence/when speaking to police], you can use that fact to help you to decide whether or not you believe the other things that the accused said. That is not to say that just because you find that an accused lied about one matter, you must also find that s/he has been lying about everything else. But you can use the fact that s/he lied to help you determine the truthfulness of the other things that s/he said. It is one factor to take into account.

You can use any of NOA's alleged lies in this way. For example, if you find that NOA was lying when [*insert example from evidence*], you may take this into account when assessing the rest of his/her evidence.

[*Identify relevant evidence and refer to relevant prosecution and defence arguments*.]

It is for you to decide what significance to give these suggested lies. But I give you this warning: do not reason that just because a person is shown to have told a lie about something, s/he must be guilty.

Lies as an implied admission of guilt

The second way in which you may be able to use a lie in this case is as evidence that NOA believed that [*describe relevant admission*, for example 's/he committed the offence charged' or 'he shot the deceased', or 'he shot the deceased without acting in self-defence'].

You may only use evidence that NOA lied in this way if you find that he did tell a deliberate untruth and the only reasonable explanation for doing so is that s/he believed that [*describe relevant admission*].

However, I must warn you that even if you find that the accused believed that s/he committed the offence charged, you must consider all the evidence when deciding whether the prosecution has proved the accused's guilt beyond reasonable doubt.

[*Insert section 22 direction here if required. See* 4.6.3 Charge: Additional direction on incriminating conduct (Section 22 direction).]

[116] If the accused's credit is not in issue, this charge will need to be modified.

[*Identify relevant evidence and refer to relevant prosecution and defence arguments. As part of this, the judge should, in relation to each offence:*

- *Identify the post offence conduct the prosecution relies upon in relation to that offence;*
- *Identify whether the post offence conduct is relevant to prove the whole charge, one or more elements, or the absence of any defences;*
- *Identify the matters which are said to show that the post offence conduct can be used as an implied admission of guilt*.]

Incriminating conduct and unreliable evidence

[*If necessary, add a direction on using evidence of incriminating conduct to support evidence covered by an "unreliable evidence" direction.*]

Last updated: 29 June 2015

4.6.2 Charge: Other Conduct as Incriminating Conduct (s 21 Direction)

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This charge should only be given if:

i) The judge has given leave for the prosecution to rely on evidence as incriminating conduct;

ii) The evidence of incriminating conduct consists of acts only and not lies; and

iii) The prosecution relies on the evidence as incriminating conduct.

If the evidence of incriminating conduct also includes lies, this direction should be adapted and added to 4.6.1 Charge: Lies as Incriminating Conduct (Section 21 direction).

If defence counsel requests a warning about the dangers of relying on evidence of incriminating conduct, also give 4.6.3 Charge: Additional direction on incriminating conduct (Section 22 direction).

Introduction

In this trial, the prosecution argued that you can use the evidence that NOA [*identify other conduct relied on as incriminating conduct*] as evidence that s/he believed that [*describe relevant admission, for example* "s/he committed the offence charged" or "s/he shot the deceased", or "s/he shot the deceased without acting in self-defence".]

You may only use this evidence in this way if you find that this conduct occurred and the only reasonable explanation of this conduct is that the accused believed that [*describe relevant belief, for example* "s/he committed the offence and needed to dispose of evidence"].

However, I must warn you that even if you find that the accused believed that s/he committed the offence charged, you must consider all the evidence when deciding whether the prosecution has proved the accused's guilt beyond reasonable doubt.

[*Insert section 22 direction here if required. See* 4.6.3 Charge: Additional direction on incriminating conduct (Section 22 direction).]

[*Identify relevant evidence and refer to relevant prosecution and defence arguments. As part of this, the judge should, in relation to each offence:*

- *Identify the post offence conduct the prosecution relies upon in relation to that offence;*
- *Identify whether the post offence conduct is relevant to prove the whole charge, one or more elements, or the absence of any defences;*
- *Identify the matters which are said to show that the post offence conduct can be used as an implied admission of guilt.*]

Incriminating conduct and unreliable evidence

[*If necessary, add a direction on using evidence of incriminating conduct to support evidence covered by an "unreliable evidence" direction.*]

Last updated: 27 March 2019

4.6.3 Charge: Additional Direction on Incriminating Conduct (s 22 Direction)

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This charge may be given where the judge gives a direction on the use of evidence as incriminating conduct and the accused seeks an additional direction warning about the dangers of relying on that evidence.

The direction should be given immediately after the direction warning the jury that even if it concludes that the accused thought that he committed the offence charged, the jury must still decide on the whole of the evidence whether the prosecution has proved the accused's guilt beyond reasonable doubt.

Warning

I must also warn you that there are all sorts of reasons why a person might behave in a way that makes him/her look guilty. This means that NOA may have [*describe relevant conduct*] even though s/he is not guilty of [*identify relevant offence charged*].

For example, NOA may have [*describe relevant conduct*] because:

[*Insert possible motivations for the incriminating conduct such as panic, shame, protecting another person or fear of the police. Care must be taken in selecting which motivations to include, so as not to advance too few alternatives, or spurious alternatives which are easily dismissed. Attempts should be made to provide plausible alternative explanations relevant to the circumstances. Any explanations raised by defence counsel should be included in the list*].

Even if you think that this conduct makes NOA look guilty, that does not necessarily mean that s/he is guilty.

Last updated: 29 June 2015

4.6.4 Charge: Avoiding Risk of Improper Use of Conduct Evidence (s 23 Direction)

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This charge should only be given if:

i) Evidence of conduct is led which the prosecution does not rely on as evidence of incriminating conduct;

ii) Defence counsel request a direction to avoid the risk of the jury misusing the evidence as incriminating conduct.

Warning

In this trial, the prosecution alleged that NOA [*describe relevant conduct*, e.g. told a number of lies].

[*Identify relevant conduct evidence.*]

You might think that this makes it look like NOA committed the offence[s] charged. But I must direct you, as a matter of law that there are all sorts of reasons why a person might behave in a way that makes it look like s/he has committed an offence. Even if you think that NOA [*describe relevant conduct*], you must not use that to conclude that s/he is guilty of [any of] the offence[s] charged.

[*If the conduct evidence consists of lies, add the following shaded section.*]

What you may do, if you find that NOA deliberately told one of the suggested lies that I have just mentioned, is to use that to help you assess [his/her] credibility. If you find that the accused deliberately lied about something, you can use that fact in deciding whether or not you believe the other things that s/he said [in evidence/in his/her account to police]. That is not to say that just because you find that an accused lied about one matter, you must also find that they have been lying about everything else. But you can use the fact that they lied to help you determine the truthfulness of the other things that they said. It is one factor to take into account. The weight you give to that factor will depend on how significant you find the lie to be.

It is up to you to decide whether NOA deliberately lied. There is a difference between rejecting a person's statements and finding that they deliberately lied. Sometimes people make mistakes, or get confused, or genuinely cannot remember a fact. While what they say may be wrong, it is not a lie. That is, you must decide whether any of [his/her] statements were untrue, and whether [he/she] knew they were untrue at the time they were made.

But you must not reason that because NOA told these lies, s/he is guilty. Evidence that s/he told these lies is not evidence of guilt. These alleged lies are only relevant, if at all, in assessing NOA's credibility.

Last updated: 9 March 2017

4.7 Corroboration (General Principles)

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Overview

1. With the exception of perjury offences, any previously persisting requirement that evidence be corroborated is now abolished (*Evidence Act 2008* s 164).
2. The rules of law or practice that previously required directions concerning the absence of corroboration, including directions about the dangers of acting on uncorroborated evidence, have also been abolished (*Evidence Act 2008* s 164(3)).
3. In addition, with the exception of perjury and similar offences, a judge must not
   (a) Warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or
   (b) Direct the jury regarding the absence of corroboration (Evidence Act 2008 s 164(4)).
4. *Evidence Act 2008* s 164(4), which prohibits corroboration directions, was introduced by the *Jury Directions Act 2015* and applies to all trials which commenced on or after 29 June 2015.
5. Despite the prohibition on corroboration directions, where the jury has been warned about a witness's potential unreliability, and there is evidence that may tend to confirm or support that witness's evidence, it will often be appropriate to direct the jury to look for supportive evidence (*R v Milton* [2004] NSWCCA 195; *R v Connors* [2000] NSWCCA 470, [133]). Such directions are included where appropriate in this Charge Book.

6. For information on the legal requirements of corroboration, which remain relevant to a charge of perjury, see Perjury.

Last updated: 29 June 2015

4.8 Delayed Complaint

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Delayed Complaint

1. The timeliness or otherwise of making a complaint may be relevant in three different ways:

    i) In some circumstances evidence of an early complaint may be used both as evidence of the offence, and to bolster the complainant's credibility;

    ii) If the complainant failed to make a complaint in a timely fashion ("a delayed complaint"), this may be used to detract from his or her credibility;

    iii) If the delay in complaint (or prosecution) has had adverse consequences for the trial that the jury may not appreciate, the jury may need to be warned about these consequences.

Recent Complaint

2. Directions in respect of "recent complaint" are designed to explain the permissible uses of evidence and to warn the jury about types of evidence that may be unreliable. For more information see 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements).

Delayed Complaint Relevant to Credit

3. At common law, the duty to direct a jury in respect of the potential impact of delayed complaint on the complainant's credit derived both from statute (*Crimes Act 1958* s 61) and from the need to give a balanced charge where delay in making complaint is raised before the jury (*Kilby v R* (1973) 129 CLR 460; *Crofts v R* (1996) 186 CLR 427).

4. The Jury Directions Act 2015 has now codified the directions on the relevance of delay to credit in sexual offence cases, and any rule of the common law which required a judge to direct the jury that:

    (a) a complainant's delay in making a complaint or lack of complaint may cast doubt on the reliability of the complainant's evidence; and

    (b) the jury should take this into account when evaluating the credibility of the allegations made by the complainant–

    is abolished (Jury Directions Act 2015 s 54).

5. For more information see Effect of Delayed Complaint on Credit.

Other Consequences of Delay

6. Two other consequences of delay may be the production of forensic disadvantage to the accused, and of honest but unreliable recollections of the complainant. These are commonly seen only as consequences of long delay, but the length of delay may not be determinative.

7. The law on these topics is modified by the *Jury Directions Act 2015* ss 14–16 and 48–54.

Delay Risking Miscarriage of Justice

8. For trials commenced prior to 1 December 2006, the judge's duty was primarily determined by the common law, as articulated in *Longman v R* (1989) 168 CLR 79 and the authorities that have applied it. In those cases, the question was whether the consequences of delay had created a perceptible risk of miscarriage of justice. The source of that risk was commonly considered to be the forensic disadvantage to the accused, and the potential for the complainant's recollection to be honest but erroneous.

Forensic Disadvantage

9. The need for and the content of a direction on forensic disadvantage is governed by *Jury Directions Act 2015* ss 38–40. A judge must give the jury a forensic disadvantage direction if one is requested, unless there are good reasons for not giving such a direction. However, a judge need not give a direction if it has not been requested, unless there are substantial and compelling reasons for giving the direction in the absence of a request (see *Jury Directions Act 2015* ss 14, 16; c.f. *Greensill v R* (2012) 37 VR 257).

Honest But Erroneous Memory

10. The provisions of the *Jury Directions Act 2015* are not directly concerned with directions about honest but erroneous memory following delay.

11. It is suggested that these issues should now be considered by reference to s 32 of the *Jury Directions Act 2015*. For more information see 4.8.3 Delay Risking Honest But Erroneous Memory.

Combination of Directions

12. If there is a dispute as to how soon after the alleged events the complaint was made, the judge may need to give the statutory directions on delayed complaint and also give directions on recent complaint at the end of the trial (see *R v Munday* (2003) 7 VR 423 and 4.14.4 Charge: Complaint Evidence).

13. Where multiple directions about the different consequences of delayed complaint are necessary in the circumstances of a case, it is permissible to combine them in a single direction (*R v BDX* (2009) 24 VR 288).

Last updated: 29 June 2015

4.8.1 Delay Causing Forensic Disadvantage

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Scope

1. Two separate risks may arise where there is a delay in making a complaint or bringing a matter to trial:

   i) The accused may suffer a significant forensic disadvantage; or

   ii) The complainant's recollection of what happened may be honest but erroneous (*Longman v R* (1989) 168 CLR 79).

2. This topic only addresses the risk of forensic disadvantage. See 4.8.3 Delay Risking Honest But Erroneous Memory for information concerning the risk of honest but erroneous memory.

History of the Forensic Disadvantage Direction

3. Prior to 1 December 2006, if a complainant failed to make a timely complaint about an alleged sexual offence, the judge needed to warn the jury about any perceptible risks of miscarriage of justice that the delay had caused, including the risk of forensic disadvantage (*Longman v R* (1989) 168 CLR 79).

4. In such cases, the "*Longman rule*" often required judges to warn the jury that it would be dangerous to convict on the complainant's evidence alone unless, after scrutinising the evidence with great care, considering the circumstances relevant to its evaluation, and paying heed to the warning, they were satisfied of its truth and accuracy (*Longman v R* (1989) 168 CLR 79.).

5. The application of the *Longman* rule to the issue of forensic disadvantage was substantially modified by the insertion of ss 61(1A)–(1F) into the *Crimes Act 1958*, which codified the law in this area and abrogated any previous law. These provisions applied to "proceedings" commenced on or after 1 December 2006 (*Crimes Act 1958* s 607).[117] From 2010, the issue of forensic disadvantage was also addressed by s 165B of the *Evidence Act 2008*.

6. From 29 June 2015, the new Part 4, Division 5 of the *Jury Directions Act 2015* replaced the statutory directions of the Crimes Act 1958 and Evidence Act 2008 regarding delay and forensic disadvantage. The common law requirements on judges to direct the jury about forensic disadvantage were abolished and judges were prohibited from warning juries that it is dangerous to convict on the complainant's evidence alone.

When to Give a Forensic Disadvantage Direction

7. The need for a direction on forensic disadvantage is governed by *Jury Directions Act 2015*, Part 4. Division 5. Defence counsel may request that a judge direct the jury on the forensic disadvantage experienced by the accused due to the consequences of delay between the alleged offence and the trial (*Jury Directions Act 2015*, 39(1)). If sought, a judge must give the jury the direction unless there are good reasons for not doing so (*Jury Directions Act 2015* ss 14, 39(2)). A judge must not give a direction if it has not been requested, unless there are substantial and compelling reasons for doing so (see *Jury Directions Act 2015* s 16).

8. The principles which govern the *Jury Directions Act* provisions on forensic disadvantage were summarised in *Robbins v The Queen* as follows:

> (1) The origins of the relevant concern are to be found in historic sex offence cases and the decision of the High Court in *Longman*.
> (2) The forensic disadvantage governed by s 39 is a disadvantage occurring because of the consequences of delay between the alleged offence and the trial.
> (3) The disadvantage must be of a forensic nature; that is, a disadvantage suffered by the accused in challenging, adducing or giving evidence, or in conducting the accused's case.
> (4) The direction can only be given if the trial judge is satisfied that the accused has experienced a significant forensic disadvantage.
> (5) There are disadvantages as a consequence of delay which do not warrant a

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[117] Under the common law, the "proceeding" commences when the court is seised of the matter by the filing of a presentment. There is a new "proceeding" if a new presentment is filed over (*R v Taylor (No.2)* (2008) 18 VR 613; *R v BDX* (2009) 24 VR 288). However, under the *Criminal Procedure Act 2009*, there is a single criminal proceeding that commences when the charge–sheet or direct indictment is filed and committal hearings, trials, appeals and re-trials are all part of a single proceeding (see *Criminal Procedure Act 2009* ss 5, 162, 164).

direction under s 39. These disadvantages can be adequately dealt with in counsels' addresses and do not require a judicial direction.
(6) The accused has the onus of establishing that the consequences of delay give rise to a significant forensic disadvantage.
(7) It is incumbent upon the accused to identify the particular risks of prejudice which constitute the significant forensic disadvantage.
(8) A loss of opportunity to obtain evidence of a contemporaneous medical examination which had occurred, or medical or other scientific investigations which might have been undertaken, or expert medical opinion which might have been obtained, could, in a particular case, constitute a significant forensic disadvantage (*Robbins v The Queen* (2017) 269 A Crim R 244, [186] (citations and references omitted).

9. While the *Jury Directions Act 2015* does not require it, judges should ask defence counsel whether they seek a forensic disadvantage direction if the judge is concerned that the issue may have been overlooked.

10. At common law, the delay which gave rise to the need for a warning was not mathematically defined. Judges needed to determine whether the case was one of "long delay" which gave rise to the need for the warning (*Doggett v R* (2001) 208 CLR 343 (Kirby J)).

Forensic Disadvantage

11. A judge may direct the jury on forensic disadvantage only if the judge is satisfied that the accused has experienced a *significant* disadvantage (*Jury Directions Act 2015* s 39(2)).

12. A direction is not required simply because there has been a delay between the alleged offence and the trial. The judge must find that the accused suffered a significant disadvantage in challenging, adducing or giving evidence, or conducting their case because of the consequences of that delay (*Jury Directions Act 2015* s 38; *Slater v The Queen* [2020] VSCA 270, [106]). A hypothetical disadvantage is not sufficient.

13. Some forensic disadvantages that may result from delay include:

- Loss of chance to explore the circumstances of the alleged offending in detail;
- Loss of chance to identify the occasion of the allegations with any specificity;
- Loss of chance to make any defence other than a simple denial;
- Loss of chance of medical examination of the complainant;
- Loss of chance to establish an alibi;
- Loss of chance to call evidence contradicting the broader evidence of the complainant;
- Loss of chance to obtain documents that may have assisted the defence;
- Disadvantage in testing events that may have affected the complainant's recollection or reliability (see *Longman v R* (1989) 168 CLR 79; *Crampton v R* (2000) 206 CLR 161; *R v Morrow* (2009) 26 VR 526; *Robbins v The Queen* (2017) 269 A Crim R 244, [186(8)]).

14. These disadvantages may be exacerbated where the complainant's own recollections are weakened by the delay, and he or she can therefore offer few specific details to be tested before the jury (*Crampton v R* (2000) 206 CLR 161).

15. Whether or not the accused has suffered any forensic disadvantage will depend on the circumstances of the case. For example:

- Where specific dates are given and opportunity is admitted, there may be no basis for arguing that a chance at alibi has been lost (*R v GTN* (2003) 6 VR 150);
- Where medical evidence could not have been led to prove or disprove the offence (e.g. an indecent touching), the lost opportunity to gather such evidence will not be significant (*Tully v R* (2006) 230 CLR 234).

16. While the passage of time alone cannot be determinative of whether a direction is required, the length of the delay will be a significant factor:

    i) The greater the delay, the more likely it is that the accused will have suffered a significant forensic disadvantage (see, e.g. *Doggett v R* (2001) 208 CLR 343 (Kirby J); *R v GTN* (2003) 6 VR 150);

    ii) The shorter the delay, the more difficult it will be to show that the accused has lost the ability to adequately test the evidence of the complainant or to adequately marshal his or her defence (see, e.g. *Tully v R* (2006) 230 CLR 234).

17. The judge will generally not need to find that the missing evidence *would* have assisted the accused. However, a positive finding that the missing evidence *would not* have assisted the accused will generally suggest that there has been no significant forensic disadvantage.

Content of the Charge

Forensic Disadvantage

18. When a forensic disadvantage direction is to be given, the judge must inform the jury of:

    i) the nature of the disadvantage experienced by the accused; and

    ii) the need to take the disadvantage into account when considering the evidence (*Jury Directions Act 2015* s 39(3)(a)).

19. The judge must clearly identify the specific forensic disadvantages which have resulted from the delay. The precise nature of those disadvantages will depend on the circumstances of the case (see above).

20. Although a judge has flexibility in the way he or she directs the jury, in light of its status as a mandatory statutory direction, and its function in protecting the accused from a potential miscarriage of justice, the direction should be invested with judicial authority. It should not be described as a "comment" (*R v Morrow* (2009) 26 VR 526).

21. "Forensic disadvantage" is a legal term of art and is unlikely to be understood by the jury without further explanation. It should not be used in the directions.

22. When informing the jury about the *nature* of the forensic disadvantages that have been identified, care should be taken to avoid suggesting that the judge has made any *findings about the facts in issue* in the trial.

23. A judge must not undermine a forensic disadvantage direction by commenting that the delay may also have disadvantaged the complainant, or that delay may mean there is a lack of evidence to corroborate the complainant. Similarly, it is not appropriate as part of a forensic disadvantage direction to comment that delay in relation to sexual assault allegations is common, or is not a criticism of the complainant. A statement that a lack of specificity is a "double-edged sword" is inappropriate, as it suggests the jury should balance the accused's disadvantage against the disadvantage of the prosecution or complainant (*Briggs v The King* [2024] VSCA 80, [85]–[94]).

Judge Must Not Warn Jury that it is "Dangerous to Convict"

24. The judge must not say, or suggest in any way, to the jury that, as a result of the delay:

    i) it would be dangerous or unsafe to convict the accused; or

    ii) the complainant's evidence should be scrutinised with great care (*Jury Directions Act 2015* s

39(3)(b)).[118]

Associated Directions

25. Where there has been a delay, judges are commonly also asked to warn the jury about the risk that the complainant's memory may be honest but erroneous.[119] Where it is appropriate to give both warnings, it will generally be convenient to combine them in the one direction.
26. Where the complainant has failed to make a timely complaint, the judge may also be required to instruct the jury about the significance of delay. See Effect of Delayed Complaint on Credit for further information.
27. Where the complainant is the sole witness asserting the commission of a crime, it may be appropriate to warn the jury about the care required before convicting on the basis of that evidence (*R v Murray* (1987) 11 NSWLR 12; *Robinson v R* (1999) 197 CLR 427). While such a direction is customary in New South Wales, in Victoria it is not regarded as obligatory (*R v Aden & Toulle* (2002) 162 A Crim R 1).

Last updated: 14 May 2024

4.8.2 Charge: Delay Causing Forensic Disadvantage

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This charge may be used in all trials that were commenced on or after 29 June 2015.

This charge should only be given where:

i) The judge is satisfied that the accused has suffered a significant forensic disadvantage because of the delay between the alleged offence and trial; and either:

a) A party has requested a direction on forensic disadvantage and there are not good reasons for not giving the requested direction; or

b) A party has not requested a direction on forensic disadvantage, but there are substantial and compelling reasons to give the direction despite the absence of a request.

Introduction

As you will be aware, the offences in this trial are alleged to have occurred [*indicate date(s) or date range(s)*]. NOC first complained to NOW about the offending on [*indicate dates*].[120] This means there was a delay of [*indicate delay*] before NOC told anybody about [the details of] these alleged offences.

Forensic Disadvantage

I must now inform you of a [further] significant consequence of this delay. This is the impact this delay has had on NOA's ability to defend himself/herself against these charges.

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[118] *Jury Directions Act 2015* uses 'victim' instead of 'complainant'. We have retained 'complainant' to maintain consistency across the Charge Book.

[119] See 4.8.3 Delay Risking Honest But Erroneous Memory.

[120] This charge is designed for use in cases where there was a delay in making the complaint. If the relevant delay arose after the complaint was made the charge will need to be modified accordingly.

In assessing the evidence in this case you must have regard to the following significant considerations. Because of this delay:

[*List the* specific forensic disadvantages *suffered by the accused due to the consequences of delay. Only those disadvantages actually suffered in the circumstances of the case should be included. Possibilities include*:

- NOA lost the opportunity to *make enquiries* at, or close to, the time of the alleged incident[s].
- NOA lost the ability to *explore the alleged circumstances* in detail soon after the offences were said to have occurred. Such an exploration may have *uncovered evidence* which would have [thrown doubt upon the complainant's allegations/confirmed NOA's denial of the charges].
- NOA lost the *means of testing NOC's allegations* which would have been available had there been no delay in prosecution.
- NOC is *not able to identify the occasion* on which the offences are alleged to have occurred with any specificity. This makes it difficult for NOA to raise any defence other than a *simple denial*.
- NOC's own recollection *of the events has faded,* so s/he has not been able to provide many specific details of the alleged offences. This [also] makes it difficult for NOA to raise any defence other than a simple denial.
- NOC could not be *medically examined* close to the time of the alleged offence, to provide evidence contradicting the allegations (referring also to expert evidence establishing the probability of detectable injury in the circumstances described by the complainant).
- Witnesses who may have been able to give evidence contradicting the complainant's allegation [are no longer available/*can no longer remember* relevant details].]

I instruct you as a direction of law that you must take these disadvantages into consideration when determining whether the prosecution has proved NOA's guilt beyond reasonable doubt.

Last updated: 29 June 2015

4.8.3 Delay Risking Honest but Erroneous Memory

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Scope

1. Two separate risks may arise where there is a delay in making a complaint:[121]

   i) The accused may suffer a significant forensic disadvantage; and

   ii) The complainant's recollection of what happened may be honest but erroneous (*Longman v R* (1989) 168 CLR 79; *R v MBX* [2014] 1 Qd R 438).

2. This topic only addresses the risk of honest but erroneous memory. See 4.8.1 Delay Causing Forensic Disadvantage for information concerning the risk of forensic disadvantage.

[121] While these risks may also arise where a delay occurs after a complaint is made (e.g. where there is a delay in interviewing, charging or prosecuting the accused), the risk of honest but erroneous memory is less likely to occur when the complaint is made in a timely fashion (cf the risk of forensic disadvantage). Consequently, this topic focuses solely on the issue of delayed complaint.

Grounds for Giving a Warning

3. The need for a direction about the risk of honest but erroneous memory may arise under s 32 of the *Jury Directions Act 2015*.

4. Alternatively, where a direction is not sought, the judge may need to give a direction if there are substantial and compelling reasons to do so in the absence of a request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015.

5. An "honest but erroneous memory" warning is a particular form of an unreliable evidence warning. This topic should therefore be read in conjunction with 4.21 Unreliable Evidence Warning.

Section 32 Unreliability Warning

When must a s 32 unreliability warning be given?

6. A judge must give a s 32 unreliability warning if:

   i) A party requests such a warning;

   ii) The evidence in question is "of a kind that may be unreliable";

   iii) The party specifies the significant matters that may make the evidence unreliable; and

   iv) There are no good reasons for not doing so (*Jury Directions Act 2015* s 32).

7. This topic focuses on the second requirement. See 4.21 Unreliable Evidence Warning for information concerning the first and fourth requirements.

"Evidence of a kind that may be unreliable"

8. Section 32 applies to "evidence of a kind that may be unreliable". While this includes the eight categories of evidence listed in s 31, it is not restricted to those categories. A s 32 warning may be required for any evidence which is "of a kind that may be unreliable" (see *R v Stewart* (2001) 52 NSWLR 301; *R v Covill* (2000) 114 A Crim R 111).

9. At common law, evidence given by a complainant after a lengthy delay was seen to be potentially unreliable, due to the risk that his or her recollection of what happened may be honest but erroneous (*Longman v R* (1989) 168 CLR 79; *Crampton v R* (2000) 206 CLR 161.See "Risk factors identified at common law" below for further information).

10. Although not yet decided, it seems likely that, for the reasons identified at common law, evidence given by a complainant after a lengthy delay will also be treated as evidence that is "of a kind that may be unreliable" for the purposes of *Jury Directions Act 2015* s 32.

11. However, the mere fact that there has been a delay in making a complaint does not mean that any evidence given will necessarily be "evidence of a kind that may be unreliable". In some circumstances there may be no risk that such evidence is unreliable, and so s 32 will not apply (see *R v Clark* (2001) 123 A Crim R 506; *R v Fowler* (2003) 151 A Crim R 166; *R v Harbulot* [2003] NSWCCA 141; *Derbas v R* [2007] NSWCCA 118. Cf *R v Stewart* (2001) 52 NSWLR 301).

12. This means that even if there has been a delay in making a complaint, a judge must still consider whether the specific evidence given in the trial in question is "of a kind that may be unreliable" (*R v Clark* (2001) 123 A Crim R 506; *R v Fowler* (2003) 151 A Crim R 166; *R v Harbulot* [2003] NSWCCA 141; *Derbas v R* [2007] NSWCCA 118. Cf *R v Stewart* (2001) 52 NSWLR 301).

13. This is a test of "possibility". The question is whether the evidence is of a kind that "may be" unreliable (*R v Flood* [1999] NSWCCA 198).

14. In determining whether the evidence in a particular case is "of a kind that may be unreliable", judges may take into account the risks of unreliability identified at common law (see "Risk factors identified at common law" below) (*Papakosmas* (1999) 196 CLR 297; *R v Stewart* (2001) 52 NSWLR 301; *Robinson v R* (2006) 162 A Crim R 88).

Risk factors identified at common law

15. Where there has been a lengthy delay in making a complaint, there is a risk that false recollections will have been converted into honestly and strongly held beliefs. This risk makes the evidence given in such circumstances potentially unreliable (*Longman v R* (1989) 168 CLR 79; *Crampton v R* (2000) 206 CLR 161).

16. Judges should warn the jury about this risk, because of the chance that the jury will merely focus upon whether the complainant seems to be a truthful witness, without taking into account the possibility that the delay has affected the reliability of his or her honest recollection (*Longman v R* (1989) 168 CLR 79).

17. In the common law cases, the length of the delay was seen to be a significant factor in creating the risk of honest but erroneous memory (see *R v GTN* (2003) 6 VR 150 for an analysis of the periods of delay in a number of appellate cases). However, the cases do not identify any minimum period of delay necessary for this risk to arise.[122]

18. As the delay in question must be capable of transforming fantasy into false memory, it is possible that the requisite period of delay will be longer than the short periods deemed capable of producing a forensic disadvantage (see 4.8.1 Delay Causing Forensic Disadvantage).

19. The risk that the complainant's recollection will be honest but erroneous must be assessed in all the relevant circumstances. It will be strongest in cases where:

    - The offence was discovered while the complainant was half-asleep;
    - There is evidence suggesting that the complainant was suggestible;
    - There is a combination of substantial delay and during the intervening period the complainant has experienced mental illness which has affected the complainant's memory (*Longman v R* (1989) 168 CLR 79*, Robinson v R* (1999) 197 CLR 162; *Crampton v R* (2000) 206 CLR 161; *Wade v The Queen* [2019] VSCA 168).

Doubts about the assumptions

20. Commentators and judges have doubted the validity of the law's assumptions about child psychology that underlie the asserted need for directions about honest but erroneous memory (*JJB v R* [2006] NSWCCA 126, [3]–[8] (Spigelman CJ); *R v MBX* [2014] 1 Qd R 438 (Applegarth J). Cf *Crampton v R* (2000) 206 CLR 161; *R v BWT* (2002) 54 NSWLR 241; *JJB v R* [2006] NSWCCA 126 (Kirby J)).

21. Doubts have also been expressed as to whether these directions are truly mandated by authority (*JJB v R* [2006] NSWCCA 126, [3]–[8] (Spigelman CJ); *R v MBX* [2014] 1 Qd R 438 (Applegarth J). Cf *Crampton v R* (2000) 206 CLR 161; *R v BWT* (2002) 54 NSWLR 241; *JJB v R* [2006] NSWCCA 126 (Kirby J)).

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[122] In *Longman v The Queen* (1989) 168 CLR 79 the delay between alleged offending and complaint was 20 years. In *Crampton v The Queen* (2000) 206 CLR 161 the delay ranged between 15 and 9 years.

22. In 2019 the Victorian Court of Appeal affirmed the need for an honest but erroneous memory direction in a case where there was a substantial delay in complaint, evidence of an intervening mental illness, and evidence of how the complainant tried to reconstruct his memories to distinguish fact from fantasy. The Court held that the trial judge had erred in finding that the degree of cross-examination and the absence of any latent danger constituted good reasons for not giving a requested direction as the risk of confabulation may not have been fully appreciated by the jury. In circumstances where the complainant's reliability was critical to the prosecution case, the Court found that a tailored direction on honest but erroneous memory was necessary (*Wade v The Queen* [2019] VSCA 168, [36]–[38]).

Content of the s 32 warning

23. A s 32 unreliability warning must:

    i) Warn the jury that the evidence may be unreliable;

    ii) Inform the jury of the significant matters that the trial judge considers may cause it to be unreliable; and

    iii) Warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it (*Jury Directions Act 2015* s 32(3)).

24. See 4.21 Unreliable Evidence Warning for information concerning the first and third requirements.

25. In informing the jury about the significant matters that may cause the evidence to be unreliable (the second requirement), it is often appropriate for the judge to refer to the risk factors identified at common law (see above) (*Kanaan v R* [2006] NSWCCA 449; *Robinson v R* (2006) 162 A Crim R 88).

26. It follows that where a s 32 warning is required because of a delay in making a complaint, the charge should include instructions to the effect that:

    - Experience has shown that human recollection may be erroneous and liable to distortion due to various factors; and
    - That the likelihood of error increases with delay (*Longman v R* (1989) 168 CLR 79).

Judge must not warn the jury that it is "dangerous to convict"

27. The judge must not warn the jury, or suggest to them in any way, that it would be dangerous or unsafe to find the accused guilty because of the delay (*Jury Directions Act 2015* s 51(2). See also *JJB v R* (2006) 161 A Crim R 187).

28. These provisions expressly prohibit judges from charging juries in the common terms of a Longman warning (*R v IAB* [2009] VSCA 229).[123]

Do not breach the prohibitions in ss 33 and 51(1)(a)

29. Section 51(1) of the *Jury Directions Act 2015* states that the judge must not warn the jury, or suggest in any way, that the law regards complainants in sexual cases as an unreliable class of witness or that complainants who delay in making a complaint are, as a class, less credible or require more careful scrutiny than other complainants.

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[123] At common law, the "Longman rule" often required judges to warn the jury that it would be dangerous to convict on the complainant's evidence alone unless, after scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation, and paying heed to the warning, they were satisfied of its truth and accuracy (*Longman v R* (1989) 168 CLR 79).

30. Any directions given in relation to the risk of honest but erroneous memory must not be expressed in terms that undermine this provision (e.g. by suggesting a stereotyped view that complainants in sexual assault cases are unreliable, or that delay in making a complaint about an alleged sexual offence is invariably a sign that the complainant's evidence is false) (*R v Crofts* (1996) 186 CLR 427; *R v Rodriguez* [1998] 2 VR 167).
31. Similarly, section 33 of the *Jury Directions Act 2015* prohibits the judge from saying or suggesting that children as a class are unreliable witnesses or that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults.
32. For this reason, it may be prudent to avoid any suggestion that the risk of an honest but erroneous memory is greater for memories of events said to have occurred in childhood. Instead, the direction should focus on the length of the delay.

Associated Directions

33. Where there has been a delay, judges are commonly also asked to warn the jury about the forensic disadvantages to the accused caused by that delay. See 4.8.1 Delay Causing Forensic Disadvantage. Where it is appropriate to give both warnings, it will generally be convenient to combine them in the one direction.
34. Where the complainant has failed to make a timely complaint, the judge may also be required to give the jury the statutory directions on the relevance of delay on credit. See Effect of Delayed Complaint on Credit for further information.
35. Where the complainant has given inconsistent or incomplete accounts, the judge may be required to direct the jury about how to assess those inconsistencies. See Differences in a Complainant's Account for further information.

Last updated: 28 August 2019

4.8.4 Charge: Delay Risking Honest but Erroneous Memory

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This charge should only be given where:

i) A party has requested a *Jury Directions Act 2015* s 32 warning about the risk of honest but erroneous memory; and

ii) There are no good reasons for not giving the direction.

Introduction

As you will be aware, the offences in this trial are alleged to have occurred [*indicate date(s) or date range(s)*]. NOC first complained to NOW about the offending on [*indicate dates*].[124] This means there was a delay of [*indicate delay*] before NOC told anybody about [the details of] these alleged offences.

[124] This charge is designed for use in cases where there was a delay in making the complaint. If the relevant delay arose after the complaint was made it will need to be modified accordingly.

Effect of Delayed Complaint on Reliability

Because of the passage of so many years between the date(s) of the alleged offences, and the date of NOC's first complaint about those alleged events, I must give you a warning about the reliability of NOC's evidence.

My warning to you is as follows. The honest recollections of a witness about events that s/he believed to have occurred many years before may be unreliable.

You will easily understand that the passage of time may affect any witness's memory. While in some cases people simply forget things, in other cases their memory may become distorted. That is, they may come to remember things that did not really happen.

Human recollection is frequently erroneous and liable to distortion in this way. The likelihood of this error increases with delay.

[*Add any* other factors *which may have exacerbated the risk of honest but erroneous memory in the circumstances, such as evidence that the complainant was suggestible. Also refer to any factors which may support the complainant's recollection, such as the exceptional or traumatic nature of the alleged acts, or a timely complaint that was made to another person.*]

Warning

The law says that every jury must take this potential unreliability into account when considering evidence that is given after a long delay.

You must take this potential unreliability into account in determining whether you accept NOC's evidence at all, and if you do accept it, in whole or in part, in deciding what weight to give to that evidence.

In making this assessment you must carefully consider not only whether NOC's evidence is honest, in the sense that NOC believes it to be true, but also whether it is in fact true. While you should use your common sense and experience in assessing the effect of the delay upon NOC's memory, you must also consider the possibility that s/he honestly believes what s/he is saying, but is mistaken due to the distortion of his/her memory.

Supporting evidence

[*If there is evidence capable of "supporting" the witness's evidence that has not otherwise been dealt with, add the following shaded section.*]

In considering whether it is safe to rely on NOC's evidence, you should have regard to any supporting evidence led in this trial that you accept. By "supporting evidence" I mean evidence that comes from a source that is independent of NOW, and that tends to show the truth of NOW's evidence of the accused's guilt.

In this case the prosecution relied upon [*insert number*] items of evidence as supporting NOC's evidence. These were [*identify evidence capable of supporting the unreliable witness's evidence*].

[*If there is a danger that the jury might mistakenly believe certain evidence to be supportive, add the following darker shaded section.*]

There was other evidence given in this case that you might have thought at first glance could support NOC's evidence. This includes the evidence [*broadly identify non-supporting evidence*].

I direct you that this other evidence is not capable of supporting NOC's account, because [*explain why the evidence is not capable of supporting*, e.g. "it does not come from an independent source".]

Complainants are not less reliable than other witnesses

To conclude this part of my charge, I must make clear that in giving you these directions I am not suggesting, and it would be wrong to suggest, that people who make complaints about sexual offences are less reliable than other witnesses. That is not the case.

These directions are necessary solely because of the because of the matters that I have explained to you.

Last updated: 29 June 2015

4.9 Prosecution Failure to Call or Question Witnesses

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Scope

1. This topic addresses the directions which should be given where the prosecution fails to call a witness to give evidence at trial, or fails to ask a witness a material question during the trial.
2. Similar issues are addressed in the following:
    - 4.10 Defence Failure to Call Witnesses;
    - 4.11 Failure to Challenge Evidence (Browne v Dunne).
3. The need for directions on these issues depends on:
    - whether directions are sought; or
    - whether there are substantial and compelling reasons for giving a direction in the absence of any request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

Failure to Call a Witness

Obligation to Call Material Witnesses

4. The prosecution alone bears the responsibility of deciding whether to call a person as a witness for the prosecution (*Apostilides v R* (1984) 154 CLR 563).
5. The prosecution must call all witnesses necessary to unfold the narrative of events unless there is a good reason not to do so (*Whitehorn v R* (1983) 152 CLR 657; *Dyers v R* (2002) 210 CLR 285; *Mahmood v Western Australia* (2008) 232 CLR 397).
6. As the prosecution seeks the truth, it must call evidence favourable and unfavourable to its case (*R v Soma* (2003) 212 CLR 299; *R v Shaw* (1991) 57 A Crim R 425; *R v Glennon (No. 2)* (2001) 7 VR 631).
7. However, the prosecution does not need to call a witness if his or her evidence:
    - Is likely to be unreliable, untrustworthy or otherwise incapable of belief (*Whitehorn v R* (1983) 152 CLR 657; *R v Newland* (1997) 98 A Crim R 455);
    - Is likely to be unnecessarily repetitious, in light of the number of witnesses available for the proof of the matter on which they would give evidence (*Whitehorn v R* (1983) 152 CLR 657); or
    - Relates to an issue which has been raised by the defence, and on which the defence bears the onus of proof (e.g. mental impairment) (*R v Fitchett* (2009) 23 VR 91; [2009] VSCA 150).

8. Previously, one of the factors the prosecution could consider when deciding whether to call a witness was whether the interests of justice required that it be able to cross-examine that witness (see, e.g. *Richardson v R* (1974) 131 CLR 116). This was due to the restrictions the common law placed on the prosecution's ability to cross-examine its own witnesses. As *Evidence Act 2008* s 38 now provides the prosecution with a greater opportunity to cross-examine its own witnesses, this is no longer a reasonable basis for refusing to call a witness (*Santo v R* [2009] NSWCCA 269; *Kanaan v R* [2006] NSWCCA 109; *Kneebone v R* (1999) 47 NSWLR 450 (Smart AJ)).[125]

Section 43 direction

9. Where the prosecution fails to call or question a witness without providing a reasonable explanation, the defence may seek a direction under *Jury Directions Act 2015* s 43 (a 'section 43 direction').

10. This direction informs the jury that it may conclude that the witness would not have assisted the prosecution's case (*Jury Directions Act 2015* s 43).

11. This direction is a statutory replacement for the common law rule in *Jones v Dunkel* (see *Jones v Dunkel* (1959) 101 CLR 298; *Dyers v R* (2002) 210 CLR 285; *R v Le–Gallienne* [2004] VSCA 223).

When Should a Section 43 Direction be Given

Prerequisites

12. A section 43 direction may be given if:

    i) A witness was available who could have given relevant evidence;

    ii) The prosecution could reasonably have been expected to call or question that witness to give evidence;

    iii) The prosecution failed to call or question the witness;

    iv) The prosecution provided no satisfactory explanation for that failure; and

    v) Counsel for the accused requests a direction or there are substantial and compelling reasons for giving the direction despite the absence of a request (*Jury Directions Act 2015* ss 12, 43; *Police v Kyriacou* (2009) 103 SASR 243).

Discuss Issue With Counsel

13. Where the defence seeks a section 43 direction, the judge should discuss the issue with the prosecution before charging the jury. This will allow the prosecution to make submissions on why it was not reasonably expected to call or question the witness, or why there is a satisfactory explanation for not calling or questioning the witness (see *Jury Directions Act 2015* s 43; *R v OGD* (1997) 45 NSWLR 744).

14. This discussion will provide the judge with the information needed to determine whether the statutory basis for the direction is established (see *Jury Directions Act 2015* s 43. See also *Dyers v R* (2002) 210 CLR 285; *R v Heinze* [2005] VSCA 124; *R v Kneebone* (1999) 47 NSWLR 450).

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[125] It will usually be unjust to refuse the prosecution leave to cross-examine a witness under *Evidence Act 2008* s 38 where it has called that witness because of its duty to put all material evidence (including unfavourable evidence) before the jury (*Santo v R* [2009] NSWCCA 269; *Kanaan v R* [2006] NSWCCA 109; *Kneebone v R* (1999) 47 NSWLR 450 per Smart AJ).

15. If the judge finds that the prosecution does not have a good reason for failing to call a witness, he or she may ask the prosecution to reconsider its decision (*Apostilides v R* (1984) 154 CLR 563).[126] If the prosecution complies with the judge's request, a section 43 direction will not be necessary.

Reasonable explanations for failing to call a witness

The Witness is Likely to be Unreliable

16. A direction should not be given where the prosecution has a strong basis for considering the witness unreliable, untrustworthy or otherwise incapable of belief (*R v Newland* (1997) 98 A Crim R 455; *Apostilides v R* (1984) 154 CLR 563; *Whitehorn v R* (1983) 152 CLR 657).

17. It is not enough for the prosecution to merely suspect the witness is unreliable. There must be identifiable circumstances which clearly establish unreliability (*Apostilides v R* (1984) 154 CLR 563).

18. The prosecution should put forward the evidence on which it formed the view that the witness should not be called (*R v Kneebone* (1999) 47 NSWLR 450; *R v Glennon (No 2)* (2001) 7 VR 631).

19. The mere fact that a potential witness has made contradictory statements in the past is not a sufficient reason for failing to call him or her (*R v Shaw* (1991) 57 A Crim R 425; *R v Armstrong* [1998] 4 VR 533; *R v Palmer* [2000] VSCA 236).

20. The fact that the prosecution expects the witness to be unfavourable, or to give evidence that does not accord with the prosecution's case theory, is also not a sufficient reason for failing to call a witness (*Whitehorse v R* (1983) 152 CLR 657; *R v Newland* (1997) 98 A Crim R 455; *R v Heinze* [2005] VSCA 124; *Dyers v R* (2002) 210 CLR 285; *R v Kneebone* (1999) 47 NSWLR 450).

The Evidence is Unnecessary or Irrelevant

21. A direction should not be given if the witness's evidence is likely to be unimportant, cumulative or inferior to what has already been adduced (*Police v Kyriacou* (2009) 103 SASR 243).

22. The prosecution will also have a reasonable explanation for not calling a witness where the unled evidence would simply have supported the unchallenged evidence of another witness. The evidence in question must have been:

    - Potentially relevant to a contested issue (*R v Dammous* [2004] VSCA 62); and
    - Able to affect the question of whether or not the prosecution has proven its case beyond reasonable doubt (*RPS v R* (2000) 199 CLR 620; *Mahmood v Western Australia* (2008) 232 CLR 397. See also *R v Louizos* [2009] NSWCCA 71; *HGA v R* [2010] VSCA 114).

Other Reasons for Not Giving a Direction

23. At common law, the prosecution has been held to have a good reason for not calling a witness in the following circumstances:

    - Where it did not know what evidence the witness would give (e.g. because the police did not take a witness statement) (*Gillan v Police (SA)* (2004) 149 A Crim R 354);
    - Where the witness could not have been compelled to give evidence (*R v Reardon (No 2)* (2004) 60 NSWLR 454);
    - Where the witness had been deported and could not be subpoenaed (*Fonseka v R* (2003) 140 A Crim R 395);

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[126] As the prosecution alone bears the responsibility of deciding whether a person will be called as a witness for the prosecution, the judge cannot force it to call a witness. Although the judge has the power to call a witness him or herself (and thus also avoid the need for a section 43 direction), this should only be done in the "most exceptional circumstances" (*Apostilides v R* (1984) 154 CLR 563).

- Where the witness had indicated that he or she would not give evidence due to a privilege under *Evidence Act 2008* (*R v Kessing* (2008) 73 NSWLR 22).

24. These reasons are also likely to provide satisfactory explanations for the purpose of the *Jury Directions Act 2015*.

25. In some cases the complexity of the circumstances may provide good reasons for not giving a section 43 direction. For example, in *R v Taufua* [1999] NSWCCA 205 the court held that, in order for the jury to determine whether the prosecution should have called the relevant witness, the judge would have had to direct them about matters such as the prosecution's obligations to call a witness under *Apostilides*, the potential unreliability of the witness and directions under s 32 of the *Jury Directions Act 2015*, and the need to seek leave to cross-examine the witness under s 38 of the *Evidence Act 2008*. In such circumstances, it was seen to be preferable to give an anti-speculation direction rather than a section 43 direction (see also *R v Smith* [2000] NSWCCA 202).

26. A failure by police to question a relevant person is not a satisfactory reason for not calling the person. A prosecutor cannot remain passive, leaving a failure by police to dictate who should be called at the trial (*Solis v The Queen* [2018] VSCA 275, [104]–[108]).

27. Similarly, reticence of the complainant to identify a witness or provide a witness' contact details, or the fact that the witness is overseas, are not satisfactory explanations for a failure to call by themselves. It is not for a complainant to decide whether a witness is important, and the availability of audio-visual links means that living overseas does not stop a witness from giving evidence (*Jacobs v The Queen* [2019] VSCA 285, [160]).

Content of the Direction

28. Where a section 43 direction is required, the judge may direct the jury that it is entitled to conclude that the witness in question would not have assisted the prosecution's case and that this supports the defence case (*Jury Directions Act 2015* s 43; *Jones v Dunkel* (1959) 101 CLR 298). In some cases, it will also be appropriate to tell the jury that the prosecution failure to call the evidence strengthens the defence case.

29. The direction must only describe a permissible path of reasoning to the jury. It must not require the jury to draw the inference described (*Nadarajamoorthy v Moreton* [2003] VSC 283).

30. The judge must not direct the jury that the missing evidence would have contradicted the prosecution's case or been unfavourable to the prosecution. He or she may only tell the jury that the evidence would not have assisted the prosecution (*Nadajaramoorthy v Moreton* [2003] VSC 283; *R v Allen & Anor* Vic CCA 20/12/1994; *R v Buckland* (1977) 2 NSWLR 452).

31. The judge may explain any competing inferences that arise in the circumstances of the case, including any innocent explanations for the failure to call the witness (*R v Jenkins* (2002) 6 VR 81; *R v OGD* (1997) 45 NSWLR 744; *R v Glennon (No 2)* (2001) 7 VR 631. See also *Apostilides v R* (1984) 154 CLR 563).

32. A judge may comment on the effect that the prosecution's failure to call a particular witness would appear to have had on the course of the trial (*Apostilides v R* (1984) 154 CLR 563).

33. If the prosecution fails to call a particular witness, but there are good reasons for not giving a section 43 direction, it may be appropriate to give an anti-speculation direction. See below for further information.

Failure to Question Witnesses

34. It is likely that section 43 also applies where the prosecution fails to question a witness about a particular matter, when it may be expected that the prosecution would ask about that matter (*R v GEC* (2001) 3 VR 334; *R v Martin* [2002] QCA 443; *Western Australia v Coates* [2007] WASC 307; *Mahmood v Western Australia* [2007] WASCA 101; *R v Priest* (2002) 137 A Crim R 133).[127]

35. This means that a section 43 direction may be given if:

    - A witness who was called could have given relevant evidence about a particular matter;
    - The prosecution could reasonably have been expected to question the witness about that matter, but failed to do so;
    - The prosecution provided no satisfactory explanation for that failure; and
    - Counsel for the accused requests a direction regarding that failure.

36. The need for this direction raises the same issues which are discussed above regarding the prosecution failure to call the witness.

37. At common law, one case where it was considered appropriate to direct the jury on the failure of the prosecution to question a witness about a topic was where:

    - The complainant's credibility was the foundation of the prosecution's case;
    - The matter that the prosecution did not ask the witness about was central to the complainant's credibility; and
    - The prosecution had no reason for not asking the witness about that matter (*Western Australia v Coates* [2007] WASC 307; *R v GEC* (2001) 3 VR 334).

38. The fact that defence counsel had the option to cross-examine the witness about the relevant matter does not remove the need for a direction. Defence counsel should not be expected to risk leading prejudicial evidence in cross-examination because the prosecution has failed to elicit all relevant evidence (*R v GEC* (2001) 3 VR 334).

39. See "Content of the Direction" above for a discussion of matters relevant to the content of a section 43 direction. If a section 43 direction is given in this context, modifications should be made to reflect the fact that an inference is being drawn from the prosecution's failure to question a witness, rather than its failure to call a witness.

Anti-speculation Direction

40. An anti-speculation direction may be given where:

    - It is possible that the jury might think that a witness could have been called by the prosecution to give evidence, or could have been questioned about a certain matter, but was not;
    - An adverse inference may not be drawn from the prosecution's failure to call or question the witness;

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[127] In *Dyers v R* (2002) 210 CLR 285, the High Court referred to *R v GEC* (2001) 3 VR 334, but did not need to decide whether the rule in *Jones v Dunkel* extended to a prosecution failure to lead evidence from a witness who has been called.

- Counsel for the prosecution has requested the direction, or there are substantial and compelling reasons to give the direction despite the absence of a request (*Jury Directions Act 2015* ss 12, 16; *Dyers v R* (2002) 210 CLR 285).

41. In such cases, the judge may direct the jury not to speculate about what the witness might have said (*Dyers v R* (2002) 210 CLR 285).
42. The judge may also direct the jury:
    - Not to speculate about why the witness was not called or questioned;
    - Not to place any weight on the failure to call or question the witness; and
    - To decide the case solely on the evidence presented at the trial (see, e.g. *R v Newland* (1997) 98 A Crim R 455; *Hugo v R* (2000) 113 A Crim R 484; *R v Holden* [2001] VSCA 63; *R v Caratti* (2000) 22 WAR 527; *HGA v R* [2010] VSCA 114).
43. If defence counsel has suggested that an adverse inference should be drawn against the prosecution for failing to call or question a witness, the judge should explicitly direct the jury not to draw such an inference (see, e.g. *R v Heinze* [2005] VSCA 124).
44. Where the prosecution does not call a witness because of doubts about his or her reliability, it will generally not be appropriate to tell that to the jury (see, e.g. *R v Chimirri* [2010] VSCA 57).
45. As an anti-speculation direction and a section 43 direction are contradictory, the two directions should not be given together (*Dyers v R* (2002) 210 CLR 285).

Last updated: 17 February 2020

4.9.1 Charge: Section 43 Direction

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This charge may be given where an adverse inference can be drawn from the prosecution's failure to call a witness to give evidence.

It may only be given where the trial judge is satisfied that the prosecution:

i) was reasonably expected to call or question the witnesses; and

ii) has not satisfactorily explained why it did not call or question the witness.

The direction must also be requested by the defence, or there must be substantial and compelling reasons for giving the direction despite the absence of any request. See 3.1 Directions Under Jury Directions Act 2015.

It may be modified for use in cases where an adverse inference can be drawn from the prosecution's failure to question a witness.

Section 43 Direction

In this case, you may have expected that the prosecution would have asked NOW to give evidence. However, they chose not to do so.[128]

[*Explain reasons why the prosecution should have called the witness, and possible reasons for their failure to do so*.]

[128] This charge was written for use in cases where the prosecution failed to call a witness. it must be adapted for cases where the prosecution fails to question a witness on a particular topic.

It is for you to determine whether the prosecution had a satisfactory reason for not asking NOW to give evidence. If you conclude that the prosecution did not have a satisfactory reason for failing to call NOW, then you may conclude that [his/her] evidence would not have helped the prosecution.

Last updated: 29 June 2015

4.9.2 Charge: Anti-Speculation Direction

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This charge should be given where:

i) The jury might think that the prosecution should have called a particular witness to give evidence;

ii) An adverse inference may not be drawn from the prosecution's failure to call the witness;

iii) Prosecution counsel have requested the direction, or there are substantial and compelling reasons for giving the direction in the absence of a request.

It may be modified for use in cases where the jury might think that the prosecution should have questioned a witness about a particular matter.

Anti-speculation Direction

You may have noticed that NOW did not give evidence in this case. You must not speculate about what s/he might have said if s/he had given evidence. As I have told you, you must decide this case solely on the evidence which has been given in court.

Last updated: 29 June 2015

4.10 Defence Failure to Call Witnesses

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Scope

1. This topic addresses directions that may be given where the defence fails to call a witness (including the accused) to give evidence at trial.
2. Similar issues are addressed in the following topics:
    - 4.9 Prosecution Failure to Call or Question Witnesses;
    - 4.11 Failure to Challenge Evidence (*Browne v Dunn*);
    - 4.15 Silence in Response to People in Authority;
    - 4.16 Silence in Response to Equal Parties.

No Obligation to Give Evidence or Call Witnesses

3. In contrast to the prosecution's duty to call all material witnesses (see 4.9 Prosecution Failure to Call or Question Witnesses), the defence is usually under no obligation to give evidence him or herself, or to call any other witnesses to give evidence. A criminal trial is an accusatorial process in which the prosecution bears the onus of proving the accused's guilt beyond reasonable doubt (*RPS v R* (2000) 199 CLR 620; *Azzopardi v R* (2001) 205 CLR 50. See 1.7 Onus and Standard of Proof).
4. This is sometimes expressed as the accused having a "right of silence". However, that expression describes a number of different rules that apply in the criminal law. To avoid confusion, it is useful to specify which aspect of the right of silence is relevant (RPS v R (2000) 199 CLR 620; Azzopardi v R (2001) 205 CLR 50).

5. In this context, the relevant aspect of the right of silence is the immunity of an accused person undergoing trial from being compelled to give or call evidence (*Azzopardi v R* (2001) 205 CLR 50).

Direction on Failure to Give Evidence or Call Witnesses

6. The need for any directions on the accused's failure to give or call evidence depends on
   (a) whether directions are sought or
   (b) whether there are substantial and compelling reasons for giving a direction despite the absence of a request (*Jury Directions Act 2015* ss 12, 14, 15, 16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.
7. Where the accused fails to give evidence or call a witness to give evidence at a trial, the defence may request a direction that warns the jury against the impermissible use of the accused's failure to give evidence or call a witness. This direction is referred to in this Charge Book as a 'Section 41 direction' (see *Jury Directions Act 2015* s 41).

Warn the Jury Against Impermissible Use: The Section 41 Direction

8. As the accused is under no obligation to give evidence at trial, the fact that the accused does not do so cannot be used as evidence against him or her (*Azzopardi v R* (2001) 205 CLR 50. See also *Weissensteiner v R* (1993) 178 CLR 217; *Dyers v R* (2002) 210 CLR 285).
9. Therefore, where the accused does not give evidence, the defence may request a direction that the judge explains:
   (a) The prosecution's obligation to prove guilt;
   (b) That the accused is not required to give evidence or call a witness;
   (c) That the jury should not guess or speculate about the evidence the accused may have given, or the evidence the witness may have given;
   (d) That the fact that the accused did not give evidence or call a witness is not evidence against the accused or an admission, must not be used to fill gaps in the evidence and does not strengthen the prosecution case (*Jury Directions Act 2015* s 41).
10. This direction is a statutory replacement for the common law *Azzopardi* direction, and contains most of the same content (See *Azzopardi v R* (2001) 205 CLR 50; *Dyers v R* (2002) 210 CLR 285; *R v DAH* [2004] QCA 419).
11. The direction applies to both the situation where the accused fails to give evidence and where the defence fails to call a particular witness.
12. At common law, such directions were given as a matter of practice, even if not requested by defence counsel. The directions were given to address the risk that the jury might use the accused's silence in court to his or her detriment (*Johnston v R* [2007] NSWCCA 133; *Server v R* [2007] NSWCCA 339; *Azzopardi v R* (2001) 205 CLR 50).
13. According to the joint judgment of the High Court in *Azzopardi*, it is "almost always" desirable to give these directions to address the risk of the jury reasoning impermissibly from the accused's silence (*Azzopardi v R* (2001) 205 CLR 50).
14. Judges conducting trials under the *Jury Directions Act 2015* will need to consider how this statement on the desirability of these directions at common law informs the judge's assessment of whether there are substantial and compelling reasons for giving the directions in the absence of a request (compare *Jury Directions Act 2015* s 16).
15. However, even at common law, these directions did not need to be given in every case (*R v Richards* [2002] NSWCCA 38; *R v Park* [2003] NSWCCA 203; *R v SMR* [2002] NSWCCA 258; *R v Nguyen* [2002] NSWCCA 342; *R v Wilson* (2005) 62 NSWLR 346. Cf *R v Macris* (2004) 147 A Crim R 99).

16. No particular form of words needs to be used when giving this direction. What is required is a warning appropriate to the issues in the particular case, paying proper attention to the guidance offered in *Jury Directions Act 2015* s 41 and in *Azzopardi* (See *Jury Directions Act 2015* s 6; *Baquayee v R* [2006] NSWCCA 103. See also *R v Colville* [2003] NSWCCA 23; *R v Burns* (2003) 137 A Crim R 557; *R v Nicholson*; *Ex parte DPP (Cth)* [2004] QCA 393; *R v DAH* [2004] QCA 419).

17. Although the High Court in *Azzopardi* used the expression "it cannot be used as a make-weight", the term "make-weight" should be avoided when charging the jury. This term was discouraged at common law as unhelpful for use with a jury, and the *Jury Directions Act 2015* uses the term 'does not strengthen the prosecution case' (See *R v DAH* [2004] QCA 419).

Prohibited Directions

18. Section 42 of the *Jury Directions Act 2015* prohibits the judge, the prosecution and defence counsel from saying or suggesting that because the accused did not give evidence or call a particular witness, the jury may:

    (a) conclude that the accused is guilty from that fact;

    (b) use the failure of the accused to provide an explanation, which must be within the knowledge of the accused, to more safely draw an adverse inference based on those facts which, if drawn, would prove the guilt of the accused; or

    (c) draw an inference that the accused did not give evidence or call a witness (as the case requires) because that would not have assisted his or her case (*Jury Directions Act 2015* s 42).

19. Previous statutory limitations on the power of the judge or a prosecutor to comment on the accused's failure to give evidence or call witnesses were given a broad construction. The same approach will likely apply to *Jury Directions Act 2015* s 42.

20. The prohibition applies to both statements and suggestions. This prohibits even "the most subtle allusion" which suggests that the accused's silence is evidence of guilt, or in any way supports the prosecution case (see *Bataillard v R* (1907) 4 CLR 1282; *RPS v R* (2000) 199 CLR 620).

21. In *RPS v R* (2000) 199 CLR 620 it was held that the jury should not be told any of the following:

    - That the accused's election not to give evidence can be taken into account in judging the value or weight of the prosecution's evidence;
    - That in the absence of a denial or contradiction of the prosecution evidence, the jury can more readily discount doubts about that evidence, and more readily accept the evidence;
    - That the accused's decision not to give evidence can enable the jury to feel more confident in relying on the evidence tendered by the prosecution;
    - That the jury is entitled to conclude from the accused's failure to give evidence that his or her evidence would not have been of assistance.

22. It is a misdirection to tell the jury that it is usually easier to accept uncontradicted evidence than evidence which is actively disputed (*R v JJT* (2006) 67 NSWLR 152).

23. However, it is not a misdirection for the judge to simply point out that some of the prosecution evidence remains uncontradicted. This differs from suggesting that the prosecution evidence might be more readily accepted as a result, or that adverse inferences can be drawn from that fact (*R v Collie* (2005) 91 SASR 339. See also *R v Tran* (2006) 96 SASR 8).

24. Similarly, it is permissible for the prosecution (and the judge in summarising the prosecution's case) to point to objective and uncontradicted circumstances from which the jury may draw a reasonable inference about the accused's state of knowledge. Such an argument does not involve reversing the onus of proof, or making a prohibited comment on the accused's silence (see, e.g., *Kelly v The King* [2024] VSCA 69, [46]–[47], where the prosecution invited the jury to infer that the accused's guilty plea was made on the basis of an adequate understanding of the charge, given it was made after having engaged a solicitor and while sitting next to the solicitor at the committal mention hearing, even though the accused and the solicitor did not give evidence).

25. The judge must not suggest that by making him or herself unavailable for cross-examination, the accused has deprived the jury of something to which they were entitled (*R v Conway* (2005) 157 A Crim R 474).

26. The judge should not tell the jury that the accused is "not required to help the prosecution", as this may imply that if the accused had given evidence it would have assisted the prosecution case (*R v Collie* (2005) 91 SASR 339).

Failure to Call a Witness: The common law *Jones v Dunkel* Direction prohibited

27. At common law, there was a limited power for judges to direct the jury that it was entitled to draw an adverse inference from the fact that the defence in a criminal trial failed to call a witness (see *Jones v Dunkel* (1959) 101 CLR 298; *Dyers v R* (2002) 210 CLR 285).

28. This direction was referred to as the *Jones v Dunkel* direction, and advised the jury that it could infer that the evidence from a witness who was not called would not have assisted the party (*Jones v Dunkel* (1959) 101 CLR 298).

29. However, due to the adversarial and accusatory nature of criminal trials, the *Jones v Dunkel* direction was only suitable in "rare and exceptional" cases (Dyers v R (2002) 210 CLR 285).

30. Under the *Jury Directions Act 2015*, the *Jones v Dunkel* direction is prohibited in relation to the accused. The judge, the prosecution and the defence must not say or suggest that the jury can infer that the accused did not call a witness because that would not have assisted his or her case (*Jury Directions Act 2015* s 42(c)).[129]

31. If the prosecution or another party breaches this prohibition, then the judge must correct the statement or suggestion, unless there are good reasons for not doing so (*Jury Directions Act 2015* s 7).

32. Instead, the section 41 direction is available to warn the jury not to guess or speculate about what evidence a witness might have given, where the witness has not been called by the defence (*Jury Directions Act 2015* s 41).

Failure to Provide an Explanation: The common law *Weissensteiner* Direction Prohibited

33. The common law also provided for judges to direct a jury that it could more safely infer that the prosecution case was established where the accused failed to call evidence to contradict a circumstantial case which, if the evidence existed, could only have been known to the accused (see *RPS v R* (2000) 199 CLR 620; *Weissensteiner v R* (1993) 178 CLR 217).

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[129] The *Jones v Dunkel* direction is only prohibited in relation to the hearing to determine guilt or non-guilt. *Jones v Dunkel* reasoning is permissible when the judge is determining facts on a voir dire to decide whether to exclude evidence under *Evidence Act 2008* s 90 (*Kelly v The King* [2024] VSCA 69, [30]).

34. This direction was known as the *Weissensteiner* direction and could only be given in exceptional cases (*Azzopardi v R* (2001) 205 CLR 50. See also *RPS v R* (2000) 199 CLR 620; *Weissensteiner v R* (1993) 178 CLR 217).

35. Under the *Jury Directions Act 2015*, the *Weissensteiner* direction is prohibited. The judge, the prosecutor and the defence must not say or suggest to the jury that the accused's failure to give evidence or call a witness allows the jury to use that failure to provide an explanation of facts must, if true, must be within the knowledge of the accused, to more safely draw an inference of guilt (*Jury Directions Act 2015* s 42(b)).

36. If the prosecution or another party breaches this prohibition, then the judge must correct the statement or suggestion, unless there are good reasons for not doing so (*Jury Directions Act 2015* s 7).

Prohibition on Comment by an Accused on a Co-accused's Failure to Give Evidence

37. Prior to the commencement of the *Jury Directions Act 2015*, section 20 of the *Evidence Act 2008* allowed an accused to comment on the failure of a co-accused to give evidence and permitted the judge to comment on that comment.

38. Under the *Evidence Act 2008*, this comment could include inviting the jury to infer that a co-accused remained silent because that co-accused was guilty (*R v Skaf* [2004] NSWCCA 74; *Azzopardi v R* (2001) 205 CLR 50).

39. For trials commencing on or after 29 June 2015, such comments are prohibited. The trial judge, the prosecution and defence counsel must not say or suggest that the jury can use the fact that an accused did not give evidence as a basis to conclude that the accused is guilty (*Jury Directions Act* 2015 s 42(a)).

40. If a party makes this prohibited comment, the trial judge must correct the statement or suggestion, unless there are good reasons for not doing so (*Jury Directions Act 2015* s 7).

Prohibited Comments by the Prosecution

41. Under the *Evidence Act*, it was held that a statement in an opening address that the accused has a right to give evidence was not a comment on the failure to do so (*Peterson v R* (1979) 41 FLR 205; *R v Anastasiou* (1991) 21 NSWLR 394), while such a comment in final addresses was prohibited (*R v Villar* [2004] NSWCCA 302).

42. Similarly, under the *Evidence Act 2008*, the prosecution could refer to the defence's failure to call any witnesses without breaching this prohibition (see, e.g. *R v Thornton* (1980) 3 A Crim R 80). The prosecution could also refer to the fact that the only version before the court is that provided by prosecution witnesses and there is no evidence to support the alternative scenario provided by defence counsel (*R v Yammine* [2002] NSWCCA 289).

43. However, a comment that the accused has failed to contradict prosecution witnesses, or to provide an alternative version of events, would breach the prohibition (*R v Siebel* (1992) 57 SASR 558; *R v Secombe* [2010] VSCA 58).

44. Despite the differences between *Evidence Act 2008* s 20, as it applied before 29 June 2015 and *Jury Directions Act 2015* s 42, it is likely that the same principles will continue to apply. The prosecution must not address the jury with an argument that the accused's failure to give or call evidence strengthens the prosecution case in any way.

45. If the prosecution makes a prohibited statement or suggestion, the trial judge must correct the statement or suggestion, unless there are good reasons for not doing so (*Jury Directions Act 2015* s 7).

46. Such a direction may include the following elements:

    - That the jury must only take into account the directions given by the judge;

- That the prosecution was not entitled to refer to the fact that the accused or other party failed to give evidence;
- That the jury must ignore any comments made by the prosecution about the party's failure to give evidence;
- That there may be reasons, unknown to the jury, why an accused person remains silent; and
- Not to speculate about those reasons (see, e.g. *R v Villar* [2004] NSWCCA 302; *R v Gardner* (2001) 123 A Crim R 439).

Do Not Speculate About Reasons for Failure: The *OGD* Direction

47. Previously, it was held that where the accused fails to give evidence, it would ordinarily be necessary to direct the jury that:
    - There may be reasons, unknown to them, why an accused person remains silent, even if he or she is in a position to contradict or explain evidence; and
    - Not to speculate about those reasons (*R v OGD* (1997) 45 NSWLR 744).
48. However, it has been noted that the High Court in *Azzopardi* did not include this "*OGD* direction" in the warning which it described as "almost always" desirable to give (see "Warn the Jury Against Impermissible Use: The Section 41 Direction" above).
49. The section 41 direction does not contain a component warning the jury that there may be reasons for the accused to remain silent and not to speculate about those reasons. Judges will need to consider whether such a direction is specifically requested in addition to or as an alternative to the section 41 direction. Alternatively, the judge will need to consider whether there are substantial and compelling reasons for giving the direction despite the absence of a request.
50. At common law, it was suggested that as the *OGD* direction was designed to balance a *Weissensteiner* direction, it was only necessary to give an *OGD* direction in the rare cases where a *Weissensteiner* direction is given (*R v Nguyen* [2002] NSWCCA 342; *R v Wilson* (2005) 62 NSWLR 346).
51. The risk posed by the *OGD* direction is that it may lead the jury to consider what reasons the accused might have had for not giving evidence, which will usually be irrelevant (*R v Graham* [2005] NSWCCA 127 (Howie J)).
52. These common law principles identified above may inform whether there are good reasons for not giving the direction, or whether there are substantial and compelling reasons for giving the direction (see *Jury Directions Act 2015* ss 15, 16).

Last updated: 14 May 2024

4.10.1 Charge: Section 41 Direction

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This charge may be given where the defence has requested a direction on the failure of the accused to give evidence or call a witness. See Directions Under Jury Directions Act 2015 for information on when directions are required.

It can be modified for use in cases where the prosecution has improperly suggested that an adverse inference can be drawn from the defence's failure to call a witness. See Defence Failure to Call Witnesses for guidance.

You may have noticed that NOA did not [call NOW to] give evidence in this case. That is his/her right. As I have told you, it is for the prosecution to prove its case beyond reasonable doubt, and the accused is not required to [call any witnesses to] give evidence. The onus of proving the accused's guilt always remains on the prosecution, regardless of whether the accused chooses to [give/call] any evidence.

This means that the fact that NOA did not [call NOW to] give evidence cannot be used as evidence against him. That fact is not evidence in the case – and as I have told you, you must decide the case only on the evidence.

So the fact that NOA did not [call NOW] to give evidence does not constitute an admission by the accused, and may not be used to fill gaps in the evidence led by the prosecution. It does not add to or strengthen the prosecution's case in any way. It proves nothing at all.

You therefore must not draw any conclusions against the accused because s/he did not [call NOW to] give evidence, or even consider the fact that NOA did not [call NOW to] give evidence when deciding whether the prosecution has proved its case beyond reasonable doubt.

You also must not speculate about what [NOA/NOW] might have said if s/he had given evidence. You must decide this case solely on the evidence which has been given in court.

Last updated: 5 October 2016

4.11 Failure to Challenge Evidence (Browne v Dunn)

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Scope

1. This topic addresses the directions which may be given when a party fails to confront a witness with a proposed challenge to his or her evidence.
2. Similar issues are addressed in the following topics:
    - 4.9 Prosecution Failure to Call or Question Witnesses;
    - 4.10 Defence Failure to Call Witness.

The Rule in *Browne v Dunn*

3. The rule in *Browne v Dunn* requires counsel to:

    i) Put any matters concerning his or her own case that are inconsistent with a witness' evidence to that witness; and

    ii) Put any allegations or imputations that he or she intends to make against a witness to that witness (*Browne v Dunn* (1893) 6 R 67; *MWJ v R* (2005) 222 ALR 436; *R v Thompson* (2008) 21 VR 135; *R v Coswello* [2009] VSCA 300; *KC v R* (2011) 32 VR 61).

4. This is a rule of fairness designed to allow witnesses to confront any proposed challenges to their evidence, and to enable the jury to see and assess the reactions of witnesses to those challenges (*MWJ v R* (2005) 222 ALR 436; *Bulstrode v Trimble* [1970] VR 840; *R v Thompson* (2008) 21 VR 135; *R v Morrow* (2009) 26 VR 526).
5. The rule applies both where a party intends to call evidence that directly contradicts a witness's account, and where a party intends to suggest that the jury draw an inference adverse to the witness from the evidence in the case. In the latter case, the suggested inference should ordinarily be put to the witness in cross-examination (*R v Birks* (1990) 19 NSWLR 677. See also *Evidence Act 2008* s 46(2)).
6. While the rule in *Browne v Dunn* applies in criminal trials, the content of the rule is narrower than in civil proceedings. This is due to the accusatorial nature of criminal trials, the obligation on the prosecution to present its whole case and the burden of proof (*MWJ v R* (2005) 222 ALR 436). These matters should be taken into account when considering the scope of the rule and the remedies for its breach (see below).

7. The rule does not require counsel to iron out inconsistencies that emerge in the other party's case. It only obliges counsel to give witnesses the chance to respond to evidence or submissions that form part of counsel's own case (*MWJ v R* (2005) 222 ALR 436; *R v MG* [2006] VSCA 264).
8. These obligations are not fulfilled simply because the accused challenged the witness's evidence in his or her record of interview. Counsel must put the version of events from the record of interview to any relevant witnesses (*R v Baran* [2007] VSCA 66).
9. The rule in *Browne v Dunn* admits of some flexibility. While it requires proposed challenges to a witness's evidence to *normally* be put to that witness, there are some circumstances in which this need not be done (see below) (*Bugeja v R* (2010) 30 VR 493)

Effect of the *Evidence Act 2008*

10. The rule in *Browne v Dunn* "remains alive and well" under the *Uniform Evidence Acts* (*Heaton v Luczka* [1998] NSWCA 104. See also *Jardein Pty Ltd v Stathakis* [2007] FCAFC 148).
11. However, a prosecution failure to challenge evidence can be particularly significant, in part because of *Evidence Act 2008* s 38, which provides a party with a greater opportunity to challenge the evidence of its own witnesses (see below).

Effect of the *Jury Directions Act 2015*

12. The *Jury Directions Act 2015* does not specify the content of any directions required in relation to the rule in *Browne v Dunn*.
13. However, the general provisions in Part 3 of the Act regarding requests for directions and the consequences of failing to request a direction apply.
14. The significance of a prosecution failure to comply with the rule in Browne v *Dunn* means that judges will often need to consider whether a direction is required, even if one is not requested (see *Cavanagh and Rekviashvili v R* [2016] VSCA 305, [103]).

Scope of the Rule

15. While the obligations in *Browne v Dunn* previously only applied to defence counsel (see, e.g. *R v Macfie (No 2)* (2004) 11 VR 215; *R v Nicholas* (2000) 1 VR 356), this is no longer the case.
16. A party may also have a duty to cross-examine one of their own witnesses, if they intend to introduce evidence that contradicts a part of that witness's account, or to criticise a part of that witness's evidence in their closing address (see, e.g. *R v McCormack (No.3)* [2003] NSWSC 645; *Kanaan v R* [2006] NSWCCA 109). In such cases, the party must apply for leave to cross-examine the witness under *Evidence Act 2008* s 38.
17. The obligations in *Browne v Dunn* do not apply to committal hearings. No inference may be drawn from a failure to cross-examine a witness at an earlier committal hearing (*R v Birks* (1990) 19 NSWLR 677).

When is the Rule Breached?

18. The rule in *Browne v Dunn* places different obligations on the defence and the prosecution. This section looks at each party's obligations in turn.

Defence Obligations

19. The extent of the obligations that arise under the rule in *Browne v Dunn* in a particular case will be informed by the nature of the case to be presented by the defence and the forensic context of the trial (*R v Coswello* [2009] VSCA 300; *R v Morrow* (2009) 26 VR 526; *Bugeja v R* (2010) 30 VR 493; *R v MG* [2006] VSCA 264; *R v Foley* [2000] 1 Qd R 290).

20. Defence counsel must not only disclose that the evidence of the witness is to be challenged, but also how it is to be challenged (*R v Morrow* (2009) 26 VR 526; *Allied Pastoral Holdings Pty Ltd v FCT* [1983] 1 NSWLR 1).

21. If the defence case involves no more than a denial of the witness's evidence, without positive evidence or hypothesis of an alternative version of events, it may be sufficient to put that case to the witness in general terms (*R v Coswello* [2009] VSCA 300; *R v Morrow* (2009) 26 VR 526; *Bellemore v Tasmania* (2006) 16 Tas R 364).

22. If defence counsel has made clear from the manner in which the defence case is conducted that the witness's evidence will be contested, or if the witness's evidence is clearly implausible, there may not be a need for any specific matters to be put in cross-examination (*R v Coswello* [2009] VSCA 300; *KC v R* (2011) 32 VR 61; *R v MG* [2006] VSCA 264; *Browne v Dunn* (1893) 6 R 67).

23. Similarly, where the defence clearly, but unsuccessfully, challenges the witness on what the witness said or did, it may not be necessary to go on to put to the witness a possible motivation for the conduct which the witness has denied. Such a situation would not involve a failure to put instructions, or a matter about which a defence witness might give evidence, but merely a failure to put the defence case theory (see *Dedeoglu v The Queen* [2023] NSWCCA 126, [231]–[234], [266]).

24. By contrast, if a positive case is to be subsequently advanced, the essential elements of the eventual case must be put to any witness who may cast doubt on them (*R v Morrow* (2009) 26 VR 526; *R v Foley* [2000] 1 Qd R 290).

25. Witnesses must be given the opportunity to respond not only to any allegation which is to be made, but to its essential features – which may include the time, place and circumstances of the alleged occurrence (*R v Morrow* (2009) 26 VR 526).

26. Where defence counsel intends to adduce evidence of specific matters contrary to the witness' evidence, he or she must put those matters in such a way that the witness has an adequate opportunity to respond (*R v Morrow* (2009) 26 VR 526).

27. In determining whether the rule has been breached, the judge should not solely focus on what questions were or were not asked. It is necessary to examine whether, in the subsequent conduct of the defence, facts or propositions were advanced that had not been "fully or fairly" put to the relevant witnesses (*KC v R* (2011) 32 VR 61).

28. It will often be a matter of impression and interpretation as to whether the cross-examination sufficiently conveys the substance of the contrary evidence (*R v Morrow* (2009) 26 VR 526).

Prosecution Obligations

29. Little guidance has been given about the extent of the obligations the rule in *Browne v Dunn* places on the prosecution.

30. In Victoria and New South Wales, it was thought that the prosecutor was under an obligation to cross-examine an accused who gives evidence about the reasons for any failure by the defence to comply with the rule before the prosecutor could make any later argument about defence breach of the rule (see *R v Thompson* (2008) 21 VR 135; *R v Scott* [2004] NSWCCA 254).

31. The High Court has now disapproved this practice. Cross-examining the accused about the defence failure to comply with *Browne v Dunn* often extends to a suggestion that the failure occurred because the accused did not instruct counsel about the relevant matter, which occurred because the accused invented that matter while giving evidence. Where there are a number of possible explanations for the defence failure to put a matter to a prosecution witness, there is no proper basis for impugning the credit of the accused through such a suggestion of recent invention. Cross-examining the accused about the failure is also likely to involve impermissible questions which seek to expose the accused's instructions to counsel (*Hofer v The Queen* (2021) 395 ALR 1, [31]–[37]).

32. The prosecution should not put forward in its closing address novel factual theories drawn from the evidence of other witnesses which were not included in its opening unless it has cross-examined the accused about those novel theories. This is necessary to ensure procedural fairness to the accused (*Astbury v The Queen* [2020] VSCA 132, [71]–[77]).

33. However, the prosecution does not need to cross-examine the accused about a matter mentioned in a contested confession, which the prosecution relies upon to say that the confession was true (*R v Arnott* (2009) 26 VR 490).

34. It is likely that the prosecution must also comply with the other obligations outlined in "Defence Obligations" above. However, care must be taken when adapting those obligations to the prosecutorial context. In particular, judges should consider the accusatorial nature of criminal trials, the obligation on the prosecution to present its case and the burden of proof. In light of such matters, judges may more readily find that the prosecution has breached the rule in *Browne v Dunn*.

Prosecution failure to cross-examine unfavourable witnesses

35. *Evidence Act 2008* gives the prosecution the right to seek leave to cross-examine a witness who gives unfavourable evidence. As explained in 4.20 Unfavourable Witnesses, the threshold for evidence being relevantly unfavourable is low (see *R v McRae* [2010] VSC 114).

36. The prosecution also has an obligation, as a matter of fairness, not to attack the credit of a witness it called without putting the basis of that attack to the witness (*Smith v The Queen* [2018] VSCA 139, [76]; *Saddik v The Queen* [2018] VSCA 249, [95]–[102]; *Ritchie v The Queen* [2019] VSCA 202, [66]–[67]; *Meer v The Queen* [2022] VSCA 164, [106]–[110]).

37. Finally, on an appeal against conviction alleging verdicts are unreasonable or cannot be supported having regard to the evidence, appellate courts have noted that where a prosecution witness gives unchallenged exculpatory evidence, it is not open to the jury to ignore or reject that evidence (see *Ferguson v The Queen* [2020] VSCA 166, [80]; *Pell v The Queen* [2020] HCA 12; *Spurritt v The Queen* [2021] VSCA 7, [98]).

38. A prosecution failure to challenge exculpatory evidence from its own witnesses can therefore have significant implications for the conduct of the prosecution case and the jury's decision making process.

39. The principles which oblige the prosecution to cross-examine its own witnesses must be applied with caution when dealing with vulnerable witnesses. In such cases, a prosecutor may make a proper forensic decision not to cross-examine or re-examine a vulnerable complainant about inconsistencies or omissions in the complainant's evidence, if satisfied that the process would be unlikely to provide any meaningful clarification (see *Duesbury v The Queen* [2022] VSCA 117, [82]–[88]).

Remedies for Breaching the Rule

40. Where counsel does not comply with the rule in *Browne v Dunn*, the trial judge has a discretion about how to best remedy the unfairness so that the trial does not miscarry (*Archer v Richard Crookes Construction Pty Ltd* NSW CA 22/10/97; *Heaton v Luczka* [1998] NSWCA 104; *Scalise v Bezzina* [2003] NSWCA 362).

41. What is necessary in any given case to ensure fairness will depend on the circumstances (*R v Ferguson* (2009) 24 VR 531; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546).

42. The rule in *Browne v Dunn* must be applied with considerable care and circumspection due to the accusatorial nature of criminal trials. The rule does not apply in the same way or with the same consequences as it does in civil proceedings (*R v Coswello* [2009] VSCA 300; *R v Morrow* (2009) 26 VR 526; *MWJ v R* (2005) 222 ALR 436; *R v Demiri* [2006] VSCA 64; *R v Birks* (1990) 19 NSWLR 677).

43. In determining what remedy is appropriate, the judge should consider whether it was the prosecution or the defence who breached the rule, and the obligations placed upon each party.

44. Great care must be taken where it is the prosecution which has suffered the unfairness. The trial judge must avoid adopting a remedy for unfairness to the prosecution which might itself work unfairness against the accused (*R v Ferguson* (2009) 24 VR 531).

Take Steps to Avoid the Need for Jury Directions

45. Where possible, steps should be taken in the running of the case to avoid having to direct the jury about the breach of the rule (*R v Coswello* [2009] VSCA 300; *R v Morrow* (2009) 26 VR 526; *R v Foley* [2000] 1 Qd R 290).

46. For example, depending on the nature of the case, the trial judge may be able to avoid the need to give a *Browne v Dunn* direction by:

    - Drawing the attention of counsel to the need to put matters to the witness during the course of cross-examination (*R v Ferguson* (2009) 24 VR 531; *R v Coswello* [2009] VSCA 300);
    - Permitting a witness to be recalled so that the relevant matters may be put to him or her (*MWJ v R* (2005) 222 ALR 436; *R v Ferguson* (2009) 24 VR 531; *R v Coswello* [2009] VSCA 300; *R v Thompson* (2008) 21 VR 135; *R v MG* [2006] VSCA 264). Leave to recall a witness may be given under *Evidence Act 2008* s 46.
    - Allowing a party to reopen its case[130] to lead evidence to rebut the contradictory evidence or corroborate the relevant witness's evidence.[131]

Excluding Evidence and Preventing Arguments

47. The judge may refuse to admit evidence in breach of the rule in *Browne v Dunn* if its probative value is outweighed by the danger of unfair prejudice (*Evidence Act 2008* ss 135, 137. See also *R v McCormack (No.3)* [2003] NSWSC 645; *R v Schneidas (No 2)* [1981] 2 NSWLR 713; *R v Body* NSW CCA 24/8/94).

48. However, a judge is not entitled, by reason of defence non-compliance with the rule in *Browne v Dunn*, to withdraw an issue of fact from the jury, nor to treat an ingredient of the charge as proved (*R v Rajakaruna (No 2)* (2006) 15 VR 592; *R v Costi* (1987) 48 SASR 269).

49. In a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence or a family violence offence, an unrepresented accused must not adduce evidence in relation to a fact in issue in order to contradict the evidence of a protected witness,[132] unless the evidence on which the accused intends to rely has been put to the protected witness during cross-examination (*Criminal Procedure Act 2009* s 357).

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[130] *Criminal Procedure Act 2009* s 233 allows the prosecution to reopen its case with leave of the trial judge when the accused gives evidence that could not reasonably have been foreseen by the prosecution, based on the defence response to the summary of the prosecution opening, and the defence response to the notice of pre-trial admissions.

[131] This remedy may not be appropriate if it would breach the prosecution's obligation not to split its case (*R v MG* [2006] VSCA 264; *R v Chin* (1985) 157 CLR 671; *Killick v R* (1981) 147 CLR 565).

[132] The following people are "protected witnesses": the complainant; a family member of the complainant; a family member of the accused; and any other witness who the court declares under s 355 to be a protected witness (*Criminal Procedure Act 2009* s 354).

50. In some cases, it may follow from the conduct of the trial that it is not fairly open to counsel to make a particular suggestion in their closing address (*R v Foley* [2000] 1 Qd R 290; *R v Thompson* (2008) 21 VR 135). This remedy may be more appropriate for prosecution breaches of the rule than defence breaches.

When to Give a Jury Direction

51. While steps should be taken to avoid having to direct the jury about the breach of the rule in *Browne v Dunn* (see above), in some cases a direction may be appropriate (*R v Coswello* [2009] VSCA 300; *R v Morrow* (2009) 26 VR 526).

52. The need for a direction depends on whether a direction is sought and whether, despite the absence of any request, there are substantial and compelling reasons for giving the direction despite the absence of a request (*Jury Directions Act 2015* ss 12, 14, 15, 16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

53. Even if a direction is sought, great care should be taken when deciding whether to give a *Browne v Dunn* direction, as giving a direction when it is not warranted may cause a substantial miscarriage of justice (*R v MG* [2006] VSCA 264. See also *R v Smart* [2010] VSCA 33; *KC v R* (2011) 32 VR 61).

54. Prior to giving a *Browne v Dunn* direction, the judge should alert counsel to the failure to sufficiently put the matter to the witness, and provide an opportunity for recalling and cross-examining that witness. A direction should only be given if:

    - The party who called the witness refuses to recall them;
    - The party who failed to properly cross-examine the witness refuses the opportunity of further cross-examination; or
    - The circumstances render the possibility of further cross-examination impracticable (*R v Coswello* [2009] VSCA 300 (Nettle JA). See also *R v MG* [2006] VSCA 264).

55. Where there is a strong possibility that counsel's case was invented after the witness gave evidence, recalling the witness may not fully address the problem. In such cases, the judge may comment on the failure to comply with the rule, even though the witness has been recalled and properly cross-examined (*R v Novak* [2003] VSCA 46).

56. In deciding whether or not to give a direction, the judge should consider whether the failure was material in the context of the case (*R v McDowell* [1997] 1 VR 473; *R v MG* [2006] VSCA 264).

57. The judge should also consider the accusatorial nature of criminal trials, and the different obligations placed upon the prosecution and the defence. A direction may be given more readily where it is the prosecution that has breached the rule.

58. The judge should also take into account the extent of the breach. Where it is relatively minor, a direction should generally not be given (*KC v R* (2011) 32 VR 61).

59. The judge will usually have good reasons for not giving a direction on a party's failure to comply with the rule where:

    - The breach was due to a party's inability to cross-examine its own witness, as it was refused leave under *Evidence Act 2008* s 38; or

- The party made it clear to the court that they wanted to cross-examine the witness, but were effectively prevented from doing so by the other party (*Bugeja v R* (2010) 30 VR 493);[133] or
- The disadvantaged party did not offer or seek to recall the witness (in order to correct the problem) (*MWJ v R* (2005) 222 ALR 436; *R v MG* [2006] VSCA 264).

Unrepresented Accused

60. As the rule in *Browne v Dunn* is a rule of professional practice and procedure, it may not be appropriate to give a direction if the accused is unrepresented (*R v Birks* (1990) 19 NSWLR 677; c.f. *McInnis v R* (1979) 143 CLR 575).

61. If a judge is going to make a comment about an unrepresented accused's breach of the rule in *Browne v Dunn*, fairness demands that he or she should first advise the accused of the existence of that rule and of the options available. If the judge fails to do so, he or she should not comment on the breach (*R v Zorad* (1990) 19 NSWLR 91).

Discharging the Jury

62. If nothing can be done to prevent a miscarriage of justice arising from the breach the jury may need to be discharged (see, e.g. *R v SWC* (2007) 175 A Crim R 71).

Content of the Direction

63. The charge given in relation to a breach of the rule in *Browne v Dunn* is properly seen as a "direction" rather than a "comment". The judge is instructing the jury that, as a matter of law, they may use counsel's failure to cross-examine a witness in a particular manner (*R v McDowell* [1997] 1 VR 473).

64. This section addresses the following directions in turn:
    - Defence breaches of the rule in *Browne v Dunn*;
    - Prosecution breaches of the rule in *Browne v Dunn*;
    - Other directions that may be required instead of a standard *Browne v Dunn* direction.

Defence Breaches of the Rule in *Browne v Dunn*

Overview of Directions

65. In most cases where a direction is necessary (see above), the judge should only direct the jury that the breach can be taken into account when assessing the weight of the contradictory evidence or the inferences that flow from that evidence (*R v Morrow* (2009) 26 VR 526; *R v Coswello* [2009] VSCA 300; *KC v R* (2011) 32 VR 61).

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[133] E.g. In *Bugeja v R* (2010) 30 VR 493, the prosecution advised defence counsel that if they cross-examined a certain witness about a particular matter, they would re-examine that witness in such a way that one of the co-accused's prior convictions would be revealed to the jury. While defence counsel could theoretically have proceeded with the desired cross-examination, that would have been highly prejudicial to the accused's defence. It was thus seen as understandable that defence counsel would choose not to do so, and unfair of the prosecution to rely on the rule in *Browne v Dunn* in such circumstances.

66. Only in exceptional cases should the judge consider directing the jury that an adverse inference as to credibility may be drawn against the accused due to the breach. This will generally not be appropriate (*R v Morrow* (2009) 26 VR 526; *Hofer v The Queen* (2021) 395 ALR 1).

67. Where a *Browne v Dunn* direction is given, the judge should usually explain that there may be good reasons why a party failed to comply with the rule (*R v MG* [2006] VSCA 264; *R v Manunta* (1989) 54 SASR 17; *R v Thompson* (2008) 21 VR 135).

68. Each of these directions is discussed in more detail below.

Using the Breach to Assess Weight

69. Where defence counsel fails to comply with the rule in *Browne v Dunn*, the judge may direct the jury about the effect that failure may have on their assessment of the contradictory evidence (*R v Morrow* (2009) 26 VR 526; *R v Coswello* [2009] VSCA 300).

70. Where such a direction is required, the judge should:

- Outline the rule in *Browne v Dunn* and its purpose;
- Tell the jury that, under the rule, the witness should have been challenged about the relevant matters, so that he or she had an opportunity to deal with the challenge;
- Tell the jury that the witness was not challenged, and thus was denied the opportunity to respond to the challenge; and
- Tell the jury that they have therefore been deprived of the opportunity of hearing his or her evidence in response (*R v Coswello* [2009] VSCA 300 (Nettle JA); *R v Foley* [2000] 1 Qd R 290. See also *R v Birks* (1990) 19 NSWLR 677; *R v Manunta* (1989) 54 SASR 17; *R v Senese* [2004] VSCA 136; *R v MG* [2006] VSCA 264; *R v Thompson* (2008) 21 VR 135).

71. The judge may also tell the jury that the failure by defence counsel to put these matters to the witness can be taken into account when assessing the weight to be given to the allegation of fact that was not pursued with the relevant witness, or the arguments which rest upon that fact (*R v Morrow* (2009) 26 VR 526. See also *R v Nicholas* (2000) 1 VR 356; *R v Rajakaruna (No 2)* (2006) 15 VR 592).

72. Failure to comply with the rule in *Browne v Dunn* does not prove that the imputations against the witness are false. It only affects the weight the jury may attach to those imputations (*R v Laz* [1998] 1 VR 453; *Bulstrode v Trimble* [1970] VR 840).

73. Great care must be taken when directing the jury about any unfairness suffered by the prosecution. In such cases it may not be appropriate to comment strongly upon the failure to comply with the rule (see, e.g. *R v Ferguson* (2009) 24 VR 531).

74. These directions only concern the jury's assessment of the weight of the evidence. Failure to put matters to a witness cannot constitute supporting evidence or consciousness of guilt (See, e.g. *R v MG* [2006] VSCA 264).

Using the Breach to Draw Adverse Inferences

75. Directions about the possibility of adverse inferences have recently been given too readily in criminal trials. The rule in *Browne v Dunn* does not apply to criminal proceedings in the same way, or with the same consequences, as it does in civil proceedings. Consequently, its application requires considerable care and circumspection (*R v Morrow* (2009) 26 VR 526 (Nettle JA); *KC v R* (2011) 32 VR 61).

76. However, in exceptional cases the judge may direct the jury that an adverse inference as to credibility may be drawn against the accused due to the breach (*R v Morrow* (2009) 26 VR 526).

77. The circumstances in which such a direction will be necessary are rare. It is one thing to remark upon the fact that a witness or a party appears to have been treated unfairly, but it is another thing altogether to comment that the evidence of a person should be disbelieved, perhaps as a recent invention, because it raises matters that were not put in cross-examination to other witnesses by that person's counsel (*R v Morrow* (2009) 26 VR 526; *R v Foley* [2000] 1 Qd R 290; *R v Birks* (1990) 19 NSWLR 677).

78. An adverse inference as to credibility can only arise where the circumstances surrounding the failure to put the allegation to the witness raise a "prominent hypothesis" that the contradictory evidence is a recent invention or is otherwise a fabrication (*R v Morrow* (2009) 26 VR 526).

79. In such cases, the jury may be directed that they may infer from the failure to cross-examine the witness that any evidence which conflicts with that given by the impugned witness was invented after he or she gave evidence, and should not be believed (*R v Birks* (1990) 19 NSWLR 677; *R v Novak* [2003] VSCA 46; *R v Manunta* (1989) 54 SASR 17; *R v Senese* [2004] VSCA 136; *R v MG* [2006] VSCA 264; *R v Thompson* (2008) 21 VR 135).

80. The process of reasoning suggested by this direction is dangerous and should only be used with caution (*R v Manunta* (1989) 54 SASR 17; *R v Laz* [1998] 1 VR 453; *R v Thompson* (2008) 21 VR 135; *R v Birks* (1990) 19 NSWLR 677; *R v Demiri* [2006] VSCA 64). It will often be appropriate to direct the jury to proceed with care.

81. An adverse inference direction is unlikely to be appropriate where the prosecution has not cross-examined the accused to suggest that the breach of the rule in *Browne v Dunn* demonstrates that his or her evidence was a recent invention, and has not argued to that effect in closing arguments (see, e.g. *R v Morrow* (2009) 26 VR 526; *R v Thompson* (2008) 21 VR 135).

82. The judge must not direct the jury on the possibility of recent invention if there is evidence which excludes this possibility. Such evidence may arise from the record of interview (*R v Baran* [2007] VSCA 66; *KC v R* (2011) 32 VR 61).

83. It is open to a party to give or call evidence to negate the inference of recent invention. For example:

    - When being cross-examined, the accused can provide reasons for counsel's failure to cross-examine the relevant witness (see "Reasons for Failure to Comply with the Rule" below);
    - The accused's solicitor may be called to give evidence that his or her instructions had always been the same (see, e.g. *Oldfield v R* (2006) 163 A Crim R 242);
    - Counsel may tender evidence of a prior statement made by the accused presenting the same account as was presented in court (see, e.g. *R v Foley* [2000] 1 Qd R 290 and *Evidence Act 2008* s 108).

Reasons for Failure to Comply With the Rule

84. Where a *Browne v Dunn* direction is given, the judge should usually:

    - Explain to the jury that there may be good reasons why defence counsel failed to comply with the rule in *Browne v Dunn*; and
    - Provide relevant examples of possible reasons for counsel's failure in the circumstances of the case (see, e.g. *R v Morrow* (2009) 26 VR 526; *R v MG* [2006] VSCA 264; *R v Manunta* (1989) 54 SASR 17; *R v Birks* (1990) 19 NSWLR 677; *Oldfield v R* (2006) 163 A Crim R 242; *R v Thompson* (2008) 21 VR 135).

85. The directions may also need to reject any improper submissions from a party about the reasons for the failure. In particular, the judge may need to warn the jury about any assumptions which underlie the improper submissions and direct the jury whether any adverse inferences are available (*Hofer v The Queen* (2021) 395 ALR 1, [37]).

86. For example, where the prosecution invites the jury to infer that the accused's evidence is a recent invention, the judge will first need to decide whether such a conclusion is open. If it is, then the judge will need to instruct the jury that it can only draw this inference if it is satisfied that there is no other reasonable explanation for the omission (*R v Morrow* (2009) 26 VR 526; *R v Thompson* (2008) 21 VR 135; *R v MG* [2006] VSCA 264; *R v Manunta* (1989) 54 SASR 17; *R v Birks* (1990) 19 NSWLR 677; *R v McLachlan* [1999] 2 VR 553; *Oldfield v R* (2006) 163 A Crim R 242).

87. The jury must be given sufficient directions to enable them to assess all other possible explanations (*R v Morrow* (2009) 26 VR 526).

88. This may require the judge to explain the course that trials may take, and the wide discretion available to counsel in their conduct (*R v Morrow* (2009) 26 VR 526; *R v Foley* [2000] 1 Qd R 290).

89. The judge may need to explain to the jury that counsel is not simply a "mouthpiece" for the client, conducting the case in close conformity with the client's directions (*R v Manunta* (1989) 54 SASR 17; *R v Coswello* [2009] VSCA 300).

90. Possible reasons for failing to comply with the rule in *Browne v Dunn* include:

    - Counsel may have considered the evidence unimportant in the context of the case;
    - Counsel may have overlooked the matter during cross-examination;
    - Counsel may have misunderstood his or her instructions;
    - The witness may not have been co-operative in providing a statement;
    - Forensic pressures may have resulted in looseness or inexactitude in the framing of questions;
    - The other evidence given by the witness may have made it clear that he or she would deny the challenge;
    - The witness' evidence may have been so fanciful that there was no need for any cross-examination (*R v MG* [2006] VSCA 264; *R v Manunta* (1989) 54 SASR 17; *R v Birks* (1990) 19 NSWLR 677; *R v McLachlan* [1999] 2 VR 553; *R v Laz* [1998] 1 VR 453; *R v Thompson* (2008) 21 VR 135; *R v Foley* [2000] 1 Qd R 290).

91. The judge must limit the reasons he or she provides to the jury to those that are realistic in the context of the trial (*R v SWC* [2007] VSCA 201).

92. The judge only needs to include reasons that the jury may otherwise overlook. This will depend on the issues in the context of the trial (*R v Manunta* (1989) 54 SASR 17; *R v Birks* (1990) 19 NSWLR 677; *R v ZW* [2006] VSCA 256).

93. Any explanations raised by defence counsel about why he or she failed to comply with the rule should be told to the jury (*R v Morrow* (2009) 26 VR 526).

94. It may not be appropriate to provide a possible explanation for counsel's failure to fully cross-examine a witness where the effect of doing so would be to emphasise the significance of counsel's omission, rather than to explain it (*R v SWC* [2007] VSCA 201; *R v Smart* [2010] VSCA 33).

95. Where it is clear that there is a good forensic reason for the party's failure to cross-examine the witness,[134] a *Browne v Dunn* direction should not be given. To give a direction in such circumstances would be to invite the jury to come to a conclusion about a matter based on a premise that everyone, apart from the jury, understands to be false (*Bugeja v R* (2010) 30 VR 493).

Prosecution Breaches of the Rule

96. Where the prosecution has breached the rule by failing to cross-examine a defence witness (including the accused), a direction should inform the jury of the prosecutor's failure to raise the matters in question with the witness and that the jury can take that into account in considering the weight they give to the prosecutor's arguments about that witness' evidence (*Cavanagh and Rekhviashvili v R* [2016] VSCA 305, [103]; *Smith v R* [2012] VSCA 187, [53]).

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[134] E.g. Where the prosecution has made it clear that one of the co-accused's prior convictions will be revealed to the jury if defence counsel cross-examines the witness (*Bugeja v R* (2010) 30 VR 493).

97. In some cases, it may be appropriate to also inform the jury of answers the witness might have given, which would blunt a line of argument advanced by the prosecution, as a way of showing why the failure may be relevant to assessing the prosecutor's arguments (see, e.g. *R v Thompson* (2008) 21 VR 135, [68], [123]).

98. Directions on the prosecution breach may not, however, be necessary if the prosecution acknowledges the breach to the jury and withdraws any arguments which should not have been made due to the breach (see *Cavanagh and Rekhviashvili v R* [2016] VSCA 305, [103]).

99. In one of the few cases to specifically address this issue, it was held that where the prosecution has breached the rule by failing to cross-examine one of its own witnesses:

    - It would ordinarily be appropriate to tell the jury that the defence had been denied the opportunity to support that witness's evidence (either in cross-examination or by calling independent evidence); and
    - In some cases it may be appropriate to direct the jury to ignore the prosecution's suggestion that the witness's evidence be rejected. This will depend on factors such as whether other contradictory evidence has been given, and the circumstances of the breach (*Kanaan v R* [2006] NSWCCA 109).

100. Since *Kanaan* was decided, a body of authority has developed on the unfairness of the prosecution attacking the credit of its own witness without having sought to cross-examine that witness, and the significance of unchallenged exculpatory evidence when deciding whether a conviction is unreasonable or cannot be supported having regard to the evidence (see Prosecution failure to cross-examine unfavourable witnesses, above). In an appropriate case, it may be open to a trial judge to:

    - Note that the prosecution has not challenged a witness' exculpatory evidence;
    - Remind the jury that the prosecution bears the onus of proof; and
    - Direct the jury that, given the witness' exculpatory evidence is unchallenged, it would not be open to ignore or disregard that evidence.

101. It will generally not be appropriate to tell the jury that they may draw an adverse inference against the prosecution due to breaching the rule in *Browne v Dunn*, as prosecution breaches are unlikely to provide an opportunity for recent invention (see "Using the Breach to Draw Adverse Inferences" above). However, in some cases it may be appropriate to tell the jury that, due to the breach, they may more readily reject certain inferences sought by the prosecution.

102. While in some cases it may be appropriate to direct the jury that there may be good reasons why the prosecution failed to comply with the rule in *Browne v Dunn* (see "Reasons for Failure to Comply With the Rule" above), judges should be careful when doing so. Such a direction risks undermining the obligations placed on the prosecution to present all relevant material to the jury. In addition, the reasons why the prosecution failed to comply with the rule may not be relevant to the jury's consideration of the consequences of the breach.

Other Directions

103. In some circumstances, the judge may need to give one or more of the following directions instead of a standard *Browne v Dunn* direction:

    - That the breach reflects only on defence counsel (*R v Foley* [2000] 1 Qd R 290; *R v Morrow* (2009) 26 VR 526);
    - That because of the breach, it was not open to counsel to advance a particular submission (*R v Ferguson* (2009) 24 VR 531); or
    - That the jury must not make an adverse finding against the accused as a result of a suggested failure to challenge a witness (*R v Coswello* [2009] VSCA 300; *Bellemore v Tasmania* (2006) 16 Tas R 364).

104. These directions are addressed in turn below.

Breach Solely Reflects on Counsel

105. Where it is clear that the omission reflects only on the accused's counsel (or solicitor), and not on the accused him or herself, instead of giving a standard *Browne v Dunn* direction, the jury should be told that:

- The witness or the prosecution's case has been potentially disadvantaged by the omission; and
- This was not the fault of the accused but rather of counsel (or the solicitor) (*R v Foley* [2000] 1 Qd R 290; *R v Morrow* (2009) 26 VR 526 (Nettle JA)).

106. A direction of this nature should not be given where it is clear that the omission reflects only on the prosecution. Incompetence by the prosecution will not excuse a breach of the rule in *Browne v Dunn*. In such cases, the judge should continue to give a standard *Browne v Dunn* direction (see above).

Counsel Was Prevented From Advancing a Submission

107. Where, due to a breach of the rule in *Browne v Dunn*, it was not open to counsel to advance a particular submission in the course of his or her final address, a judge may need to direct the jury of that fact in strong terms (*R v Ferguson* (2009) 24 VR 531).

108. In directing the jury about this matter, the judge must be careful not to withdraw any issues of fact where the prosecution carries the burden of proof from the jury (see *R v Ferguson* (2009) 24 VR 531).

109. An alternative solution to preventing an argument is to warn the jury in strong terms of the danger of adopting or accepting that argument, given the party's failure to cross-examine relevant witnesses (*CMG v R* (2013) 46 VR 728).

Warning Against Improper Browne v Dunn Reasoning

110. In some cases the prosecution may improperly suggest that the defence has breached the rule in *Browne v Dunn*. For example, in cases where defence counsel has no obligation to put a matter to a particular witness, the prosecution may nevertheless cross-examine the accused about counsel's failure to do so, or argue that the jury should draw an adverse inference from that failure (see, e.g. *R v Coswello* [2009] VSCA 300; *Bellemore v Tasmania* (2006) 16 Tas R 364; *Bugeja v R* (2010) 30 VR 493).

111. In such circumstances, the judge must:

- Direct the jury that defence counsel was not obliged to put that matter to the witness; and
- Warn the jury not to make an adverse finding against the accused as a result of the suggested failure to challenge that witness (*R v Coswello* [2009] VSCA 300; *Bellemore v Tasmania* (2006) 16 Tas R 364; *Bugeja v R* (2010) 30 VR 493).

112. At common law, it was mandatory for the judge to give these directions. Under the *Jury Directions Act 2015*, defence counsel may request these directions, or the judge may consider that there are substantial and compelling reasons for giving the directions in the absence of a request (*Jury Directions Act 2015* ss 15, 16).

113. In addition, the judge should warn the jury not to take the breach into account when assessing the weight of the contradictory evidence.

Role of the Jury

114. A *Browne v Dunn* direction generally only describes a permissible mode of reasoning. Where the direction concerns a defence breach, the jury is free to disregard the inferences that are open from the failure to properly cross-examine a relevant witness (*R v Nicholas* (2000) 1 VR 356; *Bulstrode v Trimble* [1970] VR 840; *MWJ v R* (2005) 222 ALR 436; *R v Rajakaruna (No 2)* (2006) 15 VR 592; *Bugeja v R* (2010) 30 VR 493). A prosecution breach may, however, require a direction about how certain modes of reasoning or findings are not open.

115. A judge should only give a *Browne v Dunn* direction if he or she is satisfied that a breach has, or has arguably occurred, and that it cannot be remedied by a different means (see e.g. *R v Ferguson* (2009) 24 VR 531; *R v Morrow* (2009) 26 VR 526). For more information see Remedies for Breaching the Rule and When to Give A Direction above.

116. If it is open to argue that defence counsel has not complied with the rule in *Browne v Dunn*, it is for the jury to determine whether the witness was given a fair opportunity to address the assertion being made by the cross examining party (*R v Nicholas* (2000) 1 VR 356; *Beattie v Ball* [1999] 3 VR 1; *R v Manunta* (1989) 54 SASR 17; *R v Ferguson* (2009) 24 VR 531).

117. When determining whether or not the rule has been breached, the tribunal must consider whether the differences between the witness's evidence and the other party's case were sufficiently material that the witness should have been challenged in cross-examination (*R v Nicholas* (2000) 1 VR 356; *Beattie v Ball* [1999] 3 VR 1; *R v Manunta* (1989) 54 SASR 17).

Explaining Exchanges with Counsel

118. Where counsel has asked the judge during cross-examination if he or she has complied with the rule in *Browne v Dunn*, the judge may explain this exchange to the jury (*R v Demiri* [2006] VSCA 64).

119. The judge should describe the obligation to put certain matters to a witness as a "rule of professional practice" rather than an "ethical obligation", as the latter may suggest that counsel is merely "going through the motions", and does not think that the matters he or she is putting to the witness are true (*R v Demiri* [2006] VSCA 64).

Do Not Comment on Other Unchallenged Evidence

120. Unless the rule in *Browne v Dunn* applies, judges should be careful about commenting on the fact that certain inculpatory evidence was unchallenged or uncontradicted. Such a comment may unfairly imply that it was open to defence counsel to have challenged or contradicted the evidence, when in many cases (e.g. in relation to complaint evidence) they will not have had scope to do so (*Jiang v R* [2010] NSWCCA 277).

Last updated: 30 July 2023

4.11.1 Charge: Breach of the Rule in Browne v Dunn

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This charge may be used where:

i) Defence counsel has breached the rule in *Browne v Dunn*; and

ii) That breach cannot be remedied by means other than giving a direction; and

iii) The judge determines that a direction is necessary in the circumstances of the case. See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required

The charge may be modified for use in cases where the prosecution has breached the rule in *Browne v Dunn*. However, care should be taken when doing so. The judge should bear in mind the accusatorial nature of criminal trials, the obligation on the prosecution to present its whole case and the burden of proof. See 4.11 Failure to Challenge Evidence (Browne v Dunn) for guidance.

The Rule in *Browne v Dunn*

I now need to direct you about a rule of practice concerning the cross-examination of witnesses.

This rule says that whenever a prosecution witness gives evidence, defence counsel must cross-examine him or her about any matters that are relevant to the defence case, and must put any allegations that s/he intends to make against that witness directly to him or her.

This is a rule of fairness, which allows witnesses to confront any proposed challenges to their evidence, and enables you to see and assess the reaction of the witnesses to those challenges.

Using the Breach to Assess Weight

[*If the fact that the rule was broken is not a jury issue, add the following shaded section.*]

Defence counsel broke this rule by not challenging NOW about [*describe relevant matter and/or allegation*]. As a result, NOW was denied the opportunity to respond to that challenge, and you were deprived of the opportunity of hearing his/her evidence in response.

You may take this fact into account when assessing the weight you give to [*describe relevant matter, allegation or argument*].[135]

[*If the allegation that the rule was broken is a jury issue, add the following shaded section*.]

In this case, the prosecution alleged that defence counsel broke this rule by not challenging NOW about [*describe relevant matter and/or allegation*]. They argued that NOW was therefore denied the opportunity to respond to that challenge, and you were deprived of the opportunity of hearing his/her evidence in response.

The defence denied breaking the rule, arguing that [*describe defence argument*, *e.g.* "they had put the matter to NOW in sufficient detail"].

It is for you to determine whether NOW was given a fair opportunity to address this matter. In making this determination, you should consider how significant the matter is, and whether counsel should have cross-examined NOW about it. [*Insert any other information necessary for the jury to determine whether the rule was breached*.]

If you find that defence counsel should have cross-examined NOW about [*describe matter*], you may take his/her failure to do so into account when assessing the weight you give to [*describe relevant matter, allegation or argument*].[136]

However, you should also consider the fact that there may be a good reason why defence counsel did not challenge NOW about this matter. For example, [*describe possible reasons for counsel's failure to comply with the rule*].[137]

Using the Breach to Infer Recent Invention

[*If the circumstances of the breach give rise to the prominent hypothesis that the contradictory evidence is a fabrication, consideration may be given to adding the following shaded section.*]

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[135] In some cases, it may be appropriate to delete this paragraph.

[136] In some cases, it may be appropriate to delete this paragraph.

[137] Judges should only include reasons that are realistic in the context of the trial, and that the jury may otherwise overlook. A reason should not be provided if it would emphasise the significance of counsel's omission, rather than explain it. Examples of possible reasons are provided in 4.11 Failure to Challenge Evidence (Browne v Dunn).

Warning: This part of the charge should only be given in exceptional circumstances. See 4.11 Failure to Challenge Evidence (Browne v Dunn) for guidance.

You may also infer from defence counsel's failure to cross-examine NOW about [*describe matter*], that any evidence which conflicts with NOW's evidence about that matter was invented after NOW gave his/her evidence, and should not be believed. This would include [*summarise relevant defence evidence*].

This does not mean that you must disbelieve the defence evidence on this issue. I am simply describing an inference that you are permitted to draw. It is for you to determine whether or not to draw that inference.

You must be very cautious about drawing this inference. You will recall what I previously told you about drawing inferences.[138] In this context, that means that before inferring that NOA invented his/her account after NOW gave evidence, you must decide that there is no other reasonable explanation for defence counsel's failure to cross-examine NOW about [*describe matter*]. If you think that it is possible that there was another reason for defence counsel's failure to cross-examine NOW about that matter, you may not draw this inference.

Last updated: 9 March 2017

4.11.2 Charge: Warning against Improper Browne v Dunn Reasoning

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This charge may be used where the prosecution has improperly suggested that the rule in *Browne v Dunn* has been breached.

See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

In this case the prosecution [*describe relevant action*, e.g. "cross-examined NOA about why defence counsel failed to ask NOW about..." or"suggested that defence counsel should have asked NOW about..."].

This was not an appropriate argument for the prosecution to make, as defence counsel was not obliged to ask NOW about this matter.

You must therefore disregard the prosecution's arguments on this point. You must not make any unfavourable findings against NOA as a result of defence counsel's suggested failure to challenge NOW about that matter, or take the fact that s/he failed to do so into account when assessing the evidence in this case.

Last updated: 29 June 2015

4.12 Identification Evidence

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Overview

1. Identification evidence is seen to be inherently fragile. In *Alexander v R* (1981) 145 CLR 395 at 426, Mason J stated that:

[138] This section of the charge assumes that the jury has been previously instructed about inferences. If this is not the case, the charge should be modified accordingly.

> Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognizing on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed.

2. Despite this fragility, identification evidence is seen to be particularly seductive, especially as it is often given by witnesses who appear honest and convincing. Judicial experience has shown that such witnesses can be mistaken. It is often noted that serious miscarriages of justice have occurred in the past due to juries relying on such evidence (*R v Burchielli* [1981] VR 611; *Domican v R* (1992) 173 CLR 555; *Festa v R* (2001) 208 CLR 593; see also *Jury Directions Act 2015* s 36).
3. As juries may not know of this danger, they may need to be warned about it, to prevent them from giving too much probative value to evidence that may be flawed (*R v Burchielli* [1981] VR 611; *Domican v R* (1992) 173 CLR 555; *Festa v R* (2001) 208 CLR 593).
4. *Jury Directions Act 2015* Part 4, Division 4 prescribes the content of the warning a judge may give in relation to identification evidence.

What is Identification Evidence?

5. For the purposes of jury directions, "identification evidence" is defined in *Jury Directions Act 2015* s 35. That definition is broader than the definition which applies under the *Evidence Act 2008*. It extends to capture the various common law categories of identification evidence, including:
    - positive identification evidence: evidence by a witness identifying a previously unknown person as someone they saw on a prior relevant occasion (see, e.g. *Festa v R* (2001) 208 CLR 593; *R v Marijancevic* (1993) 70 A Crim R 272);[139]
    - recognition evidence: evidence by a witness that, at the time the relevant act was committed, they recognised a person who was present (due to their prior familiarity with that person) (see, e.g. *R v Marijancevic* (1993) 70 A Crim R 272; *R v Lovett* [2006] VSCA 5);
    - similarity evidence: evidence asserting that someone's appearance or characteristics (e.g. age, race, stature, colour) are similar to that of a person seen on a prior occasion (see, e.g. *R v Clune* (No 2) [1996] 1 VR 1; *Festa v R* (2001) 208 CLR 593);[140]

[139] Positive identification evidence can be direct or circumstantial. It is direct evidence when it identifies the accused as the person who committed one or more of the acts that constitute the crime in question (e.g. evidence that the accused was seen killing the victim). It is circumstantial evidence when its acceptance provides the grounds for an inference that the accused committed the crime in question (e.g. evidence that the accused was seen leaving the scene of the crime) (*Festa v R* (2001) 208 CLR 593).

[140] Similarity evidence is sometimes called "circumstantial identification evidence" (see, e.g. *R v Clune (No 2)* [1996] 1 VR 1). Care should be taken not to confuse this with positive identification evidence of a circumstantial nature (see above).

- comparison evidence: evidence of a non-expert witness which compares two people or items which do not require particular expertise to compare (e.g. evidence comparing the voice of the accused with a voice on a tape) (see, e.g. *Bulejcik v R* (1996) 185 CLR 375; *R v Theos* (1996) 89 A Crim R 486 (Vic CA));[141]
- negative identification evidence: evidence identifying someone other than the accused as the offender, or evidence that the accused is not the offender (see, e.g. *R v Pollitt* (1990) 51 A Crim R 227).

When to Warn the Jury about Identification Evidence

6. A judge must warn the jury about identification evidence where the prosecution or defence counsel requests such a direction, unless there are good reasons for not doing so. If no request is made by counsel, a judge has a residual obligation to give a warning if he or she considers that there are substantial and compelling reasons for giving the warning (*Jury Directions Act 2015* ss 12, 16).
7. For more information on the request for direction process or on the residual obligation, see 3.1 Directions Under Jury Directions Act 2015.
8. When requesting a direction on identification evidence, the prosecution or defence must specify the significant matters that may make the evidence unreliable (*Jury Directions Act 2015* s 36).

Content of the Charge

9. A direction on identification evidence will be sufficient where it:
    - warns the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it;
    - and informs the jury of the following matters:
        - the significant matters which the trial judge considers may make the evidence unreliable (where a party has requested the direction, the judge should include those matters which the party has identified has significant, unless there are good reasons for not doing so); and
        - that a witness may honestly believe that his or her evidence is accurate when the witness is, in fact, mistaken and that the mistaken evidence of a witness may be convincing; and
        - if relevant, that a number of witnesses may all be mistaken; and
        - if relevant, that mistaken identification evidence has resulted in innocent people being convicted (*Jury Directions Act 2015* s 36(3)).
10. While the judge should address these matters in the same part of the charge, the splitting of these directions will not necessarily constitute error (*R v Stewart* (2001) 52 NSWLR 301).
11. It is common practice for all of these matters to be addressed when the evidence is admitted in the trial, as well as in the judge's summing up (S Odgers, *Uniform Evidence Law* (8th ed, 2009) [1.4.2880]).
12. Additional directions, which are unrelated to the potential unreliability of identification evidence, may also be required where:

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[141] Comparison evidence may be a form of positive identification evidence (if it posits that the items being compared are identical) or similarity evidence (if it simply asserts a resemblance between the items) (see, e.g. *Bulejcik v R* (1996) 185 CLR 375).

- an identification is made wholly or partly by examining pictures kept for the use of police officers (*Evidence Act 2008* s 115); or
- evidence is given that the accused refused to participate in an identification parade (*R v Davies* (2005) 11 VR 314).

13. This topic first provides a brief outline of the types of evidence which fall within the definition of identification evidence in the *Jury Directions Act 2015*. This outline informs the remainder of this topic, which addresses the content of the warning and any additional directions that may be required.

14. In some cases, identification evidence may be substantially the only evidence of one or more elements. In such cases, it may be appropriate for the judge to clearly identify for the jury the importance of the evidence. Judges should discuss the issue with counsel and hear submissions on what additional directions or comments are appropriate. Options include:
    - when directing the jury about the element, direct the jury that the identification evidence is the only evidence (or substantially the only evidence) in support of that element and without that evidence, the element cannot be proved beyond reasonable doubt (see 3.6.2 Charge: Sole Evidence Direction);
    - directing the jury that the jury would need to be satisfied of the identification evidence beyond reasonable doubt before acting on it;
    - commenting to the jury that the identification evidence is the only evidence, or the most significant evidence, in proof of the element and they can only be satisfied of the element beyond reasonable doubt if they are satisfied of the identification evidence;
    - refer to the identification evidence and direct the jury that it must be satisfied that the identification evidence proves the relevant element beyond reasonable doubt.

"Identification Evidence" Under the Jury Directions Act 2015

15. Section 35 of the *Jury Directions Act 2015* defines "identification evidence" as:

> An assertion by a person, or a report of an assertion by a person, to the effect that–
>
> (a) he or she recognizes, or does not recognise, a person or object as the person or object that he or she saw, heard or perceived on the relevant occasion; or
>
> (b) the general appearance or characteristics of a person or object are similar, or are not similar, to the general appearance or characteristics of the person or object that he or she saw, heard or perceived on the relevant occasion-
>
> and includes-
>
> (c) visual identification evidence within the meaning of section 114 of the *Evidence Act 2008*; and
>
> (d) picture identification evidence within the meaning of section 115 of the *Evidence Act 2008*.

16. Identification evidence may therefore be given in relation to any person, whether he or she is the accused or not, as well as in relation to objects (*Jury Directions Act 2015* s 35; see also *R v Bath* [1990] Crim LR 716 (CA); *R v Kotzmann* [1999] 2 VR 123).

17. As the definition of identification evidence in the *Jury Directions Act 2015* refers to what the person making the assertion "saw, heard or perceived", it appears to apply to:
    - aural identification (see, e.g. *Bulejcik v R* (1996) 185 CLR 375; *R v Callaghan* (2001) 4 VR 79); and
    - identification by touch (see, e.g. *AK v The State of Western Australia* [2006] WASCA 245), smell or taste (see, e.g. *AK v The State of Western Australia* (2008) 232 CLR 438 (Heydon J)).

18. The definition adopted by the *Jury Directions Act 2015* does not, however, extend to circumstances where a jury makes their own comparison, such as between a photograph or CCTV camera footage and the accused, or between voices which are captured on recordings.

19. It is unclear whether the definition of identification evidence in the *Jury Directions Act 2015* covers comparison evidence given by a non-expert witness. Arguably, the definition does cover such evidence, as the section addresses identifications that occur on a "relevant occasion". The term "relevant occasion" is not defined in the Act. Conceivably, a "relevant occasion" could include an occasion on which a witness hears an audio recording of a person's voice. Further, the Explanatory Memorandum to the Jury Directions Bill 2015 contemplates that comparison evidence given by a non-expert witness will constitute identification evidence for the purposes of the *Jury Directions Act 2015*.

Method of identification

20. The definition of identification evidence adopted in the *Jury Directions Act 2015* encompasses identifications made by any method (e.g. identification parade, photo board identification or dock identification). This applies irrespective of whether the identification was conducted in or out of court (*R v Taufua* NSWCCA 11/11/1996; *R v Tahere* [1999] NSWCCA 170; *R v Thomason* (1999) 139 ACTR 21).

21. The definition of identification evidence in the *Jury Directions Act 2015* only covers assertions made by people (or reports of such assertions). It does not cover:

    - identifications made by animals (e.g. tracker dogs) (*R v Stewart* (2001) 52 NSWLR 301);
    - identifications made by computer software (e.g. using facial recognition software) (see, e.g. *R v Tang* (2006) 65 NSWLR 681).

Types of Identification Evidence

22. The common law recognised several categories of identification evidence. These are described below, as the potential dangers of identification evidence differ between the categories.

Positive Identification Evidence

23. Positive identification evidence is evidence by a witness identifying a previously unknown person as someone he or she saw on a prior relevant occasion. Such evidence may be used as direct or circumstantial proof of an offence (*Festa v R* (2001) 208 CLR 593).

24. An example of positive identification evidence is picture identification evidence, as defined under s 115 of the *Evidence Act 2008*. Such evidence relates to 'an identification made wholly or partly by the person who made the identification examining pictures kept for the use of police officers' i.e. identification of an accused through mug shots or photo boards (see, e.g. *R v Carpenter* [2011] ACTSC 71, [41]).

Recognition Evidence

25. Recognition evidence is evidence from a witness that he or she recognises a person or object as the person or object that he or she saw, heard or perceived on a relevant occasion.

Similarity Evidence

26. Similarity evidence is evidence that the general appearance or characteristics a person or object perceived is similar to the person or object perceived on a relevant occasion.

Comparison Evidence

27. There are three ways in which comparisons may be made. These are comparisons:
    - by witnesses comparing people or items about which they have greater knowledge than the jury, but which do not require particular expertise to compare;
    - by witnesses comparing items about which they have particular expertise; and
    - by the jury comparing people or items which do not require particular knowledge or expertise to compare.
28. Only the first type of comparison listed above may be considered "identification evidence" for the purposes of the *Jury Directions Act 2015*. It is clear that jury comparisons do not fall within the ambit of that Act. Such comparisons may, however, require directions at common law.
29. Evidence comparing items about which a witness has particular expertise (e.g. fingerprints) should be treated as "opinion evidence" rather than "comparison evidence".[142]

Negative Identification Evidence

30. The term "negative identification evidence" is generally used to refer to exculpatory evidence in which:
    - someone other than the accused is identified as the offender; or
    - a witness states that the accused is *not* the offender (*R v Pollitt* (1990) 51 A Crim R 227; *R v Johnson* (2004) 89 SASR 294).
31. The term has also been used to refer to evidence that a witness failed to identify the accused from a photo-board or at an identification parade (see, e.g. *Beresi v R* [2004] WASCA 67).
32. Negative identification evidence may be adduced by the defence, or by a prosecution witness in fulfilling its duty to call all relevant witnesses (*R v Rose* (2002) 55 NSWLR 701; *Kanaan v R* [2006] NSWCCA 109).
33. This exculpatory evidence falls within the definition of 'identification evidence' under the *Jury Directions Act 2015*, as section 35 explicitly refers to statements that the witness does not recognise, or that the appearance of a person or object is not similar, to the person or object perceived on a relevant occasion.
34. The fact that negative identification evidence favours the accused does not itself provide a "good reason" for not giving a s 36 warning (*Kanaan v R* [2006] NSWCCA 109).

When to Give an Identification Evidence Warning

35. Part 3 of the *Jury Directions Act 2015* governs the circumstances in which a judge may need to warn the jury about the potential unreliability of identification evidence.
36. The overall effect of the scheme (as outlined below) is that a warning must usually be given in relation to identification evidence if the prosecution or defence counsel requests a warning or if the judge considers that there are substantial and compelling reasons for giving the warning despite the absence of a request (*Jury Directions Act 2015* ss 15, 16).
37. See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required under this residual obligation.

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[142] See 4.13.1 General Principles of Opinion Evidence.

When is a Warning under Jury Directions Act 2015 s 36 Required?

38. The prosecution or defence counsel may request that the trial judge direct the jury on identification evidence. Such a request must be in accordance with *Jury Directions Act 2015* s 12 (*Jury Directions Act 2015* s 36(1)).

39. Counsel making such a request must specify the significant matters which may make the evidence unreliable (*Jury Directions Act 2015* s 36(2)).

40. Once a party has made such a request, the trial judge must give a direction in respect of identification evidence, unless there are good reasons for not doing so (*Jury Directions Act 2015* s 15).

41. Further, a trial judge must give a direction in respect of identification evidence if he or she considers that there are substantial and compelling reasons to do so, despite the absence of a request (*Jury Directions Act 2015* s 16).

42. When giving a direction in respect of identification evidence, the trial judge must:

    - warn the jury of the need to exercise caution when determining whether to accept the evidence and the weight to be given to it; and
    - inform the jury of the significant matters that he or she considers may make the evidence unreliable; and
    - inform the jury that:
        - a witness may honestly believe that his or her evidence is accurate when the witness is, in fact, mistaken; and
        - the mistaken evidence of a witness may be convincing; and
    - if relevant, inform the jury that a number of witnesses may all be mistaken; and
    - if relevant, inform the jury that mistaken identification evidence has resulted in innocent people being convicted (*Jury Directions Act 2015* s 36(3)).

What is a "Significant" Matter?

43. The *Jury Directions Act 2015* does not define what a "significant" matter is for the purposes of directions in respect of identification evidence. The matters which are significant will depend on the facts of the case and may include:

    - the circumstances of the sighting
    - whether the person was known to the witness
    - the time that elapsed between the sighting and the reporting to police
    - any differences between the description of the person and their actual appearance.[143]

44. The party requesting the direction must also specify the significant matters that may make the evidence unreliable. The role of the judge is to determine which of those matters are significant, and then direct the jury accordingly. Unless there are substantial and compelling reasons to do so, a judge does not need to add further matters which he or she considers significant (see *Jury Directions Act 2015* ss 15, 16).

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[143] Department of Justice, *Jury Directions: the Next Step*, 2013 p38.

Substantial and Compelling Reasons for a Warning

45. In some cases, there may be substantial and compelling reasons for a judge to give an identification evidence warning even where such a direction is not sought by the parties (*Jury Directions Act 2015* s 16).

46. It is suggested that there will be "substantial and compelling" reasons for giving a direction in the following circumstances:

    - the judge considers that the direction is open on the evidence;
    - identification evidence is a matter which the judge considers is in issue in the trial. It is possible, although very unlikely, that a judge may draw such a conclusion even where defence counsel indicates that he or she does not consider it to be in issue (e.g. if defence counsel makes a fundamental error regarding what is or is not in issue and this has not been addressed during discussions with the trial judge);
    - identification evidence is a significant issue in the case. If it is a minor issue or only concerns a small portion of the evidence in the trial, it is unlikely that the reasons for giving an identification evidence direction would be substantial and compelling. On the other hand, if identification evidence is central to the issues in dispute, the direction is more likely to be necessary under the residual obligation; and
    - the reasons for giving the identification direction must substantially outweigh the reasons for not giving the direction. In applying the test, the judge must do more than merely weigh the reasons for giving the direction. He or she must also consider the reasons for not giving the direction.[144]

Factors affecting whether a direction is required

47. The following sections describe common law principles regarding when identification evidence directions are necessary. These principles may provide guidance on when a judge should suggest that counsel request a warning.

Positive Identification Evidence

48. At common law, a warning about positive identification evidence may be necessary where:

    - the evidence represents any significant part of the proof of guilt of an offence; and
    - the reliability of the identification is disputed (*Domican v R* (1992) 173 CLR 555; *R v Burchielli* [1981] VR 611; *Festa v R* (2001) 208 CLR 593; *Dhanhoa v R* (2003) 217 CLR 1).

49. A warning may be needed if the issue of identification is "fairly and squarely raised as an issue". This was for a judge to decide, in light of the circumstances of the case (*R v MacKay* [1985] VR 623; *Sindoni v R* [2011] VSCA 195).

50. It was unclear whether, at common law, a direction was required if the evidence was not disputed, but the judge considered that there was some evidence which cast doubt on the identification (compare *R v Courtnell* [1990] Crim LR 115 (CA) and *R v Bath* [1990] Crim LR 716 (CA).

51. The warning may be necessary in relation to direct and circumstantial positive identification evidence (*Festa v R* (2001) 208 CLR 593).

52. If the disputed identification evidence forms a significant part of the proof of guilt, a warning may need to be given even if a conviction could not be based on that evidence alone (e.g. if it is a purely circumstantial evidence, requiring other evidence to support it) (*R v Crupi* (1995) 86 A Crim R 229).

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[144] Department of Justice, *Jury Directions: the Next Step*, 2013 p12.

53. The need for a warning is not removed by the existence of other evidence on which the accused could be convicted. The judge should assume that the jury may decide to convict solely on the basis of the identification evidence (*Domican v R* (1992) 173 CLR 555; *Festa v R* (2001) 208 CLR 593).

54. Even if there is other important evidence, if the jury could not convict without the identification evidence the judge may need to give a strong warning (*R v Clune* [1982] VR 1).

55. A warning may be needed even if there is more than one identifying witness, as experience has shown that mistakes can occur where two or more witnesses have made positive identifications (*R v Burchielli* [1981] VLR 611).

56. Even if the principal or sole defence goes to the credibility of the identifying witness (e.g. if the defence alleges that the identification evidence is fabricated, and the trial is conducted on that basis), it may be necessary to warn the jury about the dangers of identification evidence. This is due to the possibility that the jury will reject the defence argument. In such circumstances, the jury will then need to consider whether the identification evidence is reliable, and so will need to know about the potential dangers inherent in such evidence (*Sindoni v R* [2011] VSCA 195. But see *R v Courtnell* [1990] Crim LR 115; *Shand v R* [1996] 1 WLR 67).

Recognition Evidence

57. At common law, it was not always necessary to direct the jury about the dangers of acting on recognition evidence (see, e.g. *R v Wright* (No.2) [1968] VR 174; *Arthurs v Attorney-General for Northern Ireland* (1970) 55 Cr App R 161; *R v Marijancevic* (1993) 70 A Crim R 272; *Peck v Western Australia* [2005] WASCA 20; *R v Lovett* [2006] VSCA 5; *R v Spero* (2006) 13 VR 225).

58. Although a direction was not always necessary, there were circumstances in which the opportunity of the identifying witness to recognise a suspect was so limited, or the witness's familiarity with a suspect was of such a short duration, that a full *Domican* direction was required (*R v Spero* (2006) 13 VR 225. See also *R v Boardman* [1969] VR 151; *R v Turnbull* [1977] QB 224; *WSJ v R* [2010] VSCA 339; *Sindoni v R* [2011] VSCA 195).

59. Whether a direction is necessary in a particular case will depend on all of the relevant circumstances, including:

    i) the degree of familiarity of the witness with the accused;

    ii) the circumstances in which the accused was previously seen by the witness or known to the witness; and

    iii) the circumstances in which the accused is alleged to have been seen by the witness at or about the time of the crime (*R v Carr* (2000) 117 A Crim R 272; *Smith v The State of Western Australia* [2005] WASCA 19; *R v Spero* (2006) 13 VR 225; *R v Defrutos* [2008] VSCA 55; *WSJ v R* [2010] VSCA 339; *Sindoni v R* [2011] VSCA 195).

60. If the witness is very familiar with the person observed, there was an extended opportunity for observation, and the circumstances of the observation were such that there was little likelihood that the difficulties inherent in the identification process would lead to misrecognition, a direction may not need to be given (see, e.g. *R v Carr* (2000) 117 A Crim R 272; *R v Lovett* [2006] VSCA 5; *R v Spero* (2006) 13 VR 225; *WSJ v R* [2010] VSCA 339).

Similarity Evidence

61. In *R v Benz* (1989) 168 CLR 110, Mason CJ and Dawson J held that it is the unreliability of human recollection as a basis for recognition that produces the need for a warning about positive identification evidence. In the case of similarity evidence, there is no such recognition (the witness simply describes characteristics of the offender, or notes resemblances between the accused and the offender, but does not positively identify the accused as the offender), so there is no need for a warning (see also *Festa v R* (2001) 208 CLR 593 (McHugh J); *R v Marijancevic* (1993) 70 A Crim R 272; *R v Hassan* [2004] VSC 84. But cf. *R v Benz* (1989) 168 CLR 110 (Deane J); *Festa v R* (2001) 208 CLR 593 (Hayne and Kirby JJ)).

62. While there has been some debate about the need for a warning in relation to similarity evidence, the most recent cases in the area follow the judgment of Justice McHugh in *Festa v R* (2001) 208 CLR 593, holding that a direction is not always necessary in relation to such evidence (see, e.g. *R v Cavkic* (No 2) (2009) 28 VR 341; *R v Debs* [2005] VSCA 66; *R v Campbell* [2007] VSCA 189. But cf. *Festa v R* (2001) 208 CLR 593 (Hayne J); *R v Theos* (1996) 89 A Crim R 486 (Vic CA)).

63. Although a direction may not always be required, it may be necessary to provide some kind of direction depending on the circumstances (*Festa v R* (2001) 208 CLR 593; *R v Debs* [2005] VSCA 66; *R v Campbell* [2007] VSCA 189).

64. For example, if a witness claims that the facial features of the accused are similar to those of the offender, it may be appropriate to give a direction (*Festa v R* (2001) 208 CLR 593 (McHugh J)).

65. A direction will usually not be necessary where the evidence is of similarity between inanimate objects rather than people (*R v Cavkic (No 2)* (2009) 28 VR 341).

Comparison Evidence

66. Comparisons can be undertaken in three ways:

    i) by the jury comparing people or items which do not require particular knowledge or expertise to compare;

    ii) by witnesses comparing people or items about which they have greater knowledge than the jury, but which do not require particular expertise to compare; and

    iii) by witnesses comparing items about which they have particular expertise.

67. Only the first two types of comparison listed above are classified as "comparison evidence". Evidence comparing items about which a witness has particular expertise (e.g. fingerprints) should be treated as "opinion evidence" rather than "comparison evidence" (see 4.13.1 General Principles of Opinion Evidence). There is no need to give a direction about the dangers of identification or comparison evidence in such cases (*R v Kotzmann* [1999] 2 VR 123).

Comparisons Undertaken by the Jury

68. It is not always necessary to direct a jury which has been invited to make a comparison of two people or items about the dangers of making such a comparison (*R v Kotzmann* [1999] 2 VR 123).

69. As the jury is not required to rely on their memory of a fleeting observation when making such a comparison, a direction about the dangers which arise from weaknesses in human perception and recollection will not be relevant (*Nguyen v R* (2002) 26 WAR 59).

70. While there may be problems resulting from matters such as a lack of clarity or an inadequate quantity of material for comparison, these difficulties will usually be obvious to juries who are well equipped to make allowances for such matters (*R v Kotzmann* [1999] 2 VR 123).

71. However, there may be circumstances in which it is necessary to give the jury directions about how to assess the evidence, and about the potential difficulties or dangers in making a comparison. For example, if the jury may too readily conclude that a voice on a tape matches the voice of the accused, due to similar foreign accents, a direction may be required about the risks of making such a misidentification, and the consequent miscarriage of justice that could arise (see, e.g. *Bulejcik v R* (1996) 185 CLR 375; *Nguyen v R* (2002) 26 WAR 59).

72. A direction may need to be given if the jury is asked to compare a person seen in a photograph or film taken during the crime with the accused (see, e.g. *R v Theos* (1996) 89 A Crim R 486 (Vic CA)).

73. If the jury is not asked to perform such a comparison, either explicitly or implicitly, it may not be necessary to give a direction. Mere speculation that they may make such a comparison is not sufficient to require a direction to be given (*R v Phong* (2005) 12 VR 17; [2005] VSCA 149).

Comparisons Undertaken by Non-Expert Witnesses

74. It is not always necessary to direct the jury about the dangers of a witness's evidence comparing people or items about which they have greater knowledge than the jury, but which do not require particular expertise to compare (e.g. that the gait of a person seen in video footage matches that of a person the witness knows well) (*R v Kotzmann* [1999] 2 VR 123; *Nguyen v R* (2002) 26 WAR 59).

75. However, as with comparisons made by the jury, there may be circumstances in which it is necessary to give the jury directions about how to assess the witness's evidence, and about the potential difficulties or dangers in making a comparison (see, e.g. *Bulejcik v R* (1996) 185 CLR 375; *Nguyen v R* (2002) 26 WAR 59; *R v Theos* (1996) 89 A Crim R 486 (Vic CA)).

Directions in Respect of Picture Identification Evidence

76. The directions specified under *Jury Directions Act 2015* s 36 do not affect any other statutory obligation to instruct the jury about identification evidence, where the direction does not relate to the unreliability of the evidence (*Jury Directions Act 2015* s 37).

77. Under *Evidence Act 2008* s 115(7), if picture identification evidence adduced by the prosecutor is admitted into evidence, the trial judge must, on the request of the accused:

    - if the picture of the accused was made after the accused was taken into custody in relation to the relevant offence/s – inform the jury that the picture was made after the accused was taken into that custody; or
    - otherwise – warn the jury that it must not assume that the accused has a criminal record or has previously been charged with an offence (*Evidence Act 2008* s 115(7)).

No Set Formula for Charge

78. While an identification warning must contain the mandatory matters set out in s 36, the trial judge is not required to adopt any particular form of words when giving the warning (*Jury Directions Act 2015* s 6).

79. The charge must be cogent, effective and cover those matters necessary for the particular case. It must be tailored to the circumstances of the case (*R v Burchielli* [1981] VR 611; *Domican v R* (1992) 173 CLR 555; *Festa v R* (2001) 208 CLR 593; *R v Campbell* [2007] VSCA 189).

80. The strength of any necessary warning will depend to a large degree upon the extent to which the prosecution case relies on the identification evidence (*R v Clune* [1982] VR 1).

81. Not every matter needs to be referred to in every case – but the direction needs to be adequate, and must refer to the significant matters identified by the party requesting the warning which may make the evidence unreliable (*Jury Directions Act 2015* s 36; *R v Burchielli* [1981] VR 611).

82. The judge must be careful that the directions do not rob the identification evidence of all probative value (*Festa v R* (2001) 208 CLR 593).

83. In fairness to the party adducing the evidence, the judge may make it clear that the warning is given because of the nature of the evidence, and that he or she is not expressing a personal opinion about it (*R v Stewart* (2001) 52 NSWLR 301).

84. At common law, it was recognised that a judge could tell the jury that "sometimes identification evidence is obviously correct, accurate and reliable". This direction did not impermissibly dilute the force of the warning (*Milkins v R* [2011] VSCA 93). It will be a matter for individual judges whether this statement is added to the statutory directions under the *Jury Directions Act 2015*.

Obligation to Give Directions With Judicial Authority

85. At common law, judges were required to give the directions with judicial authority (*Domican v R* (1992) 173 CLR 555; *Pinta v R* [1999] WASCA 125). It is not sufficient for the judge to merely refer to a submission about the matter made by counsel when addressing the jury. The warning must come from the judge, with the authority of the judge being used to impress the significance of the matter on the jury (*R v TJF* [2001] NSWCCA 127; *R v Yates* [2002] NSWCCA 520; *R v Sullivan* [2003] NSWCCA 100).

86. The language of the Jury Directions Act 2015 draws a distinction between the obligation to "warn" the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it, and the obligation to "inform" the jury of the other matters specified in s 36(3), such as the significant matters that may make the evidence unreliable, and the possibility that a witness is honest, but mistaken. It is unclear whether this narrows the scope of the common law obligation to give directions on identification evidence with judicial authority (see *Audsley v R* [2018] VSCA 162, [54], [67] and compare *Burchielli v R* [1981] VR 611 and *R v Mendoza* [2007] VSCA 120).

Need for Caution

87. *The Jury Directions Act 2015* requires the jury to be warned that there is a need for caution before accepting identification evidence, and in determining the weight to be given to such evidence, once it is accepted (*Jury Directions Act 201*5 s 36(3)(a)).

88. This differs from the position under the *Evidence Act 2008*, which required the jury to be warned that there is a "special" need for caution (*Evidence Act 2008* ss 116, 165; *R v Clarke* (1997) 97 A Crim R 414).

89. Courts have previously noted that trial judges need to exercise care to ensure that any warnings which he or she gives do not render the identification evidence of no probative value (see *Festa v R* (2001) 208 CLR 593; *R v Clarke* (1993) 71 A Crim R 58).[145]

Multiple Witnesses

90. If multiple witnesses give identification evidence, the jury should be told that a number of such witnesses can all be mistaken (*Jury Directions Act 2015* s 36(3)(d); *R v Turnbull* [1977] QB 224; *R v Burchielli* [1981] VR 611).

91. It may be necessary to warn a jury that two unsatisfactory or defective identifications do not necessarily support one another. However, there was debate over whether this direction was appropriate at common law (see *R v Burchielli* [1981] VR 611; *R v Dickson* [1983] 1 VR 227; *R v Haidley and Alford* [1984] VR 229 (Young CJ and Kaye J); *R v Secombe* [2010] VSCA 58. But cf. *R v Weeder* (1980) 71 Cr App R 228; *R v Haidley and Alford* [1984] VR 229 (Brooking J); *R v Callaghan* (2001) 4 VR 79).

92. If multiple witnesses give similarity evidence, the judge should usually instruct the jury against aggregating that evidence to establish identity. Similarity evidence cannot establish identity. Even if multiple people give similarity evidence, all that does is make it more likely that the accused resembles the offender (*R v Clune* (No 2) [1996] 1 VR 1).

Potential Causes of Unreliability

93. In giving an identification evidence warning pursuant to *Jury Directions Act 2015* s 36, the judge will need to inform the jury about the general causes of unreliability which are significant (*Jury Directions Act 2015* s 36).

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[145] *Jury Directions: The Next Step*, Criminal Law Review, December 2013, p38.

94. The purpose of this part of the direction is to inform the jury of matters which may be outside their general experience and understanding. Those matters need be stated only with such detail as is required to achieve that purpose (*Kanaan v R* [2006] NSWCCA 109).

95. The jury should be warned about matters that may cause the identification evidence to be unreliable (as opposed to matters that necessarily made that evidence unreliable) (*R v Riscuta* [2003] NSWCCA 6).

96. The matters that may cause identification evidence to be unreliable generally differ depending on the:

    - the type of evidence given (e.g. positive identification evidence, recognition evidence or similarity evidence);
    - the identification process used (e.g. identification parade, photo board identification or dock identification);
    - the mode of identification (e.g. visual, aural or tactile);
    - the subject matter identified (e.g. a person or an object).

97. In rare circumstances, expert evidence about particular dangers associated with certain types of identification evidence may be admissible (see, e.g. *R v Dupas* [2011] VSC 180).

98. The general dangers associated with particular types of identification evidence are examined below.

General Dangers of Positive Identification Evidence

99. Positive identification evidence is seen to be "notoriously uncertain" due to the number of variables upon which it depends. These include:

    - the extent of the opportunity for making the observation;
    - the circumstances in which the observation was made;
    - the difficulties a person may have in recognising a person they observed only fleetingly, some time in the past;
    - the vagaries of human perception and recollection; and
    - the tendency of the mind to respond to suggestions (*Alexander v R* (1981) 145 CLR 395).

100. Despite these uncertainties, identification evidence is seen to be particularly seductive, especially as it is often given by witnesses who appear honest and convincing. Judicial experience has shown that such witnesses can be mistaken (*R v Burchielli* [1981] VLR 611; *Domican v R* (1992) 173 CLR 555; *Festa v R* (2001) 208 CLR 593).

101. This risk arises because of the way in which evidence of identification depends on the witness receiving, recording and accurately recalling a subjective impression on the mind (*R v Dickson* [1983] 1 VR 227).

102. At common law, judges often told the jury that it is essential to distinguish between honesty and accuracy, and not to assume the latter because of a belief in the former (*R v Dickson* [1983] 1 VR 227).

103. Section 36 of the *Jury Directions Act 2015* focuses on the reliability of identification evidence, rather than the credibility of the witness giving the evidence. A witness can be credible but mistaken (see, e.g. *R v Tran* [2002] VSCA 29).

General Dangers of Recognition Evidence

104. The traditional identification warning was developed in relation to witnesses who were previously unfamiliar with the person identified. Many of the dangers identified in that context may not be relevant to recognition cases (*R v Burchielli* [1981] VR 611; *R v Marijancevic* (1993) 70 A Crim R 272; *R v Conci* [2005] VSCA 173; *R v Spero* (2006) 13 VR 225; *R v Trudgett* (2007) 70 NSWLR 696).

105. For example, the difficulties associated with the identification process will generally not exist in relation to recognition evidence, as there is ordinarily no need for a formal identification process (such as an identification parade) (see, e.g. *R v Lovett* [2006] VSCA 5; *R v Spero* (2006) 13 VR 225; *R v Kelly* [2002] WASCA 134).

106. However, although recognition evidence may be more reliable than evidence identifying a stranger, mistakes in recognition of close relatives and friends are still sometimes made (*R v Boardman* [1969] VR 151; *R v Turnbull* [1977] QB 224; *R v Brotherton* (1992) 29 NSWLR 95).

107. Such mistakes can arise because the difficulties surrounding the observation of a crime can be just as great when observing a familiar person as an unfamiliar person (*R v Lovett* [2006] VSCA 5).

108. There is also a possibility of jumping to a conclusion as to the identity of the offender, if they resemble a known person (*R v Lovett* [2006] VSCA 5).

109. Despite the potential unreliability of recognition evidence, there is a danger that witnesses will propound their conclusions with force and conviction (*R v Trudgett* (2007) 70 NSWLR 696).

110. Furthermore, recognition evidence is likely to be given special weight by a jury, even where its reliability is dubious (*R v Trudgett* (2007) 70 NSWLR 696).

111. The amount of care and the nature of the direction will vary according to the familiarity of the witness with the person identified (*Davies and Cody* (1937) 57 CLR 170; *R v Marijancevic* (1993) 70 A Crim R 272).

General Dangers of Similarity Evidence

112. The general dangers identified in a similarity evidence warning will depend on the nature of the evidence. The charge should be tailored to the case, and should not be a mere recitation of the suggested directions (*Festa v R* (2001) 208 CLR 593).

113. If the evidence is very weak (e.g. I saw a man wearing a red shirt), it may only be necessary to point to whatever difficulties the defence asserts the witness may have had in observing and accurately recollecting the event (*Festa v R* (2001) 208 CLR 593 (Hayne J)).

114. If the evidence is of facial similarities between the accused and the offender, the same dangers may arise as in the case of positive identification evidence (*Festa v R* (2001) 208 CLR 593 (McHugh J)).

115. In warning the jury about the need for caution in determining whether to accept the evidence and the weight to be given to it, the judge may need to point out that evidence of similarity, if accepted, only shows consistency of appearance between the accused and the offender. It is not evidence that positively identifies the accused (*Festa v R* (2001) 208 CLR 593 (Gleeson CJ); *R v Morgan* [2009] VSCA 225).

116. It may also be appropriate to warn the jury against taking the step from accepting that there is a similarity between the accused and the offender, to positively identifying the accused due to this similarity (see *R v Benz* (1989) 168 CLR 110 (Deane J)).

117. It may also be desirable to direct the jury that evidence of similarity is not sufficient, by itself, to entitle them to convict. The judge may need to point out the limited role that can be played by such evidence (*R v Morgan* [2009] VSCA 225; *R v Athuai* [2005] VSC 192).

118. If the judge gives directions about the limited weight of similarity evidence, the judge may need to distinguish that part of the direction from any directions about the weight to give to any positive identification evidence (see *Festa v R* (2001) 208 CLR 593 (McHugh J); *R v Camilleri* (2001) 127 A Crim R 290; *R v Morgan* [2009] VSCA 225).

119. If evidence can be interpreted as either positive identification evidence or as similarity evidence, it is for the jury to determine how that evidence should be treated. In such a case, the judge should:

- explain the distinction between positive identification evidence and similarity evidence;
- explain the limited utility of similarity evidence; and
- warn the jury that they cannot treat the evidence as positive identification evidence unless satisfied that the witness meant to identify the accused as the offender, as opposed to simply noting similarities between the accused and the offender (*R v Hackett* [2006] VSCA 138. See also *R v Fahad* [2004] VSCA 28).

120. However, if it is clear that the evidence should be treated in a particular way (e.g. that it is positive identification evidence rather than similarity evidence), the judge must instruct the jury accordingly. In the absence of any ambiguity, it is not for the jury to work out for themselves whether a piece of evidence is to be treated as positive identification evidence or similarity evidence (see, e.g. *R v Theos* (1996) 89 A Crim R 486 (Vic CA)).

121. While not technically incorrect, judges should avoid using the term "identification evidence" when charging the jury about similarity evidence. The terms "similarity evidence" or "resemblance evidence" are preferable (see, e.g. *R v Razzak* [2004] NSWCCA 62).

General Dangers of Comparison Evidence

122. The dangers posed by comparison evidence differ from those posed by other types of identification evidence. For example, in relation to voice comparisons, instead of being concerned with matters such as familiarity with the voice or the distinctiveness of the voice, issues such as whether the quality and quantity of the material is sufficient to enable a useful comparison to be made will be more important (*Bulejcik v R* (1996) 185 CLR 375).

123. Very careful and strong directions will often be called for in the case of voice comparisons (*Bulejcik v R* (1996) 185 CLR 375 (Toohey and Gaudron JJ)).[146]

124. Where a jury is asked to make a comparison between a recorded voice and the voice of the accused, the direction will explain the difficulty in making such a comparison (*Bulejcik v R* (1996) 185 CLR 375 (Toohey and Gaudron JJ); *Nguyen v R* (2002) 26 WAR 59; *R v Madigan* [2005] NSWCCA 170).

125. In relation to voice comparison, the similarity in circumstances in which the voices were spoken or recorded, and the number of similar words used, are likely to be significant matters which go to the determination of whether the evidence is reliable (*Bulejcik v R* (1996) 185 CLR 375).

126. The jury may need to consider whether there is a distinction between a live voice heard in court and a recorded voice (*R v Madigan* [2005] NSWCCA 170).

127. If the jury is asked to compare voices with foreign accents, they should be told of the difficulties involved in distinguishing between two such voices with which they are not familiar. In the absence of such a direction, the jury might too readily conclude that a foreign accent on a tape is that of the accused where the accents are similar (*Bulejcik v R* (1996) 185 CLR 375 (Toohey and Gaudron JJ)).

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[146] See "General Dangers of Voice Identification" below for further information concerning identification by voice.

General Dangers of Photographic Identification Evidence

128. Identification from a photograph may be unreliable due to the differences between photographic representations and nature:

- photographs are two-dimensional, static and limited (*Alexander v R* (1981) 145 CLR 395; *Roser v R* (2001) 24 WAR 254; *R v Campbell* [2007] VSCA 189);
- photographs do not depict manner of moving, posture, variety of facial expression, complexion, body size, body shape, colouring, nor many other subtle physical characteristics that an actual sighting conveys to the mind (*Roser v R* (2001) 24 WAR 254);
- photographs may be black and white (*Alexander v R* (1981) 145 CLR 395);
- photographs often provide a clear and well-lit picture of the subject in circumstances very different from the initial observation (*Alexander v R* (1981) 145 CLR 395; *R v Campbell* [2007] VSCA 189);
- photographs may hazily resemble the person seen, and lead to a false identification (*Roser v R* (2001) 24 WAR 254; *R v Campbell* [2007] VSCA 189);
- photographs may be digitally edited without the jury or anyone else realizing.

129. In addition, the presentation of a group of photographs to an identifying witness may place that witness under some subconscious pressure to pick out a photograph of a suspect who looks like the offender, notwithstanding that the witness is unable to positively identify the subject of the photograph as the offender (*R v Campbell* [2007] VSCA 189; *Pitkin v R* (1995) 130 ALR 35).

130. The accused may also be disadvantaged by the process of photo board identification. In most cases, he or she will not have been present for the identification, and so will not have first hand information about the way in which the witness identified the photograph (cf. identification parades). The accused must therefore rely on cross-examination of witnesses for knowledge about the conditions of the identification, and what safeguards against error were taken (*Alexander v R* (1981) 145 CLR 395; *R v Clarke* (1997) 97 A Crim R 414 (NSW SC); *Roser v R* (2001) 24 WAR 254; *R v Campbell* [2007] VSCA 189).

131. A judge may have good reasons for not warning the jury about some of the deficiencies of photo board identification where the accused has refused to participate in an identification parade. For example, it may not be appropriate to direct the jury about the problems arising from the accused's absence from the identification process, or to instruct the jury about the differences between the two processes of identification (see *R v Campbell* [2007] VSCA 189).

General Dangers of Single Suspect, Court and Dock Identification

132. If the accused was identified in circumstances where the witness was presented with a single suspect, this so greatly increases the liability to mistake as to make it extremely dangerous to assign any probative value to the identification evidence (*R v Burchielli* [1981] VR 611).

133. Similar dangers attend an identification in the precincts of the court. At common law, it was considered not sufficient to avoid discussing the issue out of a wish to avoid emphasising the identification (*R v Bedford* (1986) 5 NSWLR 711; *Festa v R* (2001) 208 CLR 593 (Kirby J)).

134. If a dock identification takes place,[147] the jury may be warned that it is of no probative value (as the witness will inevitably point out the person who is on trial), and that it has only been done as a formality (in order to complete the picture and to avoid any speculation as to why it was not done) (see, e.g. *Jamal v R* (2000) 182 ALR 307; *Alexander v R* (1981) 145 CLR 395; *R v Burchielli* [1981] VR 611).[148]

135. The risks associated with dock identification do not necessarily apply to identification of chattels in court. For example, provided that the witness is not asked leading questions, he or she will usually not feel compelled to positively identify any particular chattel in the same way that he or she may feel compelled to positively identify the accused (*Evans v R* (2007) 235 CLR 521).

General Dangers of Voice Identification

136. The risk of mistake in identifying a voice is seen to be at least as great as that involved in visual identification (*Festa v R* (2001) 208 CLR 593; *Li v R* (2003) 139 A Crim R 281).

137. Some factors that may be relevant in relation to the voice identification process include:

- the enhanced difficulty of identifying voices (cf. faces);
- the risk that a person may have sought to disguise his or her voice;
- the fact that voices can vary depending on the purpose for which they are being used;
- the clarity with which the voice was heard on the relevant occasions;
- the witness's familiarity with the voice;
- the distinctiveness of the voice;
- the possibility of mistaking one accented voice for another (*R v Callaghan* (2001) 4 VR 79; see also *Bulejcik v R* (1996) 185 CLR 375; *Festa v R* (2001) 208 CLR 593; *R v Madigan* [2005] NSWCCA 170; *R v E J Smith* (1986) 7 NSWLR 444; *R v Brownlowe* (1986) 7 NSWLR 46).

138. The jury should be told to allow for the possibility that an offender may have sought to disguise his or her voice (*R v E J Smith* (1986) 7 NSWLR 444; *R v Brownlowe* (1986) 7 NSWLR 461).

139. The jury should be told that mistakes can be made even in the voice recognition of close friends and relatives (*R v Brotherton* (1992) 29 NSWLR 95; *R v Turnbull* [1977] QB 224; *R v Bueti* (1997) 70 SASR 370; *R v Madigan* [2005] NSWCCA 170).

140. The jury should not be told that voice identification is less reliable if a witness cannot describe the basis on which a match is made (e.g. by describing the intonation, rapidity of speech and cadence). Voice identification may be accurate even though a person is unable to analyse and explain the characteristics of the voice (*Nguyen v R* (2002) 26 WAR 59).

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[147] Dock identification occurs when a person is asked to look either at the dock containing the accused, or the area where the accused might be expected to be sitting, and then make an identification. Where a witness simply happens to be in the same courtroom as the accused, and spontaneously recognises him or her, this is not "dock identification" (*R v Rich (Ruling No. 6)* [2008] VSC 436. See also *R v Williams* [1983] 2 VR 579).

[148] Dock identifications are not usually permitted, unless they are simply confirming an acceptable prior out-of-court identification (*Jamal v R; R v Gorham* (1997) 68 SASR 505; *Murdoch v R* [2007] NTCCA 1).

General Dangers of Negative Identification Evidence

141. Many of the causes of unreliability which apply in the context of positive identification evidence also apply to negative identification evidence. For example, just as positive identification evidence may be affected by confusion and displacement, or contaminated by conversations after the event, so may negative identification evidence (*Ilioski v R* [2006] NSWCCA 164).

142. Some matters which may affect the reliability of negative identification evidence include:

- whether the witness knew the person identified;
- the duration of the circumstances in which the identification occurred;
- whether it is possible that the observer was unconsciously influenced by publicity; and
- the quality of the image used to make the identification and whether that was a good likeness of the relevant person (see, e.g. *R v Rose* (2002) 55 NSWLR 701).

143. If a direction is given, it will not be relevant to inform the jury that mistaken identification evidence has resulted in innocent people being convicted (*Jury Directions Act 2015* s 36; *R v Rose* (2002) 55 NSWLR 701).

144. However, in most cases where negative identification evidence is adduced the jury should be instructed about how the burden and standard of proof operates in relation to this evidence (*Kanaan v R* [2006] NSWCCA 109; *Mule v R* [2002] WASCA 101; *R v Johnson* (2004) 89 SASR 294). This requires that the judge:

- emphasise that the jury has to be satisfied beyond reasonable doubt that it was the accused who committed the offence charged; and
- make it clear that the jury cannot be satisfied beyond reasonable doubt that the crime was committed by the accused if there remains a reasonable possibility that the crime was committed by someone else.

145. It was suggested in *Kanaan v R* [2006] NSWCCA 109 that an appropriate direction would be that "the Crown must remove or eliminate any possibility that the crime was committed by someone else, as well as satisfy you, on the evidence on which it relies, that beyond reasonable doubt the accused committed the offence" (see also *Ilioski v R* [2006] NSWCCA 164).

146. Although this formulation was suggested by the Court, it was made clear that no specific formula is required. All that is needed is for the judge to make it clear to the jury that there cannot be proof beyond reasonable doubt if there remains a reasonable possibility that the accused is not guilty (*Kanaan v R* [2006] NSWCCA 109; *Ilioski v R* [2006] NSWCCA 164).

147. The precise content of the direction will depend on the type of negative identification evidence adduced. For example:

- where a witness positively identifies a person as the offender who is not the accused, the judge may give modest directions about the need for caution when assessing the evidence, the circumstances of the identification and that witnesses may be honest but mistaken;
- where there is contradictory identification evidence, the judge will need to be direct the jury on the need for caution in assessing the evidence, contrast the different circumstances of the two witnesses, the risk of mistaken identification evidence and the interaction between positive and negative identification evidence (see below);
- where the witness has failed to identify the accused, then identification evidence directions are no likely to be appropriate and the judge should instead refer to the failure to identify as a matter casting doubt on the prosecution case.

148. In all cases however, the judge must remind the jury that the prosecution bears the onus of proof and that the accused does not need to prove the negative identification evidence. Instead, the evidence is a factor that, depending on the jury's view of the evidence, may raise a reasonable doubt about the prosecution's case.

Directions where Positive and Negative Identification Evidence are Adduced

149. Where both negative and positive identification evidence is adduced, the judge may need to direct the jury about the relationship between the two types of evidence. In particular, the judge may need to direct the jury about:

- the impact the negative identification evidence has on the positive identification evidence; and
- the relationship between the positive and negative identification evidence warnings.

150. The existence of contradictory, negative identification evidence, may be a significant matter which makes the positive identification evidence unreliable (see *Beresi v R* [2004] WASCA 67; *Mule v R* [2002] WASCA 101).

151. Similarly, the failure of a witness to select the accused from a previous photoboard or identification parade may cast doubt on the reliability of the subsequent identification (see *Beresi v R* [2004] WASCA 67).

152. The best approach for a judge to take in directing the jury on the relationship between the warnings will depend on the circumstances of the case:

- in some cases it will be convenient for the judge to set out separately the reasons for the warnings for each category of identification evidence;
- in other cases it will be disadvantageous to the accused to have all of the reasons for the warnings given twice – once for the positive identification evidence and once for the negative identification evidence (*Kanaan v R* [2006] NSWCCA 109).

Specific Causes of Unreliability

153. In addition to general dangers about particular forms of evidence, the judge will also need to inform the jury about any specific causes of unreliability which are significant (*Jury Directions Act 2015* s 36).

154. These specific matters should be identified as part of the warning about identification evidence, and rather than in some other part of the judge's directions (*R v Bint & Butterworth* 19/7/1996 CA SA).

155. If matters referred to by counsel reasonably can be regarded as significant matters undermining the reliability of the identification evidence, the judge must inform the jury of those matters (*Jury Directions Act* 2015 s 36(3)(b). See also *Domican v R* (1992) 173 CLR 555; *R v Dupas* (2009) 28 VR 380).

156. It is insufficient for a judge to simply put a number of questions to the jury to consider, without relating them to the particular circumstances of the case (*R v Ryan* 3/8/1995 CA Vic).

157. The judge may point out significant matters supporting an identification, as long as the weaknesses are also highlighted (*Jury Directions Act 2015* s 36(3)(b); *R v Fox (No 2)* [2000] 1 Qd R 640. See also *R v Davies* (2005) 11 VR 314).

158. Even if a matter of significance would be obvious to the jury, it should be identified (*Ilioski v R* [2006] NSWCCA 164).

159. However, a judge is only required to direct the jury about matters concerning the reliability of identification evidence. The identification evidence direction does not address matters such as bias or motives to lie (*Ilioski v R* [2006] NSWCCA 164).[149]

[149] There may, however, be a need for separate warnings concerning such matters.

160. Judges need not identify every possible weakness in the particular identification evidence in the case. He or she is only required to identify any weakness which is significant. On this basis, a judge must not overlook any evidence the jury may regard as having some cogency, which would be favourable to the accused in the resolution of the identification issue (*Jury Directions Act 2015* s 36(3)(b); *R v Bint & Butterworth* 19/7/1996 CA SA).

161. The fact that there is evidence that tends to support an identification does not diminish the importance of the direction as to identification. In some circumstances it may actually increase the need for caution (*WSJ v R* [2010] VSCA 339).

Specific Factors Affecting the Reliability of Identification Evidence

162. Factors affecting the reliability of identification evidence in a particular case include:

- the opportunity to observe the person subsequently identified;
- the nature of the relationship between the witness and the person identified;
- the length of time between the incident and the identification; and
- the nature and circumstances of the identification (*Domican v R* (1992) 173 CLR 555).

163. Factors that may be relevant to the initial observation include:

- the length of opportunity for making the observation (*R v Clune* [1982] VR 1; *Domican v R* (1992) 173 CLR 555);
- the position of the witness and the person identified (*R v Clune* [1982] VR 1; *R v Dickson* [1983] 1 VR 227);
- the distance of the witness from the person identified (*R v Turnbull* [1977] QB 224);
- the lighting and weather (*R v Clune* [1982] VR 1; *R v Dickson* [1983] 1 VR 227);
- any impairments to the observation, such as passing people or traffic (*R v Turnbull* [1977] QB 224);
- the exposure of the witness to stress or fear (*R v Clune* [1982] VR 1; *R v Dickson* [1983] 1 VR 227. But see *Winmar v Western Australia* (2007) 35 WAR 159);
- whether the witness was influenced by drugs or alcohol, or by other factors such as fatigue (*Peck v Western Australia* [2005] WASCA 20);
- whether the circumstances were such as to cause the witness to be left with an impression of the features of the offender (*R v Clune* [1982] VR 1).

164. Factors that may be relevant to the nature of the relationship between the witness and the person observed include:

- whether the witness was previously acquainted with the person observed (*Domican v R* (1992) 173 CLR 555);
- how well the witness knew the observed person (*R v Carr* (2000) 117 A Crim R 272);
- the circumstances of any previous acquaintance (*R v Carr* (2000) 117 A Crim R 272).

165. Factors that may be relevant to the identification process include:

- the length of time between the incident and the identification (*R v Clune* [1982] VR 1; *Domican v R* (1992) 173 CLR 555; *R v Dupas* (2009) 28 VR 380);
- the absence of an identification parade and the general conduct of the identification process (*R v Preston* [1961] VR 761; *R v Clune* [1982] VR 1; *R v Burchielli* [1981] VR 611);
- whether the witness had heard a description of the suspect given before attempting an identification (*R v Ryan* 3/8/1995 CA Vic);

- any imbalances in the identification process (such as only one of the suspects having a moustache, or having only one non-custodial photograph to choose from) (*R v Clune* [1982] VR 1);
- whether the witness was encouraged to identify a particular person in any way (*R v Davies* (2005) 11 VR 314);
- whether there were any witnesses to the identification process (*Alexander v R* (1981) 145 CLR 395; *Roser v R* (2001) 24 WAR 254).

166. Other factors that may be relevant to the issue include:

- the perceptiveness of the witness (*R v Clune* [1982] VR 1; *R v Dickson* [1983] 1 VR 227);
- the dangers of cross-racial identification (*R v Dodd* (2002) 135 A Crim R 32);
- errors in describing the offender prior to the identification (*R v Turnbull* [1977] QB 224; *R v Vincec* (1990) 50 A Crim R 203 (Vic CA));
- evidence which points to a person other than the accused being the offender (*R v Fahad* [2004] VSCA 28);[150]
- incentives to cooperate with the police (*R v Theos* (1996) 89 A Crim R 486 (Vic CA));
- in the case of object identification, the commonness of the object identified (*R v Theos* (1996) 89 A Crim R 486 (Vic CA)).

167. There is no immutable principle requiring the discussion of any particular one of these matters – it will depend on the circumstances. This is, however, subject to the requirement that a judge inform the jury of the significant matters which specified by the party requesting an identification evidence direction, unless there are good reasons for not doing so (*Jury Directions Act 2015* ss 15, 36; see also *R v Dodd* (2002) 135 A Crim R 32).

The Displacement Effect

168. One specific cause of unreliability that a judge may need to direct the jury about is the "displacement effect" (see, e.g. *Alexander v R* (1981) 145 CLR 395; *Roser v R* (2001) 24 WAR 254; *DPP v Douglas Jensen* [2006] VSC 179; *R v Dupas* (2009) 28 VR 380).

169. The "displacement effect" can occur when a witness initially identifies a person from a photograph, and then subsequently identifies the same person at an identification parade. In such circumstances, the witness's memory of the photograph viewed may displace his or her memory of the original sighting of the offender. Any subsequent face-to-face identification may be tainted as a result of this "displacement effect", as the witness may unwittingly compare the accused with the remembered photograph, rather than with his or her memory of the original sighting (*Alexander v R* (1981) 145 CLR 395; *Roser v R* (2001) 24 WAR 254; *DPP v Douglas Jensen* [2006] VSC 179).[151]

170. Thus, the "displacement effect" may be relevant where:

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[150] See Negative Identification Evidence for a discussion of the directions to be given when evidence is adduced identifying a person other than the accused as the offender, or stating that the accused is not the offender.

[151] While the cases in this area generally refer to the risk that the memory of a photograph will displace the memory of the original sighting, memories of other types of representation (e.g. identikit pictures) may create the same risk.

- a person is initially identified from a photograph (or other representation);
- the same person is subsequently identified at an identification parade; and
- evidence of that identification parade is admitted (*Alexander v R* (1981) 145 CLR 395; *Roser v R* (2001) 24 WAR 254; *DPP v Douglas Jensen* [2006] VSC 179)

171. In such cases, the "displacement effect" may constitute a significant matter which affects the reliability of the identification evidence, warranting a warning cautioning against accepting the evidence, and if the evidence is accepted, cautioning against the weight to be given to that evidence (*Jury Directions Act 2015* s 36(3); see e.g. *R v Burchielli* [1981] VR 611).

Picture Identification

172. Section 115 of the *Evidence Act 2008* provides that certain directions must be given in relation to "picture identification evidence" that is admitted into evidence.

173. These directions must be given if:

- the "picture identification evidence" is adduced by the prosecution; and
- a request for the directions is made by the accused or defence counsel (*Evidence Act 2008* s 115(7)).

174. The content of the direction depends on whether the relevant picture was made before or after the accused was taken into custody:

- if it was made after the accused was taken into custody, the jury must be informed of that fact;
- if it was made before the accused was taken into custody, the jury must be warned not to assume that the accused has a criminal record, or has previously been charged with an offence (*Evidence Act 2008* s 115(7)).

175. These directions are directed to the problems associated with the use of 'mug shots' – pictures which give the impression that the person depicted was known to the police (*R v Maklouf* [1999] NSWCCA 94).

176. 4.12.2 Charge: Photographic Identification includes a section addressing this issue in the context of photographic identification. This section can be modified for other forms of picture identification.

Failure to Hold an Identification Parade

177. If photographic identification evidence is admitted where it would have been reasonable and practicable to arrange for an identification parade to be held instead, it may be appropriate to:

- tell the jury such an identification parade could have been held;
- explain the differences between the identification processes;
- advise the jury that the accused has been deprived of the benefits of an identification parade;
- advise the jury that the accused may have lost the advantage they would have gained from an inconclusive parade; and
- direct the jury that it should take account of these facts in its assessment of the whole case, giving them such weight as it thinks fair (*Roser v R* (2001) 24 WAR 254).

Refusal to Participate in an Identification Parade

178. If evidence is given that the accused refused to participate in an identification parade, the judge should advise the jury that he or she had a right not to participate, and that the exercise of that right must not lead to any conclusion as to guilt (*R v McCarthy* (1993) 71 A Crim R 395; *R v Davies* (2005) 11 VR 314).

179. The direction should be given in very strong terms, explaining to the jury that it would make a mockery of our legal system to give the accused the right not to participate, but then to penalise them for relying on that right by allowing an adverse inference to be drawn from its exercise.

180. This direction should be given as soon as the evidence is given and, if necessary, again in the summing up (*R v McCarthy* (1993) 71 A Crim R 395; *R v Davies* (2005) 11 VR 314).

Last updated: 22 August 2018

4.12.1 Charge: Identification Evidence

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When to Use this Charge

This charge may be used where:

i) A witness gave identification evidence;[152] and

ii) The prosecution or defence counsel has requested a direction regarding the identification evidence and there are no good reasons for not doing so; or

iii) Despite the fact that neither party has requested a direction, there are substantial and compelling reasons for giving the direction

Introduction

Identification is an important issue in this case. The case against NOA depends, to a significant extent, on evidence claiming to identify [*outline the nature of the identification evidence in the case*].

Before you decide whether to accept this evidence, I must give you some warnings about identification evidence.

How are People Identified?

Before I give you these warnings, and to help you understand the reason why I am giving you these warnings, I will briefly explain how people are identified.

Positive identification evidence/similarity evidence

[*If the identification evidence comprises positive identification evidence or similarity evidence, add the following shaded section.*]

There are three stages that are involved whenever a positive identification is made and a witness may make an error at each stage. First, the witness must have observed somebody [*insert relevant act*].

[152] This charge has been constructed for use in cases where it is the accused that has been identified. If it is another party, or an object, that has been positively identified, the charge should be modified accordingly.

Second, the witness must have retained an image of that person in his or her mind until the time of the identification. Third, the witness must have later seen NOA, or a picture of NOA, and identified him or her as being the person seen [*insert relevant act*].[153]

Recognition evidence

[*If the identification evidence is a form of recognition evidence, add the following shaded section.*]

There are two stages that are involved whenever a person claims to recognise another person and a witness may make an error at each stage. First, the witness must have observed somebody [*insert relevant act*]. Second, the witness must have accurately recognised that person as someone the witness knew.

Comparison evidence

[*If the identification evidence constitutes comparison evidence, add the following shaded section.*]

There are three stages that are involved whenever a comparison is made and a witness may make an error at each stage. First, the witness must have heard somebody [*insert evidence relating to the initial recording*]. Second, the witness must have retained an impression of that person's voice in his or her mind until the time of the identification. Third, the witness must have later heard the voice of NOA, or a recording of the voice of NOA, and identified him or her as being the voice heard in the original recording.

Negative identification evidence

[*If the identification evidence constitutes negative identification evidence, add the following shaded section.*]

There are three stages that are involved whenever an identification of this nature is made and a witness may make an error at each stage. First, the witness must have observed somebody [*insert relevant act*]. Second, the witness must have retained an image of that person in his or her mind until the time of the identification. Third, the witness must have later seen NOA, or a picture of NOA, and stated that he or she was not the person seen [*insert relevant act*].

General Dangers of Identification Evidence

Identification evidence is potentially unreliable. For that reason, you must exercise caution in determining whether to accept the evidence and, if you do accept it, the weight that you accord to that evidence.

One of the reasons that identification evidence is potentially unreliable is that while a witness may honestly believe that his or her evidence is accurate when he or she is actually mistaken. And the mistaken evidence of a witness may be convincing.

[*If there are multiple identification witnesses, add the following shaded section.*]

You should also realise that a number of different witnesses may all be mistaken in their identification.

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[153] Where the relevant identification evidence constitutes similarity evidence, this paragraph will need to be augmented. A suggested substitute is "First, the witness must have observed somebody [*insert relevant act*]. Second, the witness must have retained an image of that person in his or her mind until the time of the identification. Third, the witness must have later seen the accused, or a picture of the accused, and identified a similarity between him or her and the person seen [*insert relevant act*]."

[*If the risk of mistaken identification evidence leading to an innocent person being convicted is relevant, add the following shaded section. Note that this will not be relevant in the case of negative identification evidence.*]

The experience of the law has shown that witnesses have given mistaken identification evidence which has resulted in innocent people being convicted.

I will now turn to discuss the significant matters in this case which may make the identification evidence unreliable.

Significant Matters that May Make the Evidence Unreliable

Having given you that general warning about identification evidence, I now want to look at some of the specific factors that may affect the reliability of the evidence in this case.

Here, there are [*insert number of significant factors*] that may be relevant to your assessment of the reliability of the identification evidence. These are [*insert significant factors affecting reliability, e.g. the circumstances in which the offender was observed; the characteristics of the witness who gave evidence; and the way in which the accused was identified*].

You should examine each of these factors closely when deciding whether to accept the identification evidence.

I will now look at these factors in more detail.

Circumstances of Observation

[*If the circumstance in which the witness made his or her observation is a significant matter which may make the evidence unreliable, add the following shaded section*.]

You should examine the circumstances in which the offender was observed. You should consider what opportunity for accurate observation existed. Some of the questions you should ask yourself include:

[*Isolate and identify the significant matters raised by counsel regarding the observation which may make the evidence unreliable, or which are otherwise necessary to include*.]

- For how long did the witness observe the person?
- How far away was the witness from what s/he was observing?
- What was the angle of observation? For example, did the witness see the person's face or only his/her back?
- Had the witness ever seen the person s/he was observing before?
- What was the light like?
- Did anything get in the way of the witness's view, such as passing people or traffic?
- Did the witness have a reason for trying to observe the person involved and to remember his/her characteristics?
- Did the person observed have any distinguishing features or characteristics which would make it likely that the witness would remember him/her? For example, did s/he have a scar or a tattoo?

Factors Concerning the Witness

[*If there are significant matters concerning the witness who made the identification which may make the evidence unreliable, add the following shaded section.*]

You must also consider the characteristics of the witness who gave the identification evidence. In that context, some of the questions you should ask yourself include:

[*Isolate and identify any significant witness-related factors raised by counsel that may make the evidence unreliable, or which are otherwise necessary to include.*]

- Is it possible to assess the quality of this witness as an observer?
- Was the witness stressed or fearful at the time of the observation? If so, what effect would this stress have had on him/her? For some people, their powers of observation increase under stress. Others "black out" and their powers of observation diminish. You need to decide how the witness is likely to have reacted in this case.
- Were there any other factors that could have affected the witness's powers of observation, such as drugs or alcohol consumption, or fatigue?

Factors Concerning the Identification

[*If the way in which the accused was identified raises significant matters which may make the evidence unreliable, add the following shaded section.*]

You must consider the way in which NOA was identified/similarities between the person observed and NOA were noted. Some of the questions you should ask yourself include:

[*Isolate and identify any significant factors about the identification process raised by counsel that may make the evidence unreliable, or which are otherwise necessary to include.*]

- Did the witness give a description of the offender before identifying the accused? If so, does the description match the accused?
- Is the witness relying too heavily on a particular memorable feature or characteristic of the accused in identifying him/her?
- How long was there between the incident and the identification? Was it likely that the witness's memory was affected by any delay?
- Was the identification process conducted fairly? For example, did the other people in the [parade/photoboard] look sufficiently similar to the accused?
- Did the witness hear a description or see a picture of the accused before attempting to identify the offender? [*If this occurred, and the risk of the "displacement effect" occurring is significant, the judge will need to warn the jury about that effect. See* 4.12.2 Charge: Photographic Identification *for an example of such a warning.*]
- Was the witness influenced in any other way to identify the accused – for example, by the behaviour of the police?

Familiarity with the Accused

[*If there are matters concerning the familiarity of the witness who made the identification with NOA, and these are significant matters which may make the evidence unreliable, add the following shaded section.*]

You must consider how well the witness knew the accused. Some of the questions you should ask yourself include:

[*Isolate and identify any significant factors about the witness's familiarity with the accused raised by counsel that may make the evidence unreliable, or which are otherwise necessary to include.*]

- How did the witness know the accused?
- How often and in what circumstances had the witness previously seen the accused? Was s/he very familiar with the accused's appearance?
- When had the witness last seen the accused? Had the accused's appearance changed since that time?

Quality of the Material

[*If the identification involves a non-expert giving comparison evidence, and the quality of the material being compared is a significant factor which may make the evidence unreliable, include the following shaded section.*]

You must consider the quality of the material which the witness was comparing. Some of the questions you should ask yourself include:

[*Isolate and identify any significant factors raised by counsel about the comparison made that may make the evidence unreliable, or which are otherwise necessary to include.*]

- [*If two recordings are being compared*] In what circumstances were the recordings made? Were those circumstances very different?
- [*If one recording is being compared with a live voice*] Does the fact that the witness compared a recording with a live voice affect his/her ability to make an accurate comparison?
- Was there enough material to enable the witness to make a proper comparison?

Nature of the Voices

[*If the identification involves a non-expert giving comparison evidence, and the nature of the voices being compared is a significant matter which may make the evidence unreliable, include the following shaded section.*]

You must consider the nature of the voices that were compared by the witness. Some of the questions you should ask yourself include:

[*Isolate and identify any significant factors raised by counsel about the comparison made that may make the evidence unreliable, or which are otherwise necessary to include.*]

- Are the voices particularly distinctive?
- Did the voices use similar words? Did they have a similar manner of speaking?
- Is it possible that either or both of the speakers were trying to disguise their voice?
- [*If the voices spoke with a foreign accent*] Did the witness rely too heavily on the fact that both voices spoke with a foreign accent? It can be very difficult to distinguish between two unfamiliar voices that speak with a similar accent.

Limitations of Similarity Evidence

[*If the identification evidence involved the witness saying that the accused appeared to be similar to the relevant person, include the following shaded section.*]

You must consider the limitations of what NOW said. S/he has not given evidence actually identifying NOA as the person who [*insert relevant act*]. Instead, s/he has given evidence that NOA resembles the person who [*insert relevant act*].

Even if you accept this evidence as true, it only shows that NOA's [appearance/voice/other characteristic] is consistent with that of the offender. It does not show that s/he is the offender. You must not conclude from this evidence alone that NOA was the person who [*insert relevant act*].

I am not saying that you should ignore this evidence of similarity between NOA and the offender. You can use it together with the other evidence in the case to help you determine whether or not NOA is the person who [*insert relevant act*]. However, by itself this evidence is not enough to identify NOA as the offender.

Miscellaneous Factors

[*If there are any other significant factors that do not fall within categories already discussed, add the following shaded section*.]

Finally, you should consider any other significant factors that may affect the reliability of the identification evidence. In this case, [*insert evidence about any other significant factors raised by counsel that may reasonably be regarded as undermining the reliability of the evidence, or which are otherwise necessary to include*].

Summary

To summarise, it is important that you take care in determining whether you accept identification evidence, and if you do accept it, in deciding what weight to give to that evidence.

If, after careful examination of the identification evidence, and in light of all of the circumstances and other evidence given in the case, you find that the accused was correctly identified, then you can use the evidence in reaching your verdict.

Last updated: 29 June 2015

4.12.2 Charge: Photographic Identification

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If the accused has been identified from a photograph, add this section where indicated in the primary charge.

In this case, as NOA was [initially] identified from a photograph, I need to give you an additional warning about photographic identification evidence.

This sort of evidence may be unreliable due to the differences between photographs and real life. For example, photographs are two-dimensional, and do not show the way a person moves, the range of their facial expressions, their body shape, or many of the other characteristics that can help you to identify a person.

The photograph used to identify the accused may also have been taken in very different circumstances from those in which the offender was observed. For example, the light in the photograph may be much better than it was at the time of the crime.

These factors can increase the risks of misidentifying the offender, who may look like the accused as seen in a photograph, but may look different when viewed face-to-face. You should therefore treat photographic identification evidence with special care.

Lack of Witnesses

[*If the conduct of the identification process is in issue, the following shaded section may be added.*]

There is an additional problem with photographic identification. As the accused was not present during the identification process, s/he is unlikely to have any first-hand information about the way in which his/her photograph was selected. Instead, s/he can only rely on the cross-examination of the people who were present to gain any information about the conditions in which the identification took place, and what safeguards against error were taken. You should take this disadvantage into account when considering the evidence.

The "Displacement Effect"

[*If the displacement effect is in issue, add the following shaded section.*[154]]

I must also warn you about what is known as the "displacement effect". This effect can occur when a person is shown a photograph of a suspect before identifying them in a parade. The witness's memory of the person observed committing the crime can be effectively replaced by a memory of that photograph. In any later face-to-face identification, there is a risk that the witness might unintentionally identify the accused because his/her appearance matches the remembered photograph, rather than matching the person originally seen. In other words, the witness will have identified the person previously seen in the photograph, instead of the person seen committing the crime.

Because of this risk, it may be dangerous for you to treat the identification parade evidence as having any significant value.

Section 115 Direction (The "Rogues' Gallery Effect")

[*If a* request for a s 115 direction *has been made by the defence, or the jury has become aware that the accused was identified by reference to a photograph held by police and the judge finds it necessary to address any possible prejudice, one of the following directions should be given*.]

[*If the photograph was taken before the accused was taken into custody, add the following shaded section.*]

You may have noticed that NOA was identified from a photograph held by the police. You are not to attach any significance to this fact. The police have photographs of many different people for a variety of reasons. You must not assume that, because the police had a photograph of NOA, s/he has a criminal record or has previously been charged with an offence. In fact, you must not draw any conclusions from the fact that the police had a photograph of NOA.

[*If the photograph was taken after the accused was taken into custody, add the following shaded section.*]

You may have noticed that NOA was identified from a photograph held by the police. You are not to attach any significance to this fact. That photograph was made after NOA was taken into custody. It

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[154] While this part of the charge has been designed for use in cases where there is a risk that a witness's memory of the offender has been displaced by a memory of a photograph, a modified version may be used where there is a risk that the witness's memory has been displaced by something else.

was not a photograph that the police already held.

If an Identification Parade Could Reasonably Have Been Held

[*If the judge finds that an identification parade could reasonably have been held instead of identifying the accused from photographs, add the following shaded section.*]

In this case, it would have been possible for the police to hold an identification parade instead of having NOW identify NOA from a photograph.

In an identification parade, a witness is asked whether they can identify the offender from a selection of people resembling the accused. This process has two main advantages over identification from photographs.

First, the witness is identifying an actual person, rather than a two-dimensional representation of that person. S/he is able to see all of the accused's physical characteristics, such as the way s/he moves and his/her facial expressions. This makes it more likely that the witness will accurately identify the offender.

Secondly, as the accused is present at an identification parade, s/he is able to obtain first-hand information about how it is carried out. S/he will be able to see what steps are taken to make sure that it is conducted fairly, rather than having to rely on cross-examination of the people present.

In this case, NOA was deprived of these benefits. S/he may also have lost any advantage s/he might have gained if an identification parade was inconclusive. You should take these disadvantages into account when assessing the evidence against NOA.

Last updated: 1 July 2013

4.12.3 Charge: Single Suspect Identification

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If the witness was presented with a single suspect to identify, add this section when the identification evidence is given, and again where indicated in the primary charge.

In this case, NOA was identified [*insert circumstances of identification*].

This type of identification is extremely unreliable, due to the fact that the witness is given just one option, instead of being provided with a selection of suspects to choose from. This greatly increases the likelihood that s/he will mistakenly identify the single suspect as the offender, relying on the fact that the police had narrowed down the selection to that one person.

It may be dangerous to rely on an identification made in these circumstances, or to give such evidence any significant value.

Last updated: 1 July 2013

4.12.4 Charge: Court Identification

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If the accused was identified in the precincts of the court, add this section when the identification evidence is given, and again where indicated in the primary charge.

In this case, NOA was identified [*insert circumstances of identification*].

This type of evidence is extremely unreliable, due to the risk that a witness will leap to the conclusion that the person they are being asked to identify must have been involved in the crime, because otherwise they would not have been at the court. Instead of comparing the person seen at the court with their memory of the person observed committing the crime, there is a danger that the witness may identify the accused on the basis of this false assumption. It may therefore be dangerous to rely on an identification made in these circumstances.

Last updated: 1 July 2013

4.12.5 Charge: Dock Identification

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If a dock identification took place, add this section when the identification evidence is given, and again where indicated in the primary charge.

In this case, NOA was identified here in court.

This type of identification is of no value to the issue of whether or not NOA committed the offence[s] charged. This is because, when asked in court to identify the person who committed the crime, the witness will inevitably point out the person who is on trial. NOA was only identified in this way as a formality, and you should not rely on that identification for any purpose.

Last updated: 1 July 2013

4.13 Opinion Evidence

4.13.1 General Principles of Opinion Evidence

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What is Opinion Evidence?

1. The "opinion rule" provides that "evidence of an opinion" is generally inadmissible (*Evidence Act 2008* s 76).[155]
2. While the *Evidence Act 2008* does not define the term "opinion", it has been held that it refers to an "inference drawn from observed and communicable data" (*Allstate Life Insurance Co v ANZ Banking Group Ltd (No 5)* (1996) 64 FCR 73) or "evidence of a conclusion, usually judgmental or debatable, reasoned from facts" (*R. W. Miller v Krupp Australia Pty Ltd* (1992) 34 NSWLR 129. See also *Hodgson v Amcor Ltd* [2011] VSC 272).
3. Evidence of an "opinion" can be distinguished from evidence of a "fact". Where a witness simply gives evidence of something he or she observed, or of a particular state of past or present affairs, that will not be opinion evidence (see, e.g. *Bodney v Bennell* (2008) 167 FCR 84; *Australian Securities and Investments Commission v Vines* [2003] NSWSC 1095; *Hodgson v Amcor Ltd* [2011] VSC 272).

[155] See "Admissibility of Opinion Evidence" below for more information about the opinion rule.

4. Evidence of an "opinion" can also be distinguished from evidence of "experience". Evidence of a witness' experiences will not be opinion evidence, unless the witness proceeds to draw some inference from those experiences (see, e.g. *Clark v Ryan* (1960) 103 CLR 486).[156]

5. Hearsay evidence of an opinion is itself opinion evidence (*R v Whyte* [2006] NSWCCA 75; *Jackson v Lithgow City Council* [2008] NSWCA 312. But cf *Australian Securities and Investments Commission v Rich* (2005) 216 ALR 320).

6. The following matters have been held *not* to be opinion evidence for the purposes of the *Uniform Evidence Acts*:

    - Evidence given by anthropologists of their observations (*Bodney v Bennell* (2008) 167 FCR 84).
    - Evidence given by expert witnesses regarding their observations of an attempted reconstruction of an accident (*Collaroy Services Beach Club Ltd v Haywood* [2007] NSWCA 21).
    - Evidence given by witnesses about what they would have done in a hypothetical situation (*Allstate Life Insurance Co v ANZ Banking Group Ltd (No 5)* (1996) 64 FCR 73; *Hughes Aircraft Systems International v Airservices Australia* (1997) 80 FCR 276; *Seltsam Pty Ltd v McNeill* [2006] NSWCA 158).
    - Evidence given by an expert witness about how a certain type of professional would generally act in particular circumstances (*Australian Securities and Investments Commission v Vines* [2003] NSWSC 1095).[157]
    - Evidence given by a member of an organisation about the information available to that organisation (*Bank of Valletta PLC v National Crime Authority* (1999) 90 FCR 565).
    - Evidence describing the workings of a complex piece of equipment, such as a computer (*Hodgson v Amcor Ltd* [2011] VSC 272).

Identification Evidence

7. It appears that identification evidence may be either evidence of fact *or* evidence of opinion, depending on the circumstances:

    - Where there is little risk of misidentification (e.g. where the witness identifies a person, clearly depicted in a studio photograph, as his or her spouse), identification evidence will normally be regarded as a statement of fact;
    - Where a real risk of misidentification is present (e.g. where the identification is made from a photograph which does not clearly depict the person who is its subject),[158] it will usually be appropriate to classify identification evidence as opinion evidence (see, e.g. *R v Leung* (1999) 47 NSWLR 405; *Smith v R* (2001) 206 CLR 650 (Kirby J); *R v Drollett* [2005] NSWCCA 356; *R v Marsh* [2005] NSWCCA 331).

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[156] For example, where a witness with experience of how a particular type of vehicle behaves in certain conditions gives evidence of that experience, it will not be opinion evidence (*Clark v Ryan* (1960) 103 CLR 486).

[157] Whether or not this type of evidence will be opinion evidence will depend on the precise nature of the evidence given. It will not be opinion evidence where it is seen to be evidence of fact about professional practices or professional standards.

[158] See 4.12 Identification Evidence for a discussion of the many risks inherent in the process of identification.

8. This means that, in every case involving identification evidence, the trial judge must examine the nature of the evidence proposed to be adduced, and all of the relevant circumstances, to determine whether the evidence is opinion evidence (and is thus subject to the admissibility provisions outlined below) (*R v Drollett* [2005] NSWCCA 356).

Evidence in the Form of an Opinion

9. The opinion rule refers to "evidence of an opinion". It has been suggested that this phrase covers both of the following:
    - Evidence which is *substantively* an opinion (i.e. an inference drawn from observed and communicable data); and
    - Evidence of a fact or observation which is given in the *form* of an opinion (e.g. evidence from a witness that "in his or her opinion" another person was intoxicated) (S Odgers, *Uniform Evidence Law* (8th ed, 2009) [1.3.4090]).

Admissibility of Opinion Evidence

10. The opinion rule states that evidence of an opinion is not admissible to prove the subject matter of the opinion (*Evidence Act 2008* s 76).[159]
11. There are two main exceptions to the opinion rule:
    - Opinion evidence from an "expert" witness is admissible if it is wholly or substantially based on specialised knowledge that the witness has obtained from training, study or experience (*Evidence Act 2008* s 79).[160]
    - Opinion evidence from a "lay" witness is admissible if it is based on what the witness saw, heard or otherwise perceived about a matter or event, and evidence of the opinion is necessary to obtain an adequate account or understanding of the witness' perception of the matter or event (*Evidence Act 2008* s 78).
12. Other exceptions to the opinion rule include:
    - Summaries of voluminous or complex documents (s 50(3));
    - Evidence that is admitted to prove something other than the subject matter of the opinion (s 77);[161]
    - Evidence about the existence or content of Aboriginal and Torres Strait Islander traditional laws and customs (s 78A);
    - Evidence of an admission (s 81);
    - Evidence of matters which are exceptions to the rule that usually excludes evidence of judgments and convictions (s 92(3)); and

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[159] Section 76 states: "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

[160] This includes specialised knowledge of child development and child behaviour, including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse (*Evidence Act 2008* s 79(2)).

[161] For example, where the evidence is admitted to establish the consistency of the witness' conduct, rather than the truth of his or her assertions.

- Character evidence (ss 110–111) (see 4.3 Character Evidence).

Evidence Must Be Relevant

13. Opinion evidence, like any other evidence, is only admissible if it is relevant (*Evidence Act 2008* ss 55–56).

14. The relevance of opinion evidence may depend upon an assessment of its factual basis. Opinion evidence will not be relevant if it does not have a rational factual basis (*Evidence Act 2008* s 55; *R v Panetta* (1997) 26 MVR 332).

Abolition of Common Knowledge and Ultimate Issue Rules

15. Opinion evidence may not be excluded simply on the basis that it is about:

    - A matter of common knowledge; or
    - An ultimate issue in the proceeding (*Evidence Act 2008* s 80).

16. Although the effect of this provision is to abolish the common knowledge and ultimate issue rules, it should be noted that s 80 does not make any evidence admissible. It simply provides that opinion evidence is *not inadmissible* on the specified bases (*Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640).

17. This means that evidence which is about a matter of common knowledge, or which relates to the ultimate issue in a proceeding, should not always be admitted. Such evidence may be inadmissible on another basis (e.g. because it is not wholly or substantially based on specialised knowledge, and thus does not comply with the requirements of s 79), or it may be excluded at the judge's discretion under ss 135 or 137 (see, e.g. *R v GK* (2001) 53 NSWLR 317; *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640; *Yates Property Corp v Boland* (1998) 85 FCR 84).

Expert Evidence in Homicide Cases Involving Family Violence

18. In homicide cases involving family violence, evidence may be led to show:

    - The cumulative effect of family violence on a person, including the psychological effect;
    - The social, cultural or economic factors that may affect a person affected by family violence;
    - The nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
    - The psychological effect of violence on people who are or who have been in a relationship affected by family violence; and
    - The social or economic factors that affect people who are or who have been in a relationship affected by family violence (*Crimes Act 1958* s 9AH).

Identification of Factual Basis

19. At common law, when expert opinion evidence is admitted:

    - The witness must state the factual basis for any conclusions he or she draws; and
    - The witness should explain how he or she has reached those conclusions (*Clark v Ryan* (1960) 103 CLR 486; *R v Bonython* (1984) 38 SASR 45; *R v BDX* (2009) 24 VR 288).

20. This allows the jury to determine whether the opinion has any value in light of their findings of fact, and to assess the weight to be given to that opinion (*Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313; *R v GK* (2001) 53 NSWLR 317).

21. While the *Evidence Act 2008* does not require witnesses to state the factual basis for their conclusions or to demonstrate their reasoning process, in the other *Uniform Evidence Act* jurisdictions they have generally been required to do so (see, e.g. *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42; *Seven Network Ltd v News Ltd (No 15)* [2006] FCA 515).

22. Thus, it may remain prudent to require expert witnesses to identify the facts they have relied upon to form their opinion (see, e.g. *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313; *R v GK* (2001) 53 NSWLR 317; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705. See also *R v Anderson* (2000) 1 VR 1; *R v Ryan* [2002] VSCA 176; *R v Johnson* (1994) 75 A Crim R 522).

23. Experts should also be required to explain how their opinion was reached, and the application of their expertise (*R v Johnson* (1994) 75 A Crim R 522; *R v Haidley & Alford* (1984) VR 229).

24. Experts may consider matters of common knowledge, as well as their specialised knowledge, when forming their opinion. They should explain that they are relying on this accumulation of knowledge, as well as the way in which they acquired that knowledge (*Velevski v R* (2002) 187 ALR 233; *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313).

25. The need to identify and explain the factual basis of an expert opinion will only arise where that basis is contested. If evidence is adduced without objection, the trial judge may ordinarily assume that all matters crucial to the admissibility of the evidence are conceded by the opposing party (*Sydneywide Distributors Pty Ltd* v *Red Bull Australia Pty Ltd* (2002) 234 FCR 549; [2002] FCAFC 157).

26. While the failure of an expert to explain his or her reasoning process will not necessarily render the evidence inadmissible, it will usually mean that it is less persuasive for the jury (*HG v R* (1999) 197 CLR 414 (Gaudron J). See also *Guide Dog Owners' & Friends' Association Inc v Guide Dog Association (NSW & ACT)* (1998) 154 ALR 527).

Hearsay Evidence Admitted as the Basis of an Opinion

27. Witnesses' opinions will often be based on out-of-court representations. Evidence of those representations will generally be admissible to explain the assumptions on which an opinion is based (see, e.g. *R v Lawson* [2000] NSWCCA 214).[162]

28. If admitted for this purpose, an out-of-court representation may also be used to prove the existence of any facts asserted in that representation (*Evidence Act 2008* s 60).

29. It has been suggested that, due to the potential unfairness that may follow from the application of this rule, it may be preferable to avoid admitting evidence of out-of-court representations solely to explain the assumptions on which an opinion is based (*R v Lawson* [2000] NSWCCA 214 (Sperling J)).

30. If such evidence is admitted, it may be desirable to use the discretion in s 136 to limit the use that may be made of such evidence (*Roach v Page (No 11)* [2003] NSWSC 907. But see *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424; *Alphapharm Pty Ltd v H Lundbeck A/S* [2008] FCA 559; *Bodney v Bennell* (2008) 167 FCR 84).

Use of Opinion Evidence

31. The precise way in which the jury may use opinion evidence will vary depending on the nature of the evidence given and the purpose for which it was admitted (see "Admissibility of Opinion Evidence" above).

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[162] As this evidence is not being admitted to prove the existence of the facts asserted by the representation, it is not captured by the hearsay rule: *Evidence Act 2008* s 59(1).

32. This topic addresses the uses that may be made of opinion evidence that is admitted under *Evidence Act 2008* s 79 (expert opinion evidence), s 78 (lay opinion evidence) and s 77 (evidence admitted for a different purpose).

Expert Opinion Evidence

33. The jury may use expert opinion evidence:[163]

    - To understand other evidence in the case; or
    - As the basis for drawing an inference (*Taylor v R* (1978) 22 ALR 599; *Farrell v R* (1998) 194 CLR 286).

34. Where an expert adopts an industry text or journal as an authoritative source, the jury may use any information contained in the text or journal as facts in the case if:

    - They accept that the expert has adopted the document; and
    - They accept the expert's evidence about that document. (*PQ v Australian Red Cross Society & Ors* [1992] VR 19).

Lay Opinion Evidence

35. Lay opinion evidence[164] may help the jury to understand the matter or event about which the witness gave evidence (see, e.g. *R v Leung* (1999) 47 NSWLR 405).

Opinion Evidence Admitted for a Different Purpose

36. If evidence of an opinion is relevant and admissible for a purpose other than proving the existence of the fact which is the subject of the opinion, the exclusionary opinion rule (s 76) does not apply (*Evidence Act 2008* s 77).[165]

37. In such cases, the evidence may *also* be used to prove the existence of the fact which is the subject of the opinion (*Allstate Life Insurance Co v ANZ Banking Group Ltd (No 5)* (1996) 64 FCR 73; *Hughes Aircraft Systems International v Airservices Australia* (1997) 80 FCR 276).

38. In some cases it will be undesirable for the evidence to be used in this way. In such circumstances it may be appropriate to use the discretion in s 136 to limit the use that may be made of such evidence (see, e.g. *Murex Diagnostics Australia Pty Ltd v Chiron Corporation* (1995) 62 FCR 424; *Perpetual Trustee Company Ltd v George; Estate of Conacher (No 2)* 28/11/97 NSW SC; *Roach v Page (No 11)* [2003] NSWSC 907; *James v Launceston City Council* (2004) 13 Tas R 89; [2004] TASSC 69).

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[163] Evidence that is wholly or substantially based on specialised knowledge that the witness has obtained from training, study or experience (*Evidence Act 2008* s 79).

[164] Evidence that is based on what the witness saw, heard or otherwise perceived about a matter or event, which is necessary to obtain an adequate account or understanding of the witness' perception of the matter or event (*Evidence Act 2008* s 78).

[165] For example, opinion evidence may be admitted to establish the consistency of a witness' conduct, rather than the truth of his or her assertions.

Jury Directions

39. The need for a direction on opinion evidence depends on whether a direction is sought or whether there are substantial and compelling reasons for giving a direction in the absence of a request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required. The following sections describe the content of directions, if the judge gives directions on opinion evidence.

40. The content of the jury directions will depend on the nature of the evidence given and the ways in which the jury may use that evidence (see "Use of Opinion Evidence" above).

41. No guidance has yet been provided about the directions to be given in relation to lay opinion evidence. The remainder of this topic therefore only addresses directions to be given in relation to expert opinion evidence.

Directions About Expert Opinion Evidence

42. Expert opinion often involves unfamiliar and technical matters. Judicial directions should ensure that the jury can understand the evidence and apply it to the facts of the case (*Velevski v R* (2002) 187 ALR 233; *R v Gemmill* (2004) 8 VR 242).

43. The judge's directions on opinion evidence should explain the significance of the evidence in the context of the case, and give any special directions needed to enable the jury to assess and use the evidence that has been led (*Taylor v R* (1978) 22 ALR 599).

44. The judge should ensure that the jury understands that, generally, only an expert is permitted to give evidence of his or her opinion. Other witnesses are generally limited to giving evidence of their own observations (*Taylor v R* (1978) 22 ALR 599; *Farrell v R* (1998) 194 CLR 286; *Ramsay v Watson* (1961) 108 CLR 642).

45. Where an expert witness has given evidence about the "ultimate issue",[166] the judge should make it clear that it is the jury's role to determine the issue (Australian Law Reform Commission, *Evidence (Interim)*, Report 26 (1985) vol.1 para 743. See also *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640).

46. It is for the jury to decide whether an opinion is credible and what weight it should be given (*R v Anderson* (2000) 1 VR 1; *Velevski v R* (2002) 187 ALR 233).

47. The judge should tell the jury that they are entitled to reject the evidence if they are not satisfied that the science or the testing is sufficiently accurate, reliable or dependable. The jury is not bound by the opinion of experts, and must not be overawed by the scientific appearance of their opinions (*R v Pantoja* (1998) 88 A Crim R 554; *R v Karger* (2002) 83 SASR 135; *United States v Baller* (1975) 519 Fed 2d 463; *R v Gilmore* [1977] 2 NSWLR 935; *R v Duke* (1979) 22 SASR 46; *R v Kotzmann* [1998] 2 VR 123; *R v Parker* VicCA 10/8/1995).

48. Where a witness has been cross-examined about the nature and quality of his or her expertise, the jury should be told that a witness' competency and credit are relevant matters to take into account when determining the weight to be given to his or her evidence (see, e.g. *Polycarpou v Australian Wire Industries Pty Ltd* (1995) 36 NSWLR 49).

49. The jury should be told that expert evidence is only as valuable as the facts supporting the evidence. That evidence only has probative value if the jury accepts the facts that form the basis of the evidence (*R v Kotzmann* [1998] 2 VR 123).

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[166] As the ultimate issue rule has been abolished (*Evidence Act 2008* s 80), such evidence may now be admissible. See "Abolition of Common Knowledge and Ultimate Issue Rules" above.

50. The jury should be directed to examine the basis on which the expert formed his or her opinion, and to determine whether the facts constituting the basis have been proven (*Nguyen v R* (2007) 173 A Crim R 557).

51. The judge should tell the jury to consider the following matters when they evaluate the evidence of experts:

    - The witness' demeanour;
    - The way the opinion is expressed;
    - The quality of the reasons for the opinion;
    - The facts offered by the expert in support of his or her conclusions;
    - The witness' response to cross-examination;
    - Whether the witness appeared to be impartial, or whether s/he was biased and overstated his or her evidence (*R v Anderson* (2000) 1 VR 1; *Taylor v R* (1978) 22 ALR 599).

Unanimous Expert Evidence

52. Where there is unanimous agreement amongst expert witnesses, the jury should be told that they are not bound by the experts' opinion. However, they may only reject that evidence if:

    - The facts underlying the opinion are not present;
    - The process of reasoning leading to the opinion is unsound; or
    - There is some factor that casts doubt on the validity of the opinion expressed (*Taylor v R* (1978) 22 ALR 599; *R v Matusevich & Thompson* [1976] VR 470; *R v Matheson* [1958] 1 WLR 474; *R v Hilder* (1997) 97 A Crim R 70; *R v Klamo* (2008) 18 VR 644).

Conflicting Expert Evidence

53. Where the evidence of expert witnesses conflicts, the jury should be told that they are entitled to prefer the evidence of one expert over another. The role of the jury is to select the evidence that they shall accept, and this includes expert evidence (*Velevski v R* (2002) 187 ALR 233; *Chamberlain v R (No 2)* (1983) 153 CLR 521; *R v Gemmill* (2004) 8 VR 242; *R v GK* (2001) 53 NSWLR 317; *R v NCT* (2009) 26 VR 247).

54. It is therefore not appropriate for the judge to direct the jury that one expert is superior to another. This intrudes on the role of the jury (*R v Gemmill* (2004) 8 VR 242).

55. In exceptional cases, the jury may be incapable of resolving a conflict between experts on matters of science. The judge should tell the jury that they must not accept disputed scientific evidence that is unfavourable to the accused unless there is a good reason to reject the defence evidence (*Velevski v R* (2002) 187 ALR 233).

56. Where the jury's decision about which expert to accept is likely to determine the accused's guilt or innocence, the judge may tell the jury that they may only accept the evidence of the expert who is adverse to the accused if they are satisfied beyond reasonable doubt that his or her opinion is correct (*R v Anderson* (2000) 1 VR 1; *R v Sodo* (1975) 61 Cr App R 131).

57. A direction that the jury must be satisfied beyond reasonable doubt that the prosecution expert is correct should not be given in all cases. Such a direction is only required when there are conflicting experts, and resolution of that conflict by the jury is likely to determine the case against the accused. In other cases the direction should not be given, as it will tend to isolate one piece of evidence and invite the jury to decide the case solely on the basis of that evidence (*R v Middleton* [2000] WASCA 213; *R v Anderson* (2000) 1 VR 1; *R v Nicholas* [1989] Tas R (NC) N24).

Expert Evidence About Witness Credibility or Reliability

58. Where expert evidence about a witness' reliability is given, the judge should clearly direct the jury that they must not allow the expert to usurp their function of assessing the credibility of witnesses (*Farrell v R* (1998) 194 CLR 286).

59. If the evidence of the expert is limited to suggesting that the witness may suffer a disorder that affects his or her reliability, the judge may comment on the limited probative value of that evidence (*Farrell v R* (1998) 194 CLR 286).

Expert Evidence About Mental Impairment

60. Expert evidence will usually be necessary to establish a defence under s 20 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

61. In such cases, the judge should relate the expert evidence to the test for mental impairment (*Taylor v R* (1978) 22 ALR 599; *Mizzi v R* (1960) 105 CLR 659. See Mental Impairment).

62. While the jury is not bound by the expert evidence, the judge must ensure that they do not ignore unchallenged expert evidence and substitute their common sense view of the evidence (*R v Wiese* [1969] VR 953; *R v Gemmill* (2004) 8 VR 242).

63. The judge should warn the jury that, when assessing the expert evidence, they should not assume that the accused would reason in the same way as a person without a mental illness. Common assumptions about sane behaviour may be wrong, and the jury should carefully consider any expert evidence (*R v Gemmill* (2004) 8 VR 242; *Taylor v R* (1978) 22 ALR 599; *R v Matusevich & Thompson* [1976] VR 470; *Mizzi v R* (1960) 105 CLR 659; *R v Weise* [1969] VR 953).

Expert Evidence About Child Sexual Abuse

64. A person who has specialised knowledge about child development and child behaviour may give evidence relating to the development and behaviour of children generally, as well as about the development and behaviour of children who have been victims of sexual offences (or offences similar to sexual offences) (*Evidence Act 2008* s 79(2)).

65. This evidence may be relevant to a range of matters in a trial, including testimonial capacity, the credibility of a child witness, the beliefs and perceptions held by a child, and the reasonableness of those beliefs and perceptions (Explanatory Memoranda to the *Evidence Act 2008*).

66. This evidence may also assist the jury to assess other evidence in the case, or to address misconceived notions about children and their behaviour (Explanatory Memoranda to the *Evidence Act 2008*).

67. Such evidence should usually only relate to the general behaviour and development of children who are victims of sexual offences. The evidence is designed to educate the jury and correct erroneous beliefs by showing that "counter-intuitive" behaviour does not detract from the complainant's credibility. However, it will rarely be appropriate for a witness to give opinion evidence on whether the complainant's behaviour makes it more likely that the complainant has been the victim of a sexual offence (*MA v R* (2013) 40 VR 564).

68. However, the admission of such evidence might invite the jury to improperly reason as follows:

    - Abuse of children elicits certain behavioural responses;
    - The complainant exhibited some or all of those behaviours;
    - Therefore the complainant is likely to be telling the truth about having been abused, or is likely to have been abused, or was abused (Australian Law Reform Commission, *Uniform Evidence Law*, Report 102 (2005) para 9.157).

69. It may therefore be appropriate in cases where such evidence is admitted to direct the jury not to reason in this way (Australian Law Reform Commission Report 102, *Uniform Evidence Law*, para 9.157).

Last updated: 29 June 2015

4.13.1.1 Charge: Uncontested Expert Evidence

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This charge may be given where expert witnesses give opinion evidence about a matter on which they unanimously agree.[167]

See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

I must now give you directions about expert evidence.

[*Insert names of expert witnesses*] were asked by the [prosecution/defence] to give evidence about [*describe issue*] because they are experts in the field. [*If appropriate, describe the experts' fields of expertise, qualifications and experience.*]

In the course of giving evidence, these witnesses expressed their opinions about [*describe issue and summarise experts' opinions*].

Ordinarily, witnesses are not allowed to give their opinions in court. They must confine their evidence to their own observations. This is because it is you who are the judges of facts, and so usually it is only your opinion that is relevant.

However, the law says that people with specialised knowledge or training are allowed to give their opinions about matters within their field of expertise, if that may assist you in making your decision.

In this case, the evidence of [*insert names of expert witnesses*] may assist you in determining [*explain permissible uses of the expert evidence and any limitations on use*].

Role of Jury

You are not required to accept NOW's opinion. You are the judges of fact in this case, and even though NOW are experts in their fields, their opinions are merely pieces of evidence like any other, which you may accept or reject.

When assessing NOW's opinion, you should consider factors such as [*describe any factors relevant to the assessment of NOW's evidence, such as his/her qualifications, objectivity, or comparison process. Summarise any evidence and/or arguments addressing these factors*].

You will, however, appreciate that the [prosecution/defence] does not challenge NOW's evidence, nor his/her expertise.

[*Where relevant add additional directions concerning particular types of expert evidence. See:*

- 4.13.2.1 Charge: DNA Evidence
- 4.13.3.1 Charge: Fingerprint Evidence
- 4.13.4.1 Charge: Handwriting Evidence (Expert Witness)]

[*If appropriate, summarise and explain any relevant prosecution and defence arguments in relation to the witnesses.*]

Last updated: 29 June 2015

4.13.1.2 Charge: Contested Expert Evidence

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This charge may be given where expert witnesses give conflicting evidence.

See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

[167] Although this charge has been designed for use where multiple witnesses give evidence about which they unanimously agree, it can also be used (with appropriate modifications) in cases where only one expert witness gives uncontested evidence.

I must now give you directions about expert evidence.

[*Insert names of expert witnesses*] were asked by the [prosecution/defence] to give evidence about [*describe issue*] because they are experts in the field. [*If appropriate, describe the experts' fields of expertise, qualifications and experience.*]

In the course of giving evidence, these witnesses expressed their conflicting opinions about [*describe issue and summarise experts' opinions*].

Ordinarily, witnesses are not allowed to give their opinions in court. They must confine their evidence to their own observations. This is because it is you who are the judges of facts, and so usually it is only your opinion that is relevant.

However, the law says that people with specialised knowledge or training are allowed to give their opinions about matters within their field of expertise, if that may assist you in making your decision.

In this case, [*insert names of expert witnesses*] evidence may assist you in determining [*explain permissible uses of the expert evidence and any limitations on use*].

It is for you to determine whose opinion, if any, to accept, and how to use that opinion. You are the judges of fact in this case, and even though these witnesses are experts in their field, their opinions are merely a piece of evidence like any other, which you may accept or reject.

When assessing evidence given by experts, you should consider factors such as the witnesses' qualifications, their demeanour, the way they expressed their opinions, and how they responded to cross-examination. You should also consider whether the witnesses appeared objective, or whether they seemed biased and overstated their evidence.

You should also examine the quality of the reasons offered for an opinion, and the facts that support that opinion. A witness's opinion is only valuable if the facts on which it is based are true.

[*If there is a* dispute about the factual bases *of the experts' evidence, explain the dispute to the jury and summarise the relevant arguments.*]

[*If resolution of the conflict is likely to determine the accused's guilt, add the following shaded section.*]

While it is for you to determine which evidence to accept, I remind you that it is for the prosecution to prove the accused's guilt beyond reasonable doubt. This means that you may only accept [*insert name of prosecution witness*] opinion that [*describe opinion*] if you are satisfied beyond reasonable doubt that his/her opinion is correct.

[*If two or more experts disagree over a matter of science, add the following shaded section.*]

In this case part of the dispute between the witnesses is about scientific matters. [*Summarise dispute*.] If you find that you cannot resolve this conflict by considering the witnesses' evidence, then you must give the accused the benefit of your doubt, and reject [*insert name of prosecution witness*] evidence.You can only accept that evidence if you find there to be a good reason to reject [*insert name of defence witness*] evidence.

[*If appropriate, summarise and explain any relevant prosecution and defence arguments in relation to the witnesses.*]

Last updated: 29 June 2015

4.13.1.3 Charge: Lay Opinion Evidence

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This charge may be given where a lay witness gives opinion evidence.

I must now give you directions about opinion evidence.

NOW was asked by the [prosecution/defence] to give evidence about [*describe matter or event*]. In the course of giving evidence, s/he expressed his/her opinion about [*describe issue and summarise witness' opinion*].

Ordinarily, witnesses are not allowed to give their opinions in court. They must confine their evidence to their own observations. This is because it is you who are the judges of facts, and so usually it is only your opinion that is relevant.

However, the law says that when a person gives evidence about something that s/he witnessed, s/he may give his/her opinion about that thing if it is necessary in order for you to properly understand what it was that s/he witnessed. That is the case here. [*Explain how the opinion evidence may assist the jury to understand the witness' account.*]

You should keep in mind, however, that [*describe opinion*] is only NOW's opinion. You are not required to accept it. You are the judges of fact in this case. NOW's opinion is merely a piece of evidence like any other, which you may accept or reject.

When assessing NOW's opinion, you should examine the quality of the reasons offered for NOW's opinion, and the facts that support that opinion. A witness's opinion is only valuable if the facts on which it is based are true.

You should also consider factors such as [*describe any factors relevant to the assessment of NOW's evidence, such as his/her objectivity. Summarise any evidence and/or arguments addressing these factors*].

Last updated: 1 December 2009

4.13.2 DNA Evidence

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What is DNA Evidence?

1. "DNA evidence" refers to a type of expert evidence in which the DNA of a sample found at a crime scene (a "forensic sample") is compared with a DNA sample provided by the accused (a "reference sample").
2. As DNA evidence is a type of expert evidence, the principles outlined in General Principles of Expert Evidence apply (subject to any modifications noted below).
3. DNA may be examined and compared using:
    - "Nuclear DNA testing" which examines and compares the DNA contained in the nucleus of a cell. Nuclear DNA is unique to an individual (apart from identical twins).
    - "Mitochondrial DNA testing" which examines and compares the DNA contained in the mitochondria. This does not produce a unique result, as mitochondrial DNA is inherited entirely from the mother, and so is the same between siblings (*R v Rye* [2007] VSCA 247);
    - "Y-STR testing" which examines and compares the DNA contained on the Y chromosome. This is comparable to mitochondrial testing, as it is inherited entirely from the father, and so is the same between siblings (*Tilley v The King* [2023] SASCA 80, [81]).

What does DNA evidence establish?

4. The DNA strands in chromosomes are held together by base pairs. There are approximately three billion base pairs, and about three million of those vary between individuals (*R v Noll* [1999] 3 VR 704; *R v Jarrett* (1994) 62 SASR 443).
5. Due to the uniqueness of nuclear DNA, if *all* base pairs of two nuclear DNA samples were tested and matched, it would be possible to say that the samples came from the same person, or an identical twin.

6. However, DNA testing does not measure and compare every single base pair of the relevant samples. It only measures and compares the length of certain strings of base pairs at known positions called "loci" (*R v GK* (2001) 53 NSWLR 317; *R v Pantoja* (1996) 88 A Crim R 554).

7. In Victoria, at least 21 loci (singular, locus) are measured as a standard set. The loci that are measured contain sequences of DNA known as short tandem repeats, which consist of repeated sequences of DNA which are known to be highly variable between people. The number of short tandem repeats at each loci is referred to an allele, and alleles are inherited from the person's mother and father. The frequency of alleles at each loci has been measured.

8. By comparing the alleles present in a forensic sample with a reference sample, forensic scientists can give an opinion if the forensic sample could have come from the person who provided the reference sample. If the reference sample and forensic sample display different alleles at any locus, and that difference cannot be reasonably explained, then the person who provided the reference sample is excluded as a contributor to the forensic sample.

9. If the alleles in the reference sample match those in the forensic sample, then the person who provided the reference sample is not excluded.

10. Using information about the frequency of alleles at each loci within a particular population group, a suitably qualified expert can give evidence about the likelihood ratio. This involves comparing two alternative propositions: 1. That the person who provided the reference sample is the source of the DNA in the forensic sample; and 2. An unknown and unrelated person chosen at random from the relevance population is the source of the DNA in the forensic sample.

11. Expert witnesses may state their conclusions about the likelihood ratio in the following, equally mathematically correct, forms:

    - As a ratio of the number of people who would be expected to have the same DNA profile (e.g. 1 in 100);
    - As a ratio of the number of people who would not be expected to have the same DNA profile (e.g. 99 in 100);
    - As a percentage of the number of people who would be expected to have the same DNA profile (e.g. 1%);
    - As a percentage of the number of people who would not be expected to have the same DNA profile (e.g. 99%);
    - As the number of people in Australia who would be expected to have the same DNA profile; and
    - As the number of people in Australia who would not be expected to have the same DNA profile (see *Aytugrul v R* [2010] NSWCCA 272, [86] per McClelland CJ at CL).

12. As all of these values express the same information there is no reason to prefer one method of expression over another (provided the numbers are accurately calculated). Experts should express their conclusions in a way that the jury can readily comprehend (*Aytugrul v R* [2010] NSWCCA 272 per Simpson and Fullerton JJ (McClelland CJ at CL contra). See also *R v GK* (2001) 53 NSWLR 317; *R v Doheny & Adams* [1997] 1 Cr App R 369).

13. To avoid the risk that the jury may be overwhelmed by exceptionally high probabilities or likelihood ratios, witnesses may be permitted to present the statistical evidence concerning the probability of a match qualitatively rather than quantitatively, by describing the probability of a match with the accused as "strong", "very strong" or "extremely strong" (see *Forbes v R* (2009) 167 ACTR 1).

14. These frequencies are recorded in databases, which have been built up using previous genetic testing. A database (and the consequent results obtained from that database) will only be reliable if it contains a representative sample of the general community or, if the offender is from a specific ethnic group, the relevant ethnic community (*R v Noll* [1999] 3 VR 704; *R v Pantoja* (1996) 88 A Crim R 554).

Samples from More than One Person

15. Where a forensic sample contains DNA material from several people, an expert witness may give evidence on the probability of the profile if a particular person is a contributor to the sample rather than if the sample was the product of a group of randomly selected people.[168]

16. The expert may also give evidence on the likelihood of the DNA having come from one specified set of contributors (e.g., those alleged by the prosecution) rather than another (e.g., those alleged by the defence). This will allow the jury to assess the relative probability of the prosecution and defence hypotheses (*R v Berry & Wenitong* (2007) 17 VR 153).

Standard of Proof

17. Under the *Jury Directions Act 2015*, the only matters that must be proved beyond reasonable doubt are the elements and the absence of any relevant defences (*Jury Directions Act 2015* s 61. See also *Payne v R* [2015] VSCA 291, [13]; *DPP v Roder* [2024] HCA 15, [15]).

18. However, in some cases, DNA evidence may be substantially the only evidence of one or more elements. In such cases, it may be appropriate for the judge to clearly identify for the jury the importance of the evidence. Judges should discuss the issue with counsel and hear submissions on what additional directions or comments are appropriate. One option is to refer to the DNA evidence and direct the jury that it must be satisfied that that evidence proves the element beyond reasonable doubt (*Jury Directions Act 2015* s 61, Example).

Jury Directions

19. DNA evidence is not a class of evidence that calls for special directions in every case (*R v Berry & Wenitong* (2007) 17 VR 153; *R v Karger* (2002) 83 SASR 135).

20. Where DNA evidence is given, the judge must:

    - Ensure that the jury understands the issues and the evidence in the case; and
    - Give any directions that are necessary to ensure that the jury does not misuse the evidence.

21. Judges have traditionally accomplished these goals by giving a careful summary and explaining the limitations of the evidence (*R v Berry & Wenitong* (2007) 17 VR 153; *R v Karger* (2002) 83 SASR 135).

22. Following the *Jury Directions Act 2015*, a judge is not required to summarise the evidence, but must *identify* so much of the evidence the judge considers necessary to assist the jury to determine the issues in the trial (*Jury Directions Act 2015* ss 65, 66).

23. The need for directions on DNA evidence will depend on whether any directions are sought or whether there are substantial and compelling reasons for giving a direction in the absence of any request (*Jury Directions Act* 2015 ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required. See also 3.9 Judge's Summing Up on Issues and Evidence.

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[168] The expert uses population statistics to determine the probability of each string length that is measured. Provided each string length is independent, these probabilities are multiplied together to determine the probability of all string lengths being detected in a random sample.

24. Ordinarily, expert evidence about DNA only needs to inform the jury of the relevant likelihood ratios and provide a basic explanation of what they mean. The language used should be as simple and comprehensible as possible, and the jury needs to focus on what the statistical results are and what those results do and do not tend to prove. It is not necessary to understand the underlying science of DNA profiling (*Tuite v The Queen* [2020] VSCA 318, [113]; *Vyater v The Queen* [2020] VSCA 32).

25. There are, however, some cases where a more detailed explanation of DNA evidence is required. For example, it may be necessary to explain:

    - The jury's role in determining whether a certain person is excluded or not excluded as a possible contributor to the forensic sample;
    - The jury's role in assessing the accuracy and reliability of the expert evidence; and
    - The consequences of finding that a person may have been a contributor to the forensic sample.

26. The judge may also need to address any fallacies put forward by the parties.

Assessing whether a person is excluded or not excluded

27. Where directions are required about whether the accused could be a contributor to the forensic sample, the judge should tell the jury that it is a question of fact for them whether the accused is excluded or not excluded as a possible contributor to the forensic sample (*R v Pantoja* (1996) 88 A Crim R 554; *R v Karger* (2002) 83 SASR 135).

28. This will usually be determined by the jury using the evidence given by the expert witnesses (*R v Pantoja* (1996) 88 A Crim R 554; *R v Karger* (2002) 83 SASR 135).

Was the Testing Accurate and Reliable?

29. Where directions are required about whether the testing was accurate and reliable, the judge should tell the jury that is a question of fact for them (*R v Pantoja* (1996) 88 A Crim R 554; *R v Karger* (2002) 83 SASR 135).

30. In some cases, this may require the jury to consider whether the evidence may have been affected by laboratory error (*R v Karger* (2002) 83 SASR 135).

31. In other cases, it may require the jury to consider the accuracy and reliability of the method used to generate the relevant evidence (see, e.g., *Xie v The Queen* [2021] NSWCCA 1).

32. The jury may also need to consider any limitations in the database used by the experts to assess the probability of the sample coming from someone other than the accused (*R v Pantoja* (1996) 88 A Crim R 554).

33. This may be particularly relevant where there is evidence that the offender is a member of a particular ethnic group that may have different genetic characteristics from the general community. The jury should be directed to consider these limitations and their effect on the statistical evidence (*R v Pantoja* (1996) 88 A Crim R 554).

What Are the Consequences of the Jury's Findings?

34. When directing the jury about the significance of DNA evidence, the judge should generally explain to the jury that evidence that the accused is a possible contributor to the forensic sample is not direct evidence that the accused committed the offence. It is only circumstantial evidence, and must be considered in light of the other evidence in the case (*R v Karger* (2002) 83 SASR 135; *R v Vivona* Vic CCA 12/9/94).

35. Precisely what the jury should be told about the use they can make of this circumstantial evidence will depend on the content of the evidence:

- Where there is evidence of the likelihood ratio, the jury should be told that (if accepted) the evidence establishes that the accused *could* be the source of the forensic sample, and indicates the likelihood that another person could also be responsible for the forensic sample (*R v Karger* (2002) 83 SASR 135; *R v Vivona* Vic CCA 12/9/94).
- When the evidence only demonstrates that the accused cannot be excluded from the possible contributors to the forensic sample (that is, there is no likelihood ratio, and the evidence is not exclusionary), the jury should be told that the evidence (if accepted) cannot establish the accused's guilt, and can only demonstrate that the accused cannot be excluded from the class of people who could be guilty (see *R v Rye* [2007] VSCA 247, [55]–[57]).
- Where there is evidence that accused is excluded as a possible contributor to the forensic sample, the jury should be told that the evidence (if accepted) establishes that the accused is *not* responsible for the forensic sample (*R v GK* (2001) 53 NSWLR 317; *R v Pantoja* (1996) 88 A Crim R 554).
- Where the evidence in the case has raised other possible explanations for the accused to be a contributor to the forensic sample (such as contamination, secondary transfer or innocent deposit), the jury should be told that it must consider those other explanations when deciding what weight to give the DNA evidence.

Warning Against Misuse of Evidence

36. Expert evidence on the likelihood ratio is apt to mislead the jury. In particular, it creates a risk that the jury will adopt the following erroneous reasoning (known as the "prosecutor's fallacy"):
    - Only one person in a million has a DNA profile that matches the forensic sample;
    - The accused has a DNA profile that matches the forensic sample;
    - Therefore there is a million to one probability that the accused is responsible for the forensic sample and is guilty (*R v Doheny & Adams* [1997] 1 Cr App R 369; *R v Karger* (2002) 83 SASR 135; *R v GK* (2001) 53 NSWLR 317).
37. This line of reasoning fails to recognise that even though only one person in a million has a DNA profile that matches the forensic sample, in a country the size of Australia (with over 25 million people), it is statistically likely that the DNA of at least 20 other people will also match that sample (*R v GK* (2001) 53 NSWLR 317; *R v Doheny & Adams* [1997] 1 Cr App R 369).
38. It is not necessary to warn against the prosecutor's fallacy in all cases. The judge should consider the need for a direction based on the following factors:
    - Whether a direction is requested;
    - The clarity of the witness' evidence and the witness' chain of reasoning;
    - The purpose for which the evidence has been led;
    - The circumstantial nature of the evidence;
    - The risk of the jury misusing the evidence;
    - The arguments raised in the case;
    - The magnitude of the likelihood ratio, especially where it exceeds the population of Australia (*Jury Directions Act 2015* ss 14–16; *R v Karger* (2002) 83 SASR 135; *Xie v The Queen* [2021] NSWCCA 1, [307]–[318]).
39. If a direction is necessary, the judge should generally warn the jury against engaging in the prosecutor's fallacy when the DNA evidence is led, and again in the final directions (*R v Doheny & Adams* [1997] 1 Cr App R 369; *R v Karger* (2002) 83 SASR 135; *R v GK* (2001) 53 NSWLR 317; *Latcha v R* (1998) 127 NTR 1).

40. The judge may also warn the jury not to disregard the strength of the likelihood ratio. Even if DNA evidence is not capable of proving to a scientific certainty that the accused is the contributor, it may be strong circumstantial evidence (*R v GK* (2001) 53 NSWLR 317).

41. Where the likelihood ratio is sufficiently high, the jury should consider the fact that there is no evidence connecting any other (random) people with a matching DNA profile to the offence (*R v GK* (2001) 53 NSWLR 317; *R v Doheny & Adams* [1997] 1 Cr App R 369).

Last updated: 14 May 2024

4.13.2.1 Charge: DNA Evidence

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[*In most cases, DNA evidence provides such a high likelihood ratio that jurors can confidently use it to decide that the DNA material comes from the accused rather than another person. Instead, the forensic contest concerns the circumstances in which the DNA material was deposited. In other words, the case is fought on the issue of transference, rather than identity. This direction is designed for a transference case where the DNA evidence concerns the likelihood that the accused is a contributor.*

Where the evidence involves a particularly low likelihood ratio, a different direction is required, which alerts the jury to the limited ability of the evidence to support a conclusion of identity and warns the jury against any overreliance on objectively weak forensic science evidence.

Where the evidence is about the identity of a person other than the accused, the direction must be modified, based on the issues in dispute.

This charge is designed to be used in conjunction with Charge: Uncontested Expert Evidence.]

Limitations of Evidence

Even if you accept NOW's evidence, that does not necessarily mean that NOA must be guilty of the offence[s] charged.

[*If the witness only provided the likelihood ratio, use the following shaded section*]

You have heard NOW explain that the DNA evidence is estimated to be [*identify likelihood ratio*] times more likely to occur if the DNA originated from NOA than if it originated from an unknown and unrelated person randomly selected from the [*identify relevant population group, e.g.* Australian Caucasian"] population.[169]

[*If the witness provided the verbal equivalent to the likelihood ratio, use the following shaded section*]

You have heard NOW explain that the DNA was analysed and provides [*identify verbal equivalent expression, e.g.* "very strong support"] to the proposition that the DNA originated from NOA rather than an unknown and unrelated person randomly selected from the [*identify relevant population group,*

[169] Where there is a mixed profile, use the following direction instead: You have heard NOW explain that the DNA profile analysed is estimated to be [*identify likelihood ratio*] times more likely to occur if NOA contributed to the sample than if an unknown and unrelated person randomly selected from the [*identify relevant population group,* e.g. "Australian Caucasian"] population was the contributor.

e.g. Australian Caucasian"] population.[170]

The parties accept that it was NOA's DNA material which NOW identified on the [*identify relevant item*]. The real issue is when, how and why NOA's DNA material was left there.

[*Refer to relevant evidence and arguments, including any opinion evidence about the likelihood of direct contact or secondary transfer*].

You must consider these matters when you are deciding what weight to put on NOW's evidence.

As I told you earlier in my directions,[171] you can only convict the accused if you are satisfied that his/her/their guilt is the only reasonable conclusion to be drawn from the whole of the evidence. You must therefore consider whether the prosecution has satisfied you that NOA's DNA was deposited on the [*identify relevant item*] when [*refer to circumstances of offence*]. In other words, you must consider whether the prosecution has satisfied you that NOA's DNA was not deposited through some other means, such as [*identify explanations for DNA evidence consistent with innocence*].

Last updated: 14 May 2024

4.13.3 Fingerprint Evidence

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What is Fingerprint Evidence

1. "Fingerprint evidence" refers to a type of expert evidence in which the characteristics and patterns of two sets of fingerprints (such as the ridges, furrows and minutiae points) are compared by an expert witness.
2. As fingerprint evidence is a type of expert evidence, the principles outlined in 4.13.1 General Principles of Opinion Evidence apply (subject to any modifications noted below).

What does Fingerprint Evidence Establish?

3. A fingerprint is a unique quality of an individual (*R v Lawless* [1974] VR 398; *R v O'Callaghan* [1976] VR 676; *R v Parker* [1912] VLR 152).
4. Due to the uniqueness of fingerprints, if the characteristics and patterns of two fingerprint samples are found to match at a sufficient number of points, it is possible to say that the samples came from the same person.

[170] Where there is a mixed profile, use the following direction instead: You have heard NOW explain that the DNA was analysed and provides [*identify verbal equivalent expression*, e.g. "very strong support"] to the proposition that NOA contributed to the sample rather than an unknown and unrelated person randomly selected from the [*identify relevant population group*, e.g. "Australian Caucasian"] population.

[171] See 3.6.1 Charge: Circumstantial evidence and Inferences. If this direction has not been given, this direction must be modified.

5. However, it will not always be possible to compare the characteristics and patterns of two samples at a sufficient number of points to state with certainty that they came from the same person.[172] In such cases, although the characteristics and patterns may match at the points at which they have been compared, one of the samples may have come from a different person who happens to have the same features at those points (but different features elsewhere in his or her prints).
6. In such cases, a "match" between the two samples only establishes that they *could* have come from the same person. That is, the evidence does not *exclude* the possibility that the same person was responsible for both samples.[173]
7. For fingerprint evidence to have any further probative force in such cases, evidence must also be given about the probability of a match with a random member of the population. See 4.13.2 DNA Evidence for a discussion of principles concerning such evidence.

Use of Expert Evidence

8. The identification of the characteristics and patterns of fingerprints is a matter calling for expert evidence, as the detection of similarities between sets of fingerprints is often beyond the capacity of a lay person (*R v Lawless* [1974] VR 398; *R v O'Callaghan* [1976] VR 676; *Bennett v Police* [2005] SASC 415 (Perry ACJ)).
9. An expert is not required to identify every similarity that s/he observed between the two sets of fingerprints. S/he may explain the process used to compare the fingerprints and state that, by using that process, s/he determined that the two sets of fingerprints matched. The lack of detail in the expert's evidence is merely a matter that affects the weight of the evidence (*Bennett v Police* [2005] SASC 167; *Bennett v Police* [2005] SASC 415).

Jury Use of Fingerprint Images

10. The images of the fingerprint samples may be admitted as exhibits. The jury may examine the exhibits to help them understand and evaluate the expert evidence (*R v Lawless* [1974] VR 398; *R v O'Callaghan* [1976] VR 676).
11. However, the images of the fingerprint samples do not need to be tendered in all cases. The expert's evidence of his or her examination of the fingerprints can provide the basis for his or her opinion (*Bennett v Police* [2005] SASC 167; *Bennett v Police* [2005] SASC 415).

Jury Directions

12. The need for a direction about fingerprint evidence depends on whether a direction is sought or whether there are substantial and compelling reasons for giving a direction in the absence of a request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.
13. If the judge directs the jury about fingerprint evidence, the following issues should usually be addressed:
    - The jury's role in determining whether or not there is a match between the samples;

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[172] For example, where only a partial print has been found at a crime scene, or where the samples are not sufficiently clear.

[173] This is analogous to the situation in relation to DNA testing. See 4.13.2 DNA Evidence.

- The consequences of finding that the fingerprint samples match.

Is there a Match?

14. The judge should tell the jury that it is a question of fact for them whether there is a match between the fingerprint samples. The expert evidence is admitted only to assist the jury to make this determination (*R v Lawless* [1974] VR 398; *R v O'Callaghan* [1976] VR 676; *R v Parker* [1912] VLR 152).

15. In making this determination, the jury should consider whether the comparison was accurate and reliable (see 4.13.2 DNA Evidence).

What Are the Consequences of the Jury's Findings?

16. The judge should explain to the jury the consequences of finding that the samples match. This will differ depending on the evidence that has been presented.

17. If the characteristics and patterns of two fingerprint samples have been found to match at a *sufficient number of points* that it is possible to say with certainty[174] that the samples came from the same person, the jury should be directed that, if accepted, the evidence can be used to find that the fingerprints came from that person (see, e.g. *R v Lawless* [1974] VR 398; *R v O'Callaghan* [1976] VR 676). The consequences of that finding should also be explained.

18. If the characteristics and patterns of two fingerprint samples have *not* been found to match at a sufficient number of points that it is possible to say with certainty that the samples came from the same person, the judge should explain that the evidence only establishes that the prints *could* have come from the same person.[175]

19. If evidence of the probability of a match with a random member of the population is also given, the jury should be told that (if accepted) the evidence indicates the likelihood that another person could also be responsible for the forensic sample. See 4.13.2 DNA Evidence for further explanation of this issue.

Last updated: 29 June 2015

4.13.3.1 Charge: Fingerprint Evidence

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This charge is for use in conjunction with 4.13.1.1 Charge: Uncontested Expert Evidence in cases where:

i) The fingerprint evidence inculpates the accused;

ii) That evidence is given by a single witness; and

iii) The features of the relevant fingerprint samples have been found to match at a sufficient number of points that it is possible to say with certainty that the samples came from the same person.[176]

See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

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[174] Subject to any error in the comparison process.

[175] This is analogous to the situation in relation to DNA testing. See 4.13.2 DNA Evidence.

[176] See 4.13.3 Fingerprint Evidence for a discussion of this requirement.

If the features of the relevant fingerprint samples have not been found to match at a sufficient number of points that it is possible to say with certainty that the samples came from the same person, the charge will need to be modified. In such circumstances, 4.13.2.1 Charge: DNA Evidence may provide some assistance.

If the evidence exculpates the accused, or conflicting evidence is given by expert witnesses, the charge will also need to be modified. In such circumstances, 4.13.1 General Principles of Opinion Evidence may provide some assistance.

Use of Images

[*If images of the two sets of fingerprints have been admitted as exhibits, add the following shaded section:*]

To help you to understand and evaluate NOW's evidence, you have been given copies of the images s/he compared. [*Identify relevant exhibits*].

When you look at these exhibits, remember that you are not fingerprint experts. Comparing fingerprints is a task that calls for specialised skills. While you may look at the exhibits, you should be guided by NOW's evidence. You should not reject that evidence just because you cannot see the similarities s/he described.

Use of Evidence

If you accept NOW's opinion, you can use that evidence to find that [*describe permissible use of the evidence, e.g.* "the fingerprints found at the crime scene belonged to NOA].

However, you should keep in mind the fact that the fingerprint evidence is just one piece of circumstantial evidence, and must be considered in the light of the other evidence in the case. You will remember what I have told you about circumstantial evidence.[177]

[*Summarise and explain any prosecution and defence arguments in relation to the fingerprint evidence that have not yet been addressed.*]

Last updated: 29 June 2015

4.13.4 Handwriting Evidence

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What is Handwriting Evidence?

1. "Handwriting evidence" refers to a type of expert evidence in which a sample of a person's handwriting is compared with the handwriting in a document about which authorship is disputed.
2. As handwriting evidence is a type of expert evidence, the principles outlined in 4.13.1 General Principles of Opinion Evidence apply (subject to any modifications noted below).

[177] If the judge has not given a direction on circumstantial evidence, this should be modified accordingly.

Handwriting Comparison Evidence

3. A handwriting expert may give evidence on the similarities and differences between a handwriting sample and a disputed document, and give an opinion on whether the sample and the document were written by the same person (*Evidence Act 1958* s 148; *R v Mazzone* (1985) 43 SASR 330).

4. A non-expert witness who is familiar with the handwriting of the alleged author may also give evidence on whether s/he believes the disputed document was written by the alleged author. This is an exception to the rule prohibiting opinion evidence from non-expert witnesses (*R v Mazzone* (1985) 43 SASR 330; *W v R* (2006) 16 Tas R 1).

Provision of Original Documents to the Jury

5. The jury should generally be given original documents so that they can compare the handwriting. Copies may be used if providing original documents is not possible or necessary in the circumstances of the case (*R v Burns & Collins* (2001) 123 A Crim R 226).

Jury Directions

6. The authorship of disputed documents is a question of fact for the jury to determine (*Adami v R* (1959) 108 CLR 605; *R v Knight* (2001) 160 FLR 465; *Jeans v Cleary* [2006] NSWSC 647; *R v Burns & Collins* (2001) 123 A Crim R 226; *R v Doney* (2001) 126 A Crim R 271).

7. Consequently, the jury may itself compare the sample and disputed writings to determine whether the documents were written by the same person. This comparison may be undertaken even without the assistance of expert evidence (*Adami v R* (1959) 108 CLR 605; *Grayden v R* [1989] WAR 208; *R v Knight* (2001) 160 FLR 465; *Jeans v Cleary* [2006] NSWSC 647; *R v Burns & Collins* (2001) 123 A Crim R 226; *R v Doney* (2001) 126 A Crim R 271).

8. The need for any directions depends on whether a direction is sought or whether there are substantial and compelling reasons for giving a direction in the absence of a request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

9. Where expert evidence has been led, the judge should ensure that the jury does not allow the expert's opinion to dictate their conclusions. The jury must consider all of the evidence, including any circumstantial evidence that may support or cast doubt on the expert's opinion (*Jeans v Cleary* [2006] NSWSC 647; *R v Doney* (2001) 126 A Crim R 271; *R v Leroy* [1984] 2 NSWLR 441; *Gawne v Gawne* (1979) 2 NSWLR 449; *Grayden v R* [1989] WAR 208).

10. While the jury must not allow an expert's opinion to dictate their conclusions, they should be guided by the expert evidence (*R v Leroy* [1984] 2 NSWLR 441; *Grayden v R* [1989] WAR 208; *R v Medina* (1990) 3 WAR 21; *R v Mazzone* (1985) 43 SASR 330).

11. In some cases, the process of comparing handwriting samples will be particularly difficult. The judge may warn the jury about the need to exercise care, especially where no expert evidence has been led. This need may arise when there are significant differences between the writing samples, such as when one sample is a photocopy and the other is an original (see *Grayden v R* [1989] WAR 208).

12. If the authorship of the sample document is itself disputed, the judge should emphasise that the jury must be satisfied that the sample document was written by the alleged author. The authorship of the sample document is a question of fact that will affect the probative value of the evidence regarding the disputed document (*R v Browne–Kerr* [1990] VR 78).

13. The jury may be warned to act with caution when a non-expert witness compares the handwriting between two samples. This warning is not mandatory, but may be given as a matter of prudence (*R v Burns & Collins* (2001) 123 A Crim R 226; *R v Leroy* [1984] 2 NSWLR 441; *Grayden v R* [1989] WAR 208; *Medina v The Queen* (1990) 3 WAR 21).

14. If authorship of a disputed document is an essential link in a chain of reasoning leading to guilt, the jury may need to be directed that they must be satisfied of the author's identity beyond reasonable doubt (see, e.g. *Grayden v R* [1989] WAR 208; *Shepherd v R* (1990) 170 CLR 573). See 3.6 Circumstantial Evidence and Inferences for further information concerning the standard of proof in such cases.

Last updated: 29 June 2015

4.13.4.1 Charge: Handwriting Evidence (Expert Witness)

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This charge is for use in conjunction with 4.13.1.1 Charge: Uncontested Expert Evidence in cases where:

i) Handwriting evidence inculpates the accused;

ii) That evidence is given by a single witness who is a handwriting expert; and

iii) A direction about the evidence is requested, or there are substantial and compelling reasons to give a direction in the absence of a request. See 3.1 Directions Under Jury Directions Act 2015.

If the evidence exculpates the accused, or conflicting evidence is given by expert witnesses, the charge will need to be modified. In such circumstances, see 4.13.1 General Principles of Opinion Evidence.

Use of Documents

To help you to understand and evaluate NOW's evidence, you have been given [copies of] the documents s/he compared. [*Identify relevant exhibits.*]

While you are free to make your own comparison of the handwriting in these documents, you should remember that you are not handwriting experts. You should therefore be guided by NOW's evidence, although you are free to reject his/her opinion. Ultimately, it is for you to determine who wrote [*describe relevant document*].

Use of Evidence

[*Where authorship of the control document is not disputed, add the following shaded section.*]

If you accept NOW's opinion, you can use that evidence in deciding whether [*describe permissible use of the evidence, e.g.* "NOA wrote the letter"]. If you find that [*describe permissible use of the evidence*], then [*describe consequences of finding a handwriting match*].

[*Where authorship of the control document is disputed, add the following shaded section.*]

If you accept NOW's opinion, you can use that evidence in deciding whether [*describe relevant document*] and [*describe control document*] were written by the same person.

However, before you can conclude that it was NOA who wrote [*describe relevant document*], you must also find that it was NOA who wrote [*describe control document*].[178]

The prosecution argued that this was the case. [*Summarise prosecution evidence and/or arguments.*] The

[178] This charge is based on the assumption that the comparison is being made with the accused's handwriting. If the comparison is with a different party's handwriting, the charge will need to be modified accordingly.

defence denied this, alleging [*summarise defence evidence and/or arguments*].

It is only if you find that NOA wrote [*describe control document*], that you can use NOW's evidence to decide whether NOA also wrote [*describe relevant document*].

If you find that NOA did write [*describe relevant document*], you may use this fact to find [*describe consequences of finding a handwriting match*].

You should keep in mind the fact that the handwriting evidence is just one piece of circumstantial evidence, and must be considered in the light of the other evidence in the case. You will remember what I have told you about circumstantial evidence.[179]

[*Summarise and explain any prosecution and defence arguments in relation to the handwriting evidence that have not yet been addressed.*]

Last updated: 9 March 2017

4.13.4.2 Charge: Handwriting Evidence (Non-Expert Witness)

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This charge is for use in cases where:

i) Handwriting evidence inculpates the accused; and

ii) That evidence is given by a non-expert witness who is familiar with the alleged author's handwriting; and

iii) A direction about the evidence is requested, or there are substantial and compelling reasons for giving a direction in the absence of any request. See 3.1 Directions Under Jury Directions Act 2015.

If the evidence exculpates the accused, or conflicting evidence is given by expert witnesses, the charge will need to be modified. In such circumstances, 4.13.1 General Principles of Opinion Evidence may provide some assistance.

I must now give you directions about the handwriting evidence that NOW gave. [*Summarise evidence*.]

NOW was permitted to give this evidence because of his/her familiarity with NOA's handwriting.[180] [*Describe reason for familiarity*.]

In the course of giving evidence, NOW expressed his/her opinion that [*describe opinion, e.g.* "NOA probably wrote document X"].

Ordinarily, witnesses are not allowed to give their opinions in court. They must confine their evidence to their own observations. This is because it is you who are the judges of facts, and so usually it is only your opinion that is relevant.

However, in limited circumstances the law allows people who have particular experience in an area to give their opinions, if it may assist you in making your decision. This is one of those circumstances.

In this case, NOW's evidence may assist you in determining [*explain permissible uses of the expert evidence*].

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[179] If the judge has not given a direction on circumstantial evidence, this should be modified accordingly.

[180] This charge is based on the assumption that the comparison is being made with the accused's handwriting. If the comparison is with a different party's handwriting, the charge will need to be modified accordingly.

Role of Jury

You are not required to accept NOW's opinion. You are the judges of fact in this case, and even though NOW is familiar with NOA's handwriting, his/her opinion is merely a piece of evidence like any other, which you may accept or reject.

When assessing NOW's opinion, you should consider factors such as [*describe any factors relevant to the assessment of NOW's evidence, such as his/her degree of familiarity with the accused's handwriting, objectivity, or responses to cross-examination. Summarise any evidence and/or arguments addressing these factors*].

Use of Documents

[*If control documents are not available, this section should be omitted.*]

To help you to understand and evaluate NOW's evidence, you have been given [copies of] a document written by the accused and the [*describe relevant document*]. [*Identify relevant exhibits*.[181]]

You are free to make your own comparison of the handwriting in these documents. While you may be guided by NOW's evidence, you should be careful about doing so, as s/he is not a handwriting expert. Ultimately, it is for you to determine who wrote the [*describe relevant document*] by using your common sense and experience. However, I warn you that comparing handwriting is difficult, and you should not jump to conclusions.

Use of Evidence

If you accept NOW's opinion, you can use that evidence in deciding whether [*describe permissible use of the evidence*, e.g. "NOA wrote the letter"]. If you find that [*describe permissible use of the evidence*], then [*describe consequences of finding a handwriting match*].

You should keep in mind the fact that the handwriting evidence is just one piece of circumstantial evidence, and must be considered in the light of the other evidence in the case. You will remember what I have told you about circumstantial evidence.[182]

[S*ummarise and explain any prosecution and defence arguments in relation to the handwriting evidence that have not yet been addressed.*]

Last updated: 16 February 2017

4.13.4.3 Charge: Handwriting Evidence (Jury Comparison)

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This charge is for use in cases where:

i) Handwriting evidence inculpates the accused; and

ii) No expert witness has been called to compare handwriting samples, and the jury is asked to compare handwriting samples itself.

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[181] If the authorship of the control document is disputed, this section should include a direction on the need to be satisfied that the control document was written by the accused. See 4.13.4.1 Charge: Handwriting Evidence (Expert Witness).

[182] If the judge has not given a direction on circumstantial evidence, this should be modified accordingly.

If the evidence exculpates the accused, or conflicting evidence is given by expert witnesses, the charge will need to be modified. In such circumstances, 4.13.1 General Principles of Opinion Evidence may provide some assistance

I must now give you directions about handwriting comparisons.

One of the issues for you to determine in this case is whether NOA wrote [*describe relevant document*].[183] [*Summarise relevance of the issue, and prosecution and defence arguments on the issue*.]

[*Where authorship of the control document is not disputed, add the following shaded section.*]

You have been given [a copy of] [*describe relevant document*]. [*Identify relevant exhibit.*] It is for you to determine whether NOA wrote that document.

To help you decide this, you have also been given a [copy of a] document written by the accused. [*Identify relevant exhibit.*]

The prosecution alleges that these two documents were written by the same person – NOA. The defence denies this, alleging that the handwriting differs.[184]

It is for you to decide if they were written by the same person. If you find that they were, you may conclude that it was NOA who wrote [*describe relevant document*].

[*Where authorship of the control document is disputed, add the following shaded section*.]

You have been given [a copy of] [*describe relevant document*]. [*Identify relevant exhibit.*] It is for you to determine whether NOA wrote that document.

To help you decide this, you have also been given a [copy of a] document the prosecution alleges was written by the accused. [*Identify relevant exhibit.*]

The prosecution alleges that these two documents were written by the same person, and that person was NOA.[185] [*Summarise prosecution evidence and/or arguments.*]

The defence denies this, alleging that [*describe control document*] was not written by the accused. [*Summarise defence evidence and/or arguments.*] If this is the case, then even if you find that the handwriting in the documents is identical, you cannot conclude that it was NOA who wrote [*describe relevant document*].

For you to find that NOA wrote [*describe relevant document*], you must find both that s/he wrote [*describe control document*] and that the handwriting in the two documents is identical.

In making your determination, you may compare the handwriting samples yourself.

[*If a party has raised the lack of expert evidence as an issue in the case, add the following shaded section.*]

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[183] This charge is based on the assumption that the handwriting comparison is being made with the accused's handwriting. If the comparison is with a different party's handwriting, the charge will need to be modified accordingly.

[184] This charge is based on the assumption that the prosecution is alleging a match between the handwriting samples. If the prosecution alleges that the handwriting differs, it will need to be modified accordingly.

[185] This charge is based on the assumption that the prosecution is alleging a match between the handwriting samples. If the prosecution alleges that the handwriting differs, it will need to be modified accordingly.

I note that you have not had the benefit of any expert evidence to assist you with this task. Often in these sorts of cases, one of the parties will call an expert in handwriting comparison to give evidence on whether s/he believes the documents were written by the same person.

Without the assistance of expert evidence, you can only compare the documents using your common sense and experience. However, I warn you that comparing handwriting is difficult, and you should not jump to conclusions.

However, you should keep in mind the fact that the handwriting evidence is just one piece of circumstantial evidence, and must be considered in the light of the other evidence in the case. You will remember what I have told you about circumstantial evidence.[186]

[*Summarise and explain any prosecution and defence arguments in relation to the handwriting evidence that have not yet been addressed.*]

Last updated: 9 March 2017

4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements)

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Admissibility and Use of Previous Representations

1. Evidence of a previous representation will only be admissible if it is relevant (*Evidence Act 2008* s 55).
2. Even if evidence of a previous representation is relevant, it will generally not be admissible:
    - To prove the existence of a fact asserted in the representation (the "hearsay rule") (*Evidence Act 2008* s 59); or
    - If it only affects the assessment of a witness's credibility ("the credibility rule") (*Evidence Act 2008* ss 101A, 102).
3. However, there are a number of exceptions to both the hearsay rule[187] and the credibility rule,[188] which allow previous representations to be admitted in certain circumstances.
4. This topic addresses the directions that should be given when evidence of a previous representation is admitted:
    - To prove the existence of the facts asserted in the representation (a "hearsay purpose"); or
    - Because it is relevant for a purpose other than proof of an asserted fact (a "non-hearsay purpose").
5. Evidence which is admitted for a non-hearsay purpose may be used to prove the existence of a fact asserted in the representation (*Evidence Act 2008* s 60).

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[186] If the judge has not given a direction on circumstantial evidence, this should be modified accordingly.

[187] See the Notes to *Evidence Act 2008* s 59 for a list of exceptions to the hearsay rule.

[188] See the Notes to *Evidence Act 2008* s 102 for a list of exceptions to the credibility rule.

6. Similarly, evidence which is admitted for a hearsay purpose may (where relevant) be used by the jury when assessing a person's credibility (*Evidence Act 2008* ss 101A, 102).

Content of the Charge

7. There is no direction that must be given whenever evidence of a previous representation is admitted. The judge must tailor the directions to the facts of the case.
8. Depending on the circumstances, judges may need to:
    - Tell the jury how they may use the evidence; or
    - Warn the jury about the potential unreliability of the evidence.
9. The need for any of these directions depends on whether a direction is sought or whether there are substantial and compelling reasons for giving a direction in the absence of any request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.
10. In directing the jury about these matters, it will not always be necessary for the judge to remind the jury of the words used in the previous representation. The degree of specificity with which the judge must refer to the content of a representation will depend upon the circumstances (*Jury Directions Act 2015* ss 65, 66; *R v Demiri* [2006] VSCA 64).

How May the Jury Use Evidence of a Previous Representation

11. The directions about the possible uses of previous representation evidence will depend on:
    - The nature of the evidence; and
    - Whether the judge has limited the use of the evidence under *Evidence Act 2008* s 136.
12. This topic focuses on the directions that may be given when the following types of previous representations have been admitted:
    - Evidence of complaint (formerly "recent complaint" evidence);
    - Evidence of prior inconsistent statements; and
    - Evidence of prior consistent statements.

Admissibility of Complaint Evidence

13. Evidence that the complainant made a complaint about the alleged offending is most likely to be admitted under *Evidence Act 2008* s 66. It may also be admissible under *Evidence Act 2008* s 108.

Evidence Act 2008 s 66 – maker available

14. *Evidence Act* s 66 provides two alternative pathways for admitting evidence of a previous representation.
15. For both, the representation will only be admissible if the person who made the representation has been or is going to be called to give evidence (*Evidence Act 2008* s 66(2)(a)).

Evidence Act 2008 s 66(2)(b)(i) – fresh in the memory

16. A previous representation is admissible under *Evidence Act 2008* s 66(2)(b)(i) if the occurrence of the asserted fact was fresh in the memory of the speaker when he or she made the representation.
17. The court may consider all matters it regards as relevant when determining whether an occurrence is fresh in the memory of a person, including:
    - The nature of the event;
    - The age and health of the person;
    - The passage of time before the representation is made (*Evidence Act 2008* s 66(2A)).

18. The High Court in *Graham v R* (1998) 165 CLR 606 held that the temporal connection between the occurrence of an asserted fact and the making of the representation is the primary factor in determining whether an occurrence is fresh in the memory. Under that decision, a representation must be recent, immediate, contemporaneous or nearly contemporaneous. Subsection (2A) was added to the Uniform Evidence Acts to limit the effect of this decision, so that the temporal connection is only one factor the court must consider (ALRC 102, [8.119]–[8.124]; *R v XY* (2010) 79 NSWLR 629).

19. Whether an event remains fresh in the memory is a question of fact and degree. The court should examine the content of the representation and the circumstances in which it was made to determine whether it was fresh in the speaker's memory (*Skipworth v R* [2006] NSWCCA 37; *Gordon-King v R* [2008] NSWCCA 335; *R v XY* (2010) 79 NSWLR 629).

20. While the period of time between the event in question and the making of the representation is relevant, other factors will also be relevant and may displace any concerns that arise from the passage of time. Courts have recognised that general information about some forms of offending conduct, such as sexual offences, is inherently likely to remain fresh in the memory of the complainant for an extended period of time, even if memory of details fade (*LMD v R* [2012] VSCA 164)

21. The fact that there is a conflict or inconsistency between the previous representation and later statements is not relevant to the court's determination of whether the event was fresh in the speaker's memory (*Skipworth v R* [2006] NSWCCA 37; *Gordon-King v R* [2008] NSWCCA 335; *R v XY* (2010) 79 NSWLR 629).

22. In cases involving repeated sexual offences, or similar conduct, the effect of subsequent offences may keep the memory of earlier offences fresh in the memory of the complainant (*R v Le* [2002] NSWCCA 49).

Evidence Act 2008 s 66 – child complainant

23. Under *Evidence Act 2008* s 66(2)(b)(ii), evidence of a previous representation by the complainant[189] is admissible if the complainant is available to give evidence, and the complainant was under the age of 18 years at the time when the representation was made.

24. A narrower form of this exception was previously provided for by the *Criminal Procedure Act 2009* s 377. That exception applied only to sexual offences, and did not apply unless the court was satisfied that the evidence was relevant to a fact in issue and sufficiently probative having regard to the nature and content of the representation and the circumstances in which it was made.

25. While s 66(2)(b)(ii) does not contain an express requirement that the evidence must be 'sufficiently probative', cases on the operation of that requirement may continue to be relevant to the operation of the exclusionary provisions in *Evidence Act 2008* ss 135 and 137 (see, e.g. *WSJ v R* [2010] VSCA 339; *Watson v R* [2010] VSCA 189; *Stark v R* (2013) 45 VR 1; *HSG v R* [2011] VSCA 163). These cases identified that the lapse of time between the event and the representation, the degree of specificity of the representation and the existence of inconsistencies between the representation and the child's evidence are relevant to assessing the probative value. These considerations must, however, also be considered in light of the requirement from *IMM v R* (2016) 257 CLR 300 that probative value of evidence must be assessed by taking the evidence at its highest.

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[189] *Evidence Act 2008* s 66 uses 'victim' instead of 'complainant'. We have retained 'complainant' to maintain consistency across the Bench Book.

26. *Evidence Act 2008* s 66(2)(b)(ii) will apply to any trial that has commenced on or after 1 October 2017. A trial commences when the accused is arraigned in the presence of the jury panel from which the trial jury is formed (*Criminal Procedure Act 2009* s 210). This exception also applies to summary hearings held on or after 1 October 2017. While the *Criminal Procedure Act 2009* does not specify when a summary hearing commences, the Act does distinguish between a summary hearing and the procedure before a summary hearing, the latter including a mention hearing and a contest mention hearing (compare *Criminal Procedure Act 2009* Part 3.2 and Part 3.3).

27. The former exception, *Criminal Procedure Act 2009* s 377, continues to apply to trials and summary hearings that had already commenced on 1 October 2017.

Evidence Act 2008 s 108

28. Even where evidence is not admissible under *Evidence Act 2008* s 66, it may become admissible under *Evidence Act 2008* s 108 as a prior consistent statement where it is suggested that the witness's evidence has been fabricated, reconstructed, or is the result of a suggestion, and the court gives leave. Once the evidence is admitted, it may be used as evidence of a complaint (see *Langbein v R* [2008] NSWCCA 38; *Gordon-King v R* [2008] NSWCCA 335; *R v XY* (2010) 79 NSWLR 629).

Uses of Complaint Evidence

29. There are three ways in which complaint evidence can potentially be used by the jury:

    i) To prove the truth of the facts asserted in the complaint;

    ii) To assess the credibility of the witness (by showing that the witness' account of the events in question has been consistent); and

    iii) To rebut the argument that would otherwise arise that an absence of complaint suggests that the offending did not take place (*R v GAR* [2003] NSWCCA 224; *R v BD* (1997) 94 A Crim R 131; *R v Lynch* [1999] NSWCCA 32).

30. This differs from the position at common law, where the use of complaint evidence was limited to the jury's assessment of the complainant's credibility (see, e.g. *R v Freeman* [1980] VR 1).

31. Another difference from the common law position is that the jury may use the evidence without being satisfied that:

    - the words were spoken spontaneously and constituted a "complaint"; and
    - the complaint was made at the first reasonable opportunity (*Evidence Act 2008* s 66; *R v Harbulot* [2003] NSWCCA 141).

32. In some cases the jury may take into account the mere fact that a complaint was made when assessing the complainant's credibility. In other cases it will be the consistency of the account presented in the complaint that the jury may use in their assessment (see, e.g. *R v GAR* [2003] NSWCCA 224 and *R v Harbulot* [2003] NSWCCA 141).

33. It is for the jury to decide what significance, if any, is to be attached to the evidence. The law does not oblige the jury to treat the evidence in any particular way (see *R v Matthews* [1999] 1 VR 534).

Uses of Prior Inconsistent Statements

34. A prior inconsistent statement is a "previous representation that is inconsistent with evidence given by the witness" (*Evidence Act 2008* Dictionary).

35. This definition is not limited to verbal "statements". It covers any previous "representations", including representations that can be inferred from a person's conduct (*R v Selsby* [2004] NSWCCA 381; *R v KNP* (2006) 67 NSWLR 227).[190]

36. Evidence that a witness made a prior inconsistent statement may be admissible under *Evidence Act 2008* ss 103 or 106. The cross-examination of a witness about a prior inconsistent statement is regulated by *Evidence Act 2008* s 43.

37. When a party adduces a prior inconsistent statement the jury will have two inconsistent accounts from the same witness. It is for the jury to determine which account, if any, to believe (*R v Thynne* [1977] VR 98; *Sainsbury v Allsop* (1899) 24 VLR 725).

38. The jury may use evidence that a witness made a prior inconsistent statement when assessing a witness's credibility or reliability, if that evidence demonstrates that the witness is unable or unwilling to accurately recall relevant events (*R v Hackett* [2006] VSCA 138; *R v NRC* (No 2) [2001] VSCA 210; *R v Thompson* (2008) 21 VR 135; *Driscoll v R* (1977) 137 CLR 517; *R v Salih* (2005) 160 A Crim R 310).

39. A witness who makes a prior inconsistent statement is not necessarily lying. While dishonest witness are more likely to introduce inconsistencies into their stories, truthful witnesses may make mistakes about details (*R v Salih* (2005) 160 A Crim R 310).

40. The jury may also use evidence of a prior inconsistent statement to prove the truth of the facts asserted in the statement (*Evidence Act 2008* s 60).

41. When a party adduces evidence of a prior statement that contains parts that are both consistent and inconsistent with the evidence given in court, the jury may use the evidence to assess the consistency or inconsistency of the witness' evidence. The jury may find that a prior inconsistent statement enhances the witness's credit by presenting a generally consistent narrative (*R v Kehagias, Leone & Durkic* [1985] VR 107; *R v Titijewski* [1970] VR 371; *R v PFG* [2006] VSCA 130).

Direction about the Uses of Prior Inconsistent Statements

42. A direction about prior inconsistent statements is not necessary in all cases. In some cases, counsel's arguments may have sufficiently identified the relevant principles for the jury and removed the need for a judicial direction (see *R v Hartwick, Hartwick & Clayton* (2005) 14 VR 125; *R v BR* [2005] VSCA 145).

43. While it is not strictly necessary, where the judge directs the jury about prior inconsistent statements, the better approach is to identify the two permissible uses of prior inconsistent statements (*Pavitt v R* (2007) 169 A Crim R 452; *R v Abdallah* [1999] NSWCCA 380; *Raimondi v R* [2013] VSCA 194).

44. However, where the alleged inconsistencies form an important part of the defence case, they must ordinarily be identified as part of the obligation to put the accused's case before the jury (*R v Mark & Elmazovski* [2006] VSCA 251; *R v Salih* (2005) 160 A Crim R 310; *R v Stewart* (2001) 52 NSWLR 301 (Howie J); c.f. *R v PFG* [2006] VSCA 130; *R v RH* [2004] VSCA 231).

45. Similarly, if a party has sought a direction under *Jury Directions Act 2015* s 14, the judge must give the requested direction unless there are good reasons for not doing so.

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[190] For example, evidence that the complainant continued to voluntarily associate with the accused after the alleged commission of sexual offences may be said to be a representation by conduct that the accused did not commit an offence against the complainant (see *R v Selsby* [2004] NSWCCA 381; but c.f. *R v ERJ* [2010] VSCA 61 and discussion of reasons for delay in complaint and continued association with an offender).

46. In addition, if a party has applied for a direction under *Jury Directions Act 2015* s 32, the judge will need to consider whether, as a form of hearsay evidence, the prior inconsistent statement is evidence of a kind that may be unreliable. See Section 32 Unreliability Warning (below).

47. Where a prior inconsistent statement suggests a difference in the complainant's account of the offence charged that is relevant to the complainant's credibility or reliability, the trial judge will need to give a direction in accordance with *Jury Directions Act 2015* s 54D. See Differences in a Complainant's Account.

48. When directing the jury about a prior inconsistent statement, the judge should avoid implying that the jury must choose between the two statements, or that the jury needs to apply a particular standard of proof to whether a statement was made. Where a prosecution witness makes a prior inconsistent statement, it is appropriate to direct the jury to consider whether the inconsistencies demonstrated raise a reasonable doubt about the witness' evidence (*Raimondi v R* [2013] VSCA 194).

49. Where a party introduces evidence of a prior inconsistent statement that is part of a larger statement, and the jury asks about the remainder of the statement, the judge should direct the jury not to speculate about the content of the rest of the statement, as they are only concerned with what has been admitted into evidence (*R v Hackett* [2006] VSCA 138).

Uses of Prior Consistent Statements

50. Evidence that a witness made a prior consistent statement may be admissible under *Evidence Act 2008* s 108.

51. Evidence of a prior consistent statement can be used:

    - To explain why the witness has given an inconsistent account;[191] or
    - To rebut suggestions that the witness's evidence has been fabricated, reconstructed or is the result of a suggestion (*Evidence Act 2008* s 108(3). See also *R v Ali* [2000] NSWCCA 177; *R v Cassar & Ors* [1999] NSWSC 352; *R v Sood (Ruling No 2)* [2006] NSWSC 732).

52. Circumstances in which evidence of prior consistent statements can be used include:

    - Where the opposing party suggests that a witness's evidence was invented in response to a particular incident. In such cases, evidence that the witness made a consistent statement that pre-dates the specified incident may be used to refute that suggestion (*R v MDB* [2005] NSWCCA 354; *R v DJT* [1999] NSWCCA 22. See also, in a common law context, *R v Martin (No 2)* (1997) 68 SASR 419; *R v Cox & Sadler* [2006] VSC 333).
    - Where the opposing party attacks the reliability of the witness's account, suggesting that it has been reconstructed rather than recollected. In such cases, evidence of a statement that was made contemporaneously with the alleged offence, and which demonstrates a consistent recollection of the alleged events, may be used to refute the attack (*R v Sood (Ruling No 2)* [2006] NSWSC 732).

53. While evidence of a prior consistent statement is admitted because it is relevant to the jury's assessment of the complainant's credibility, it may also be used to prove the truth of the facts asserted in the statement (*Evidence Act 2008* s 60). This differs from the position at common law.

54. It will therefore only be correct to direct that jury that a prior consistent statement cannot be used to prove the truth of its contents if the judge limits the use of the evidence under *Evidence Act 2008* s 136 (*R v Singh-Bal* (1997) 92 A Crim R 397). See Limiting the Use of Evidence under s 136 (below).

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[191] For example, in *R v Ali* [2000] NSWCCA 177, the complainant reported the alleged offences to a school counsellor under a promise of confidentiality and later denied those allegations to workers from the Department of Community Services (DOCS). The complainant claimed that she made the false denials to DOCS out of fear that they would pass on the allegations to her mother.

55. The value of a prior consistent statement that is not independently verified is a matter for the jury. The lack of independent verification does not automatically weaken the probative value of the statement (*R v DJT* [1998] 4 VR 784).

Prior Consistent Statements admitted under s 108 and Complaint Evidence admitted under s 66(2)

56. When evidence of a prior statement is admitted under an exception to the hearsay rule (e.g. s 66(2)), the jury may also use it (if relevant) to assess the credibility of a witness, as the credibility rule will not apply (see *Evidence Act 2008* s 101A(b)). Similarly, when evidence of a previous representation is admitted under *Evidence Act 2008* s 108, the jury may also use the statement as hearsay evidence due to s 60, unless it is excluded or the use limited under ss 135–137.

57. The judge must identify the basis or bases for admitting the previous representation and how the jury may or may not use the evidence. Where issues are raised as to the reliability of the evidence of the prior statements, section 32 warnings may also be required (see below).

58. While judges and parties can and will refer to evidence of prior statements of an alleged victim admitted under s 66(2) as "complaints", they should not refer to evidence admitted under s 108(3) as "complaint" evidence in order to minimise the risk of confusion (*R v DBG* [2002] NSWCCA 328; *Friend v R* [2007] NSWCCA 41).

Need for a Direction about the Uses of Prior Consistent Statements

59. It is not always necessary to direct the jury about the uses of prior consistent statements. Without directions, the court may assume that the jury will use such statements in the same way as any other evidence in the trial, as jurors are not aware of the common law distinctions between the use of hearsay evidence and direct evidence (*Pavitt v R* (2007) 169 A Crim R 452; *R v Abdallah* [1999] NSWCCA 380).

60. However, while it is not strictly necessary, the better approach is for judges to identify the two permissible uses of prior consistent statements (*Pavitt v R* (2007) 169 A Crim R 452; *R v Abdallah* [1999] NSWCCA 380; *Raimondi v R* [2013] VSCA 194).

Limiting the Use of Evidence under s 136

61. Judges will need to direct the jury about any limitations placed on the use of the evidence under *Evidence Act 2008* s 136 (*WSJ v R* [2010] VSCA 339).

62. A judge may limit the use of evidence if there is a danger that a particular use of the evidence might:

    - Be unfairly prejudicial to a party; or
    - Be misleading or confusing (*Evidence Act 2008* s 136).

63. It will usually only be necessary to consider this matter when counsel applies for a s 136 order (*Pavitt v R* (2007) 169 A Crim R 452).

64. At common law, juries were generally prohibited from using hearsay evidence to prove the existence of the facts asserted in the representation, due to the potential unreliability of that evidence. It was the intention of the *Evidence Act 2008* to change this position, and allow evidence that was admitted either as an exception to the hearsay rule, or for a non-hearsay purpose, to be used to prove the existence of asserted facts (see *Evidence Act 2008* s 60).

65. Judges should therefore not automatically prevent previous representations that are admitted under the *Evidence Act 2008* from being used to prove the existence of any asserted facts. To do so would be to constrain the legislation by reference to common law rules and distinctions which the legislature has discarded (*Papakosmas v R* (1999) 196 CLR 297; *ISJ v R* (2012) 38 VR 23).

66. While a judge may be more willing to exercise the power under *Evidence Act 2008* s 136 to limit the hearsay use of evidence admitted under s 108, compared to limiting the hearsay use of evidence admitted under s 66 of the *Evidence Act 2008*, there is no obligation to do so (*Pavitt v R* (2007) 169 A Crim R 452).

67. When the party seeking to adduce the evidence relies on s 66, the judge should generally not confine the relevance of the evidence to credibility (*ISJ v R* (2012) 38 VR 23).

68. Before limiting the use of evidence to credit, the judge must consider whether the preconditions for admissibility in sections 108(3)(b) and 192 are met, as it is not appropriate to circumvent those conditions by admitting the evidence under s 66 and then limiting the use of the evidence under s 136. The need to ensure the evidence meets the conditions in ss 108(3)(b) and 192 applies regardless of whether the evidence is initially admitted as an exception to the hearsay rule or the credibility rule (*ISJ v R* (2012) 38 VR 23).

69. In determining whether to limit the use of previous representations, the judge should consider whether any warning under *Jury Directions Act 2015* s 32 regarding the dangers of relying on hearsay evidence (see below) would limit the risk of unfair prejudice (see *R v BD* (1997) 94 A Crim R 131).

70. If the judge limits the use of prior consistent statements, he or she should also consider whether to limit the use of prior inconsistent statements. Consistency will usually require the same treatment of both types of evidence (*R v Ali* [2000] NSWCCA 177).

Directions which are not required

71. Following the commencement of the *Jury Directions and Other Acts Amendment Act 2017* on 1 October 2017, the following common law directions in relation to previous representations are no longer necessary:

    - A direction that repeating a previous representation does not make the original statement true (*Jury Directions Act 2015* s 44B; contra *Papakosmas v R* (1999) 196 CLR 297);
    - Where evidence of a complainant's previous complaint is given,
        - a direction that the evidence does not independently confirm the complainant's evidence of the alleged offence (*Jury Directions Act 2015* s 44C; contra *R v Stoupas* [1998] 3 VR 645); and
        - where the previous complaint evidence is given in general terms, a direction not to substitute the evidence of the previous representation for evidence of a specific charge (*Jury Directions Act 2015* s 44D; contra *R v HJS* [2000] NSWCCA 205).

72. *Jury Directions Act 2015* ss 44B–44E only abolish common law rules requiring these directions. Unlike other provisions of the *Jury Directions Act 2015* (see, e.g. ss 40, 44G, 44J, 44M, 64D), a judge is still permitted to give these directions and there may be cases where such a direction should be given in the interests of ensuring a fair trial (*Jacobs v The Queen* [2019] VSCA 285, [90]).

Section 32 Unreliability Warning

73. Where evidence of a previous representation is admitted, a judge may need to warn the jury about the potential unreliability of that evidence under *Jury Directions Act 2015* s 32.

74. A s 32 warning may be required in relation to *any* evidence of a previous representation, including complaint evidence, prior inconsistent statements and prior consistent statements.

75. Section 32 of the *Jury Directions Act 2015* closely follows the structure of *Evidence Act 2008* s 165, as it applied to criminal trials. The most significant difference is that as part of the request, the party must identify the significant matters which make the evidence unreliable.

When is a s 32 Warning Required?

76. A judge must give a s 32 unreliability warning if:

    i) A party in a jury trial requests such a warning;

    ii) The evidence in question is "of a kind that may be unreliable";

    iii) The party making the request specifies the significant matters that may make the evidence unreliable; and

iv) There are no good reasons for not doing so (*Jury Directions Act 2015* ss 14, 32).

77. See 4.21 Unreliable Evidence Warning for information concerning the first and third requirements.

78. In relation to the second requirement, s 31 states that hearsay evidence (evidence in relation to which Part 3.2 of the *Evidence Act 2008* applies) is "of a kind that may be unreliable".

79. This does not mean that a s 32 unreliability warning is required for all hearsay evidence that is admitted. Such a warning is only required if the judge finds that the *specific evidence* in the case is "of a kind that may be unreliable" (and the other requirements of s 32 have been met). In some circumstances, there may be no risk that the relevant evidence is unreliable and so s 14 does not require a warning (see, e.g. *R v Clark* (2001) 123 A Crim R 506; *R v Fowler* (2003) 151 A Crim R 166; *R v Harbulot* [2003] NSWCCA 141; *Derbas v R* [2007] NSWCCA 118. Cf *R v Stewart* (2001) 52 NSWLR 301).

80. For example, evidence that the complainant made a complaint about a sexual offence is not inherently unreliable. The potential unreliability of such evidence will depend on the circumstances of the case (*R v Harbulot* [2003] NSWCCA 141).

81. This means that whenever evidence of a previous representation is admitted, judges must consider whether that particular piece of evidence is "of a kind that may be unreliable" (*R v Clark* (2001) 123 A Crim R 506; *R v Fowler* (2003) 151 A Crim R 166; *R v Harbulot* [2003] NSWCCA 141; *Derbas v R* [2007] NSWCCA 118. Cf *R v Stewart* (2001) 52 NSWLR 301).

82. This is a test of "possibility". The question is whether the evidence is of a kind that "may be" unreliable (*R v Flood* [1999] NSWCCA 198).

83. A s 32 warning may be required for any evidence of a previous representation, even if:

- The evidence is admitted as an exception to the hearsay rule; or
- The same representation would not be hearsay if given as part of the witness's evidence in court (*R v Fernando* [1999] NSWCCA 66).

Content of the s 32 unreliability warning

84. A s 32 unreliability warning must:

i) Warn the jury that the evidence may be unreliable;

ii) Inform the jury of matters that may cause it to be unreliable; and

iii) Warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it (*Jury Directions Act 2015* s 32(3)).

Warning the jury about potential unreliability

85. The judge must warn the jury that the evidence in question may be unreliable (*Jury Directions Act 2015* s 32(3)(a)).

86. A simple repetition of the language of s 32(3)(a) is likely to be sufficient to comply with this requirement (see, e.g. the direction approved in *R v Stewart* (2001) 52 NSWLR 502, [135]).

87. Where evidence of a prior inconsistent statement is admitted:

- The judge may warn the jury that the *evidence* may be unreliable due to its hearsay nature; and
- The judge should *not* warn the jury that the inconsistency makes the *witness* unreliable. The jury can usually assess the effect of a prior inconsistent statement on a witness' credibility without judicial assistance (*Driscoll v R* (1977) 137 CLR 517; *R v Salih* (2005) 160 A Crim R 310; *R v BR* [2005] VSCA 145; *R v Juric* (2002) 4 VR 411*; Relc v R* [2006] NSWCCA 383).

Informing the jury about sources of unreliability

88. The judge must inform the jury of the significant matters that may cause the evidence to be unreliable (*Jury Directions Act 2015* s 32(3)(b)(i)).

89. In informing the jury about the significant matters that may cause evidence of a previous representation to be unreliable, the judge should refer to the risk posed by the specific evidence given in the case. Depending on the circumstances, these may include:

    - That in repeating what the speaker said, the original words or their effect may not have been accurately recalled and repeated;
    - That any weaknesses of perception, memory, narration skill and sincerity of the speaker and the person reciting the representation may have been compounded;
    - That the representation was not made in the court environment and may have been subject to pressures that resulted in a false account being given;
    - That the representation was not made on oath or affirmation, and so may not have been truthful;
    - That the jury was unable to assess the credibility of the speaker at the time he or she made the representation, and so are unable to know whether or not he or she was being honest (see, e.g. *R v Harbulot* [2003] NSWCCA 141; *R v Vincent* [2002] NSWCCA 369; *R v Nemeth* [2002] NSWCCA 281; *Brown v R* [2006] NSWCCA 69).

90. The judge should identify any inconsistencies that exist between different representations that a person has made. These inconsistencies are a basis for suggesting that the evidence may be unreliable (*R v Mayberry* [2000] NSWCCA 531; *R v TJF* (2001) 120 A Crim R 209; c.f. *R v Stewart* (2001) 52 NSWLR 502 (Howie J)).

91. Judges may note that the memory of what a person has heard is sometimes less reliable than the memory of what he or she has seen (*R v Nemeth* [2002] NSWCCA 281).

92. While in relevant cases a judge may also mention that there has been no opportunity to cross-examine the maker of the statement, it is not sufficient for a judge to *only* mention this matter. Unlike the other matters listed above, lack of cross-examination only affects the potential to discover whether the evidence is unreliable and does not affect the inherent reliability of the evidence (*R v Nemeth* [2002] NSWCCA 281; *Brown v R* [2006] NSWCCA 69).

Warning the jury about the need for caution

93. A s 32 warning must alert the jury to the need for caution in determining whether to accept the evidence, and the weight to be given to it (*Jury Directions Act 2015* s 32(3)(c)).

94. The warning must alert the jury to the need to exercise caution, but it need not tell them how to exercise that caution (*R v Stewart* (2001) 52 NSWLR 502).

95. See 4.21 Unreliable Evidence Warning for further information concerning this requirement.

Statutory Direction on Differences in a Complainant's Account in Sexual Offence Proceedings

96. In sexual offence cases where evidence of previous representations is led, the judge will need to consider whether there are gaps, inconsistencies or differences in the complainant's account. If so, the judge may need to give the jury statutory directions about those differences (*Jury Directions Act 2015* s 54D). See Differences in a Complainant's Account for further information.

Last updated: 17 February 2020

4.14.1 Charge: Unreliability of Hearsay Evidence

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This is a generic charge that can be adapted for use in cases where:

i) Evidence of a previous representation has been admitted; and

ii) A party in a jury trial requests a warning under Jury Directions Act 2015 s 32 or a warning is necessary under Jury Directions Act 2015 s 16; and

iii) The evidence in question is "of a kind that may be unreliable"; and

iv) There are no good reasons for not giving a warning.

Where the requirements of s 32 have been met, this warning should be inserted into the following charges where indicated:

4.14.4 Charge: Complaint Evidence;

4.14.2 Charge: Prior Inconsistent Statements;

4.14.3 Charge: Prior Consistent Statements.

Introduction

In this case you heard evidence that [*insert details of the previous representation*].

It is for you to determine whether NO3P[192] made the alleged statement. If you find that s/he did, you can use that fact to [*identify the asserted facts in the statement and how those facts are relevant in the case. If necessary, also describe any limitations on the use of the evidence, following a ruling under s 136*].

However, before you do so, I must warn you about the need for caution when considering NOW's evidence about that statement.

Matters that may cause unreliability

I must give you this warning because NOW's evidence was about a statement that was made out of court. It is the experience of the law that evidence of out-of-court statements may be unreliable, because [*identify* all *of the* risks of unreliability *posed by the evidence in the case, such as:*

[192] See the Notes to *Evidence Act 2008* s 59 for a list of exceptions to the hearsay rule.

- NOW may not have *accurately recalled or repeated* NO3P's statement and may have changed its meaning;
- People sometimes cannot remember things they *hear* as well as they can remember things they *see*;
- It was not possible for you to assess *NO3P's credibility* at the time s/he made the representation, and so you cannot know whether or not s/he was being honest;
- The process of repeating a statement *compounds any weaknesses* of the people involved, such as imperfect perception, memory or sincerity. Errors can occur when the original statement is *made*, when it is *heard* or when it is *repeated* in court. This means that even if you accept NOW's evidence as truthful, it might not be an accurate representation of what happened – either because of problems in what NOW heard or remembered, or because NO3P's statement itself was not accurate or truthful.
- NO3P may have been subject to *pressures that caused him/her to make a false statement*, which you do not know about;
- The statement was not made in a court environment, and so NO3P was not under the same *obligation to tell the truth* as s/he would have been if s/he gave evidence in court.]

[*The judge should also identify any* other factors *that may have a bearing on the reliability of the evidence in the case, such as:*

- Any *inconsistencies* that exist between different representations that have been made; or
- The *lack of opportunity to cross-examine* the person who made the original statement.]

Warning

The law says that every jury must take this potential unreliability into account when considering evidence of an out-of-court statement. You must take it into account in determining whether you accept NOW's evidence at all, and if you do accept it, in deciding what weight to give to that evidence.

Last updated: 29 June 2015

4.14.2 Charge: Prior Inconsistent Statements

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This charge is designed to be used in cases where:

i) Evidence of a prior inconsistent statement has been admitted under Evidence Act 2008 ss 103 or 106; and

ii) That evidence can be used for both a hearsay and non-hearsay purpose.

If the judge has limited the use of the evidence under Evidence Act 2008 s 136 the charge should be modified accordingly.

The judge should discuss the proposed charge with counsel before instructing the jury. See 3.1 Directions Under Jury Directions Act 2015 for information on when the direction is required.

Introduction

In this case you heard evidence that [*insert details of evidence given in court*]. In response, the [prosecution/defence] alleged that NOW had previously given a different version of events.[193] [*Describe prior inconsistent statement and identify the alleged inconsistencies.*]

If you accept that NOW made this statement, there are two ways you can use it.

First, you can use the contents of the statement as evidence in the case. For example, you could use NOW's statement that [*describe part of the statement*] as evidence that [*describe relevant asserted fact*].

Secondly, if you find that NOW's statement is inconsistent with his/her account in court, you may use the statement when assessing his/her credibility and reliability. You may find that the fact that NOW had previously given an inconsistent account means that the evidence s/he gave in court is less likely to be truthful or accurate. You may therefore be less willing to accept his/her evidence. It is for you to determine whether or not to draw this conclusion from any inconsistencies you find.

You should keep in mind the fact that a witness who gives inconsistent accounts is not necessarily lying. While dishonest witnesses are more likely to introduce inconsistencies in their stories, truthful witnesses may make mistakes about details.

If you do find that NOW's statement is inconsistent with his/her evidence in court, you will have two different accounts from the same witness. It is for you to determine which account, if any, to believe.

Differences in complainant's account

[*In sexual offence matters, where the judge, after hearing submissions, considers there is evidence that suggests there is a gap, inconsistency or difference in the complainant's account of the offence charged that is relevant to the complainant's credibility or reliability, the judge must give a direction about that gap, inconsistency or difference. See* 7.3.1.5.1 Charge: Differences in Complainant's Account.]

Section 32 Unreliability Warning

[*In some cases it will be necessary to warn the jury about the potential unreliability of the evidence under Jury Directions Act 2015 s 32. See* 4.14.1 Charge: Unreliability of Hearsay Evidence *for an example of such a warning.*]

Last updated: 2 October 2017

4.14.3 Charge: Prior Consistent Statements

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This charge is designed to be used in cases where:

i) Evidence of a prior consistent statement has been admitted under Evidence Act 2008 s 108; and

ii) That evidence can be used for both a hearsay and non-hearsay purpose.

If the judge has limited the use of the evidence under Evidence Act 2008 s 136 the charge should be modified accordingly.

[193] If the inconsistent statement is adduced during cross-examination as an unfavourable witness under s 38 of the *Evidence Act 2008*, this may need to be modified accordingly.

The judge should discuss the proposed charge with counsel before instructing the jury. See 3.1 Directions Under Jury Directions Act 2015 for information on when the direction is required.

Introduction

When cross-examining NOW, the [defence/prosecution] [suggested/implied] that s/he had changed his/her evidence. [*Summarise evidence and arguments concerning prior inconsistent statements or suggestions of fabrication or reconstruction.*] In response, the [prosecution/defence] led evidence that [*describe prior consistent statement*].

If you accept that NOW made this statement, there are two ways you can use it.

First, you can use the contents of the statement as evidence in the case. For example, you can use NOW's statement that [*describe part of the statement*] as evidence that [*describe relevant asserted fact*].

Secondly, you can use this statement when assessing NOW's credibility. If you accept that the statement is consistent with NOW's evidence in court, you may find that this reinforces his/her credibility, because [*summarise the way in which the evidence supports NOW's credibility, e.g.* "it shows that s/he has given a consistent account since the alleged offence"].

Section 32 Unreliability Warning

[*In some cases it will be necessary to warn the jury about the* potential unreliability *of the evidence under Jury Directions Act 2015 s 32*. See 4.14.1 Charge: Unreliability of Hearsay Evidence *for an example of such a warning.*]

Last updated: 29 June 2015

4.14.4 Charge: Complaint Evidence

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This charge is designed to be used in cases where:

i) Evidence of a complaint has been admitted under Evidence Act 2008 s 66 or Criminal Procedure Act 2009 s 377; and

ii) That evidence can be used for both a hearsay and non-hearsay purpose.

If the judge has limited the use of the evidence under Evidence Act 2008 s 136 the charge should be modified accordingly.

The judge should discuss the proposed charge with counsel before instructing the jury. See 3.1 Directions Under Jury Directions Act 2015 for information on when the direction is required.

This charge must be adapted if evidence has been admitted under Evidence Act 2008 s 66 which does not take the form of a complaint.

Introduction

In this case you heard evidence that [*insert details and timing of the complaint*].

It is for you to determine whether NOC made the alleged complaint. If you find that s/he did, you can use the complaint in two ways.

First, you can use the contents of NOC's complaint as evidence in the case. For example, you can use NOC's statement that [*describe part of the complaint*] as evidence that [*describe relevant asserted fact*].

[Jury Directions Act 2015 *s 44E abolishes common law rules requiring judges to give the direction in this shaded area, but the Act does not prohibit such a direction. See* 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements) *for further information.*]

When considering this evidence, it is important to remember that just because a person says something on more than one occasion, that does not mean that what s/he says is truthful or accurate. A false or inaccurate statement does not become true and accurate by virtue of being repeated.

Secondly, you can use NOC's complaint to assess his/her credibility. The fact that NOC made the complaint, and the content of that complaint, may show that his/her account of the events in question has been consistent. [*Where relevant, add*: In addition, the evidence may rebut an argument that the absence of complaint would suggest that the offences did not take place.]

In this case the prosecution submitted that the fact that NOC complained about the alleged incident in this manner makes it more likely that s/he is telling the truth here in court because [*insert prosecution arguments*]. The defence disputed this, contending [*insert defence arguments*].

Section 32 Unreliability Warning

[*In some cases it will be necessary to warn the jury about the* potential unreliability *of the evidence under* Jury Directions Act 2015 *s 32*. See 4.14.1 Charge: Unreliability of Hearsay Evidence *for an example of such a warning.*]

Complaint Evidence is Not Corroborative

[Note: The following direction may be given if a witness other than the complainant gave evidence of the complaint. Under *Jury Directions Act 2015* ss 44C and 44E, this direction is not mandatory, but is not prohibited. See 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements) for further information.]

In this case, you [also] heard evidence of the complaint from NOW. It would be a mistake to treat this as evidence that is independent of the complainant. Although NOW gave evidence about the complaint in court, it was NOC who was the source of that evidence.

You may use this evidence in the ways I have just described, as evidence of the offence, or in your assessment of NOC's credibility, but you must not mistake it for independent evidence of the offence.

Last updated: 15 January 2021

4.15 Silence in Response to People in Authority

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Scope

1. This topic addresses the directions which may be required when, prior to trial, a person exercises the right to remain silent when questioned or asked to supply information by a person in authority.
2. Similar issues are addressed in the following topics:
    - 4.16 Silence in Response to Equal Parties;
    - 4.10 Defence Failure to Call Witnesses.

Right to Remain Silent When Questioned by Authorities

3. The right to remain silent when questioned or asked to supply information by a person in authority is a fundamental rule of the common law (*Petty v R* (1991) 173 CLR 95).

4. This aspect of the right of silence is designed to prevent oppression by the police or other authorities of the State (*Petty v R* (1991) 173 CLR 95 (Brennan J); *Harman v The State of Western Australia* (2004) 29 WAR 380; [2004] WASCA 230).

No Adverse Inference May be Drawn

5. At common law it has been held that one consequence of this right is that no adverse inference can be drawn against the accused by reason of his or her failure to answer questions asked by a person in authority, or to supply information to such a person. To draw such an inference would be to erode the right or to render it valueless (*Petty v R* (1991) 173 CLR 95. See also *Woon v R* (1964) 109 CLR 529; *R v McNamara* [1987] VR 855).
6. This aspect of the right of silence has been given legislative form by *Evidence Act 2008* s 89 (*R v Tang* (2000) 113 A Crim R 393). However, the common law continues to apply (*R v Anderson* [2002] NSWCCA 141; *R v Stavrinos* (2003) 140 A Crim R 594).
7. Although there are some minor differences in scope and content, s 89 and the common law largely overlap (*R v Coe* [2002] NSWCCA 385; *R v Matthews* NSW CCA 28/5/96).
8. The right to silence has been restricted in some ways by the *Criminal Procedure Act 2009*. See "Pre-trial Disclosure Requirements" below for further information.

Scope of the Prohibition Against Adverse Inferences

9. The statutory prohibition on drawing adverse inferences from a person's pre-trial silence applies to criminal proceedings in which:
    - A party or other person failed or refused to answer one or more questions, or to respond to a representation; and
    - The question or representation was put or made by an investigating official[194] who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence (*Evidence Act 2008* s 89(1)).
10. By comparison, the equivalent common law prohibition applies whenever a person is suspected, or believes on reasonable grounds that he or she is suspected, of having been a party to an offence (*Petty v R* (1991) 173 CLR 95).
11. As s 89 prohibits unfavourable inferences being drawn against a party where *any person* fails or refuses to answer a question asked by a relevant party, in some circumstances it can prevent an adverse inference from being drawn against a witness other than the accused (e.g. a defence witness who gave a statement to the police, but failed to mention something later raised in court) (see, e.g. *Jones v R* [2005] NSWCCA 443).
12. As there is significant overlap between the scope of s 89 and the common law, in most cases where a person exercises his or her pre-trial right of silence, adverse inferences will be prohibited on both grounds.

Content of the Prohibition Against Adverse Inferences

13. There are two main consequences of the pre-trial right to silence:

    i) Adverse inferences may not be drawn from the failure to answer questions asked by people in

[194] An investigating official is defined in the Dictionary to the Act to be either a police officer, or a person appointed by or under an Australian law whose functions include the prevention or investigation of offences. People who are engaged in covert investigations under the orders of a superior are excluded.

authority; and

ii) Adverse inferences may not be drawn from previous silence about a defence raised at trial (*Petty v R* (1991) 173 CLR 95).

Failure to Answer Questions

14. *Evidence Act 2008* s 89(1) provides that no unfavourable inferences can be drawn against a party from a person's failure or refusal to answer questions put by an investigating official, or to respond to the official's representations.

15. Section 89 prohibits all unfavourable inferences, including inferences of consciousness of guilt and inferences relevant to a party's credibility (*Evidence Act 2008* s 89(4)). This reflects the common law (see, e.g. *Petty v R* (1991) 173 CLR 95).

Failure to Raise a Defence

16. Previous silence about a defence raised at the trial cannot provide a basis for inferring that the defence is a new invention or is rendered suspect or unacceptable (*Petty v R* (1991) 173 CLR 95; *R v Stavrinos* (2003) 140 A Crim R 594; *Sanchez v R* [2009] NSWCCA 171).[195]

17. This stems from the rule that it is never for an accused person to prove his or her innocence. To allow that an explanation might be judged false because it was not put forward before trial is, in effect, to allow the burden of proving guilt to be more readily discharged because the accused did not signal the precise basis of his or her innocence (*Petty v R* (1991) 173 CLR 95).[196]

18. The prohibition against drawing an inference of recent invention applies even if:

- The accused bears an evidential burden in relation to the defence;
- The accused was not specifically asked about the matter which is the subject of the defence, or was asked no questions at all;
- The accused answered questions about other matters;
- The defence was not raised at the committal proceedings; or
- The accused only raised the facts giving rise to the defence after the close of the prosecution case (*Petty v R* (1991) 173 CLR 95; *Sanchez v R* [2009] NSWCCA 171).

Previous Inconsistent Accounts

19. While *Evidence Act 2008* s 89 and the common law both prohibit adverse inferences being drawn from silence, they do not prevent adverse inferences being drawn in cases where the accused has previously told a contrary story. The jury is entitled to draw whatever inferences are reasonably open from the responses actually made by the accused (*Petty v R* (1991) 173 CLR 95; *R v Gonzales-Betes* [2001] NSWCCA 226; *Sanchez v R* [2009] NSWCCA 171).

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[195] This inference is prohibited by the common law. While it may also be prohibited by s 89, this issue has not yet been decided by an appellate court (see *R v Coe* [2002] NSWCCA 385).

[196] In *R v Merlino* [2004] NSWCCA 104 the NSW Court of Criminal Appeal seems to have suggested that there may be some circumstances in which an adverse inference can be drawn from the accused's failure to raise a defence at the point of arrest. However, this decision seems difficult to reconcile with the High Court's decision in *Petty v R* (1991) 173 CLR 95.

20. Thus, where the accused chooses to break his or her silence and give an explanation before trial that is inconsistent with the account given in evidence, the inconsistency may be used by the prosecution, both to attack the accused's credit and as demonstrating a consciousness of guilt (*Jones v R* [2005] NSWCCA 443; *Van der Vegt v R* [2016] NSWCCA 279, [13], [40]–[41]).

21. Similarly, where the accused gives an account which is inconsistent with the case presented at trial, and fails to withdraw that account until the time of trial, evidence of the accused's failure to withdraw the account is relevant and admissible. It can constitute a denial by conduct of the defence raised at trial (*Petty v R* (1991) 173 CLR 95). See also 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements).

Selective Silence

22. No adverse inference can be drawn from the fact that the accused answered some questions but did not answer others (*R v McNamara* [1987] VR 855; *R v Towers* NSW CCA 7/6/93; *Yisrael v District Court of New South Wales* (1996) 87 A Crim R 63; *R v Barrett* (2007) 16 VR 240. See also *Evidence Act 2008* s 89(1)(a)).

23. By answering some questions, the accused does not waive his or her right of silence. He or she does not assume any obligation to provide information to the police (*R v Stavrinos* (2003) 140 A Crim R 594).

24. The accused's selectiveness in answering questions therefore cannot demonstrate a consciousness of guilt (*R v McNamara* [1987] VR 855; *R v Towers* NSW CCA 7/6/93; *Yisrael v District Court of New South Wales* (1996) 87 A Crim R 63; *R v Barrett* (2007) 16 VR 240).

25. However, the answers the accused gives may be used, and can be considered as a whole, in the context of his or her refusal to answer other questions (*Woon v R* (1964) 109 CLR 529; *Yisrael v District Court of New South Wales* (1996) 87 A Crim R 63; *R v Towers* NSW CCA 7/6/93).

26. The jury can draw adverse inferences from the answers that were given, but cannot draw any inferences from the questions that were not answered (*R v Barrett* (2007) 16 VR 240).

27. As the accused is under no obligation to give notice of his or her defence prior to trial, a failure to proffer an explanation cannot be relied upon as a basis for an inference of guilt or as adversely affecting the credibility of a defence (*R v Makin* (1995) 120 FLR 9).

28. However, where the accused gives a detailed account of events to the police, the jury may be able to infer a consciousness of guilt from the conscious omission of certain details (*R v Cuenco* (2007) 16 VR 118; *R v Russo* (2004) 11 VR 1; *De Marco* 26/6/1997 CA Vic).[197] See 4.6 Incriminating Conduct (Post Offence Lies and Conduct) for further information.

Pre-trial Disclosure Requirements

29. In Victoria, some limitations have been placed on the right of silence by the pre-trial disclosure requirements of Part 5.5 of the *Criminal Procedure Act 2009*. For example:

    - If the prosecution has served on the accused a summary of its opening, the accused must serve on the prosecution (and file in court) a response to the summary, which identifies the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken (s 183);

[197] As long as this inference is drawn from the accused's conscious omission of details from his or her account, rather than his or her failure to answer a question or respond to a representation, it appears not to breach *Evidence Act 2008* s 89.

- If the prosecution has served on the accused a notice of pre-trial admissions, the accused must serve on the prosecution (and file in court) a response to the notice, which indicates which evidence set out in the notice is agreed and which evidence is in issue, and the basis on which issue is taken (s 183);
- If the accused intends to call a person as an expert witness at the trial, he or she must file a copy of the witness's statement with the court, and serve a copy on the prosecution, within a certain timeframe (s 189);
- If the accused intends to give or adduce evidence of an alibi, he or she must notify the DPP of that fact within a certain timeframe (s 190).

30. If the accused fails to comply with the pre-trial disclosure requirements contained in the *Criminal Procedure Act 2009*:

    i) He or she may be prevented from giving or calling certain evidence (see, e.g. ss 190, 233);

    ii) His or her response to the prosecution's opening address may be restricted (s 225(2)); or

    iii) The judge or a party may comment on the breach (s 237).[198]

31. Any comment made by the judge must be relevant, permitted by another Act or a rule of law and must not be unfairly prejudicial (*Criminal Procedure Act 2009* s 237).

When Can Evidence of Silence Be Admitted?

32. Evidence that a person failed to respond to a person in authority, or failed to raise some defence or matter of explanation, will generally be inadmissible. Such evidence is usually not probative of any relevant fact or circumstance (in light of the fact that the accused has a right to remain silent, and no adverse inferences can be drawn from his or her exercise of that right) (*Petty v R* (1991) 173 CLR 95; *Bruce v R* (1987) 74 ALR 219; *R v Ireland* (1970) 126 CLR 321; *R v McNamara* [1987] VR 855. See also *Evidence Act 2008* ss 56, 89(2)).

33. However, evidence that the accused exercised the right of silence can be admitted if there is a legitimate purpose for admitting the evidence (*R v Reeves* (1992) 29 NSWLR 109; *R v Astill* NSW CCA 8/7/92; *R v Coyne* [1996] 1 Qd R 512).

34. For example, evidence that the police put the prosecution's version of the facts to the accused, and gave him or her the opportunity to answer them, may be admitted to meet an anticipated criticism of the fairness of the investigating police officers' conduct (*R v Reeves* (1992) 29 NSWLR 109; *R v Hartwick* Vic CCA 20/12/95; *Wilson v County Court of Victoria* (2006) 14 VR 461).

35. In such circumstances, the accused's silence can only be used to counter the allegation of inadequate investigation. It cannot be used to demonstrate a consciousness of guilt or as the basis of a claim of recent invention (*Wilson v County Court of Victoria* (2006) 14 VR 461).

36. Evidence of the accused's pre-trial silence may also be admitted where the failure or refusal to answer a question is a fact in issue in the proceeding (e.g. where it is a criminal offence for the accused to refuse to respond to a question by an investigating official) (*Evidence Act 2008* s 89(3)).

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[198] See Chapter 5 of the Victorian Criminal Proceedings Manual for more information on the operation of pre-trial processes and the consequences of non-compliance.

37. Where the accused answers some questions but not others, it may be necessary to admit the whole record of interview to prevent a distorted or unreal version of the interrogation being placed before the jury (*R v McNamara* [1987] VR 855; *Brain v R* [2010] VSCA 172. See also *R v Astill* NSW CCA 8/7/92; *R v Towers* NSW CCA 7/6/93).

38. Evidence of the accused's pre-trial silence should not be admitted solely to prevent the jury from speculating about whether the accused had given any account of his or her actions when first challenged by the police (*R v Hartwick* Vic CCA 20/12/95. But see *R v Familic* (1994) 75 A Crim R 229; *DPP v Butay* [2001] VSC 346; *R v Ivanovic* [2003] VSC 403).

39. Even if evidence that the accused exercised his or her right of silence is admissible, it may be appropriate to exclude it under *Evidence Act 2008* ss 135 or 137 (see, e.g. *R v Astill* NSW CCA 8/7/92).

When to Direct the Jury About Pre-trial Silence

40. As *Evidence Act 2008* s 89 does not address the issue of when a jury should be directed about pre-trial silence, Part 3 of the *Jury Directions Act 2015* applies (see *Jury Directions Act 2015* s 10).

41. The need for a direction depends on whether a direction is sought or whether there are substantial and compelling reasons for giving a direction in the absence of any request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

42. At common law, whenever evidence was given which disclosed that the accused had exercised his or her pre-trial right of silence, the judge was required to direct the jury about the issue. If a direction was not given, the jury might mistakenly use that fact to the accused's detriment (King v R (1986) 15 FCR 427. See also *R v Reeves* (1992) 29 NSWLR 109; *R v Astill* NSW CCA 8/7/92; *R v Familic* (1994) 75 A Crim R 229; *R v Matthews* NSW CCA 28/5/96).

43. A direction on pre-trial silence was considered necessary even if it was not sought by counsel (*R v Booty* NSWCCA 19/12/94).

44. Under the *Jury Directions Act 2015*, the judge should consider the significance of the evidence of silence in the context of the trial when deciding whether to give the direction despite the absence of a request.

45. The direction should be given when the relevant evidence is first adduced (*R v Reeves* (1992) 29 NSWLR 109; *R v Matthews* NSW CCA 28/5/96; *Sanchez v R* [2009] NSWCCA 171).

46. While there is no rule to the effect that the direction must be repeated in the summing up, it will often be desirable and prudent to do so (*Sanchez v R* [2009] NSWCCA 171).

47. It is not sufficient to rely on counsel having addressed the issue. The right of silence is fundamental, and requires a direction that is given with judicial authority (*R v Matthews* NSW CCA 28/5/96).

Content of the Direction

48. When directing the jury on the accused's exercise of the right of silence, the judge must:

- Warn the jury against the impermissible use of that fact; and
- Explain any permissible uses of the evidence.

Warn the Jury Against Impermissible Use of the Evidence

49. A direction about impermissible uses of evidence of pre-trial silence must tell the jury:

- That the accused has a fundamental right to remain silent; and

- That they should not conclude that the accused is guilty, or draw any adverse inference against the accused, from the fact that he or she exercised that right (*Petty v R* (1991) 173 CLR 95; *R v Reeves* (1992) 29 NSWLR 109; *King v R* (1986) 15 FCR 427; *R v Astill* NSW CCA 8/7/92; *R v Familic* (1994) 75 A Crim R 229; *R v Matthews* NSW CCA 28/5/96).

50. No particular form of words is required when directing the jury about this issue. The judge is required to do no more than direct the jury as to the nature of the right and that no inference adverse to the accused can be drawn (*R v Hodge* [2002] NSWCCA 10).

51. It will usually be appropriate to also remind the jury that the accused was specifically cautioned by the police that he or she was not obliged to answer any questions, so as to avoid any suggestion of a familiarity by the accused with criminal investigation procedures (*R v Reeves* (1992) 29 NSWLR 109).[199]

52. Where the accused's account of events has been presented for the first time at trial, the judge must make it clear that no suggestion can be made that that account is an invention because it had not been presented earlier (*R v Anderson* [2002] NSWCCA 141).

53. If the accused's selective silence is revealed to the court, the jury must be directed not to draw an adverse inference from that fact (*King v R* (1986) 15 FCR 427).

Direct the Jury About Permissible Uses of the Evidence

54. Where evidence of the accused's pre-trial silence is admitted for a legitimate purpose (see "When Can Evidence of Silence Be Admitted?" above), the judge's directions on pre-trial silence should:

- Explain how that evidence may be used (e.g. to counter an allegation of inadequate investigation); and
- Direct the jury that they may only use the evidence for that purpose (see, e.g. *Wilson v County Court of Victoria* (2006) 14 VR 461).

Contested Silence

55. In some cases it will be unclear whether a person responded to official questioning or remained silent. For example:

- The accused may have made an ambiguous gesture (such as a shrug) in response to a police question, which could be interpreted as "I have nothing to say" (silence) or as "I have no explanation for what you have asked" (a response) (see, e.g. *R v Astill* NSW CCA 8/7/92);[200]
- The accused may claim that he or she responded to a particular question, but the police may deny that was the case (see, e.g. *R v Tang* (2000) 113 A Crim R 393).

56. If such evidence is admitted, the directions should:

- Explain the different possible findings to the jury;

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[199] This caution is required by *Crimes Act 1958* s 464A(3). The prohibition against drawing adverse inferences applies regardless of whether such a caution has been administered (*Petty v R* (1991) 173 CLR 95).

[200] In many cases it will be appropriate to exclude such evidence, as the risk of prejudice to the accused will outweigh the probative value of the evidence. This will especially be the case where the jury is asked to determine the meaning of a gesture which they did not see (see, e.g. *R v Astill* NSW CCA 8/7/92).

- Tell the jury that it is for them to determine whether the person remained silent or gave a response; and
- Explain the consequences that follow each possible finding (*R v Astill* NSW CCA 8/7/92; *R v Familic* (1994) 75 A Crim R 229).

Correcting a Prosecution Breach of the Prohibition

57. The prosecution must not suggest that an adverse inference can be drawn against the accused by reason of his or her failure to answer questions asked by a person in authority, or to supply information to such a person (*R v Stavrinos* (2003) 140 A Crim R 594).
58. The prosecution also must not suggest that the right to silence is subject to exceptions that allow adverse inferences to be drawn in certain circumstances (*R v Stavrinos* (2003) 140 A Crim R 594).
59. Consequently, the prosecution ordinarily must not:
    - Ask a person why they declined to answer official questions or why they failed to raise a defence at an earlier time (*R v Coe* [2002] NSWCCA 385; *R v Fraser* [1988] 1 Qd R 182; *R v Armstrong* (1990) 54 SASR 207);
    - Invite the jury to ask themselves why an accused had remained silent (*R v Stavrinos* (2003) 140 A Crim R 594);
    - Suggest that the jury can evaluate the version of events put forward at trial (and discount it) by reference to the accused's earlier silence about it (*R v Stavrinos* (2003) 140 A Crim R 594).
60. Where the prosecution breaches this prohibition, the judge may be able to remedy the situation with a strong direction (see, e.g. *R v Coe* [2002] NSWCCA 385).
61. Such a direction should tell the jury:
    - That as the accused has a right of silence, they cannot use his or her exercise of that right against him or her;
    - To ignore the contrary suggestion made by the prosecution;
    - To put the issue and the evidence relating to the accused's pre-trial silence out of their minds; and
    - To clear from their minds whatever views they might have formed as a result of the evidence and address of the prosecution (*R v Brown* [2004] VSCA 59. See also *R v Stavrinos* (2003) 140 A Crim R 594).
62. These directions should be given when the improper suggestion is made, and again during summing up (*R v Coe* [2002] NSWCCA 385; *R v Brown* [2004] VSCA 59).

Prohibited Directions

63. The jury must not be invited to take the accused's pre-trial silence into account against him or her in any way (*Petty v R* (1991) 173 CLR 95; *Evidence Act 2008* s 89).
64. This means that judges must not suggest:
    - That the exercise of the right of silence can provide a basis for inferring a consciousness of guilt;
    - That a defence raised at trial is a recent invention or is suspect because it had not previously been mentioned; or
    - That the jury can infer from the accused's silence about the facts giving rise to that defence that those facts are false (*Petty v R* (1991) 173 CLR 95).

65. The judge should not comment on the fact that a particular matter was not raised at the committal proceedings, or imply that there was a duty to raise matters at committal (*Petty v R* (1991) 173 CLR 95).

66. The judge also must not tell the jury:

    - That the accused's silence can be used to test the veracity of his or her evidence (*Glennon v R* (1994) 179 CLR 1);
    - That the accused's silence is relevant to the weight of the evidence given in court (*Petty v R* (1991) 173 CLR 95);
    - That the police "gave the accused the opportunity to explain" his or her whereabouts (as this may convey the impression that an innocent person would have willingly answered the questions and given the police an account of his or her movements at the relevant time) (*King v R* (1986) 15 FCR 427);
    - That the prosecution was deprived of an opportunity to investigate the defence raised, or to call evidence in disproof of that defence (as this suggests that the accused is under some duty to make timely disclosure to permit an investigation of his or her story by the prosecution) (*Petty v R* (1991) 173 CLR 95, but see *Criminal Procedure Act 2009* ss 183, 233 and 237);
    - That the accused's failure to respond to certain questions was not the "sort of response one would expect" from a person telling the truth (*Yisrael v District Court of New South Wales* (1996) 87 A Crim R 63);
    - That if the accused had been telling the truth he or she would have responded to particular questions (*Yisrael v District Court of New South Wales* (1996) 87 A Crim R 63).

Last updated: 16 February 2017

4.15.1 Charge: Failure to Answer Police Questions

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This charge may be given when evidence is disclosed that, prior to trial, the accused failed to answer one or more questions asked by the police.

It should be given when that evidence is first adduced, and may be repeated (with appropriate modifications) in the summing up.

The charge will need to be adapted if:

i) A party other than the accused exercised the right to silence;

ii) Questions were asked by an authority other than the police; or

iii) The question of whether the accused remained silent is contested.

Failure to Answer Police Questions

You have just heard evidence that NOA chose not to answer [some of] the questions asked by the police. That was his/her right, as the police told him/her when they sought to question him/her.

It would therefore be wrong for you to use his/her silence against him/her in any way. The fact that a person chooses not to answer police questions does not mean that s/he has something to hide, or is guilty of some offence. It cannot provide the basis for drawing any unfavourable inferences. To use an accused person's silence in such a way would be to undermine a fundamental right provided by the law.

[*If evidence is disclosed that the accused failed to raise his or her defence at an earlier time, add the following shaded section.*]

You also may not use against NOA the fact that s/he did not tell the police that [*insert details of defence*, *e.g.* "s/he acted in self-defence"]. That was also his/her right. As I have told you, it is for the prosecution to prove its case beyond reasonable doubt, and the accused is not required to provide the police with any information in order to prove his/her innocence.

This means that you must not conclude from the fact that NOA did not raise the defence at an earlier time that it was an invention, or draw any other inferences against the accused for failing to mention it. You must not even consider the fact that NOA did not tell the police about that defence when deciding whether the prosecution has proved its case beyond reasonable doubt.

[*If the evidence of silence may be used for a* legitimate purpose*, explain that purpose here. For example, if evidence of the accused's selective silence has been adduced, add the following shaded section.*]

Of course, you are free to use any answers that NOA did give the police when considering the case against him/her. However, you must not draw any conclusions from the fact that s/he chose not to answer some of their questions, or from his/her choice of which questions to answer. Evidence of the accused's silence has only been given in order to provide you with a complete picture of the police interview. It must not be used against the accused.

Last updated: 29 June 2015

4.16 Silence in Response to Equal Parties

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Right of Silence Does Not Apply to Equal Parties

1. The right to remain silent when questioned or asked to supply information by a person in authority is a fundamental rule of the common law (*Petty v R* (1991) 173 CLR 95. See 4.15 Silence in Response to People in Authority).
2. That aspect of the right of silence is designed to prevent oppression by the police or other authorities of the State. It does not encompass silence towards people with whom the accused speaks on equal terms (*Petty v R* (1991) 173 CLR 95 (Brennan J); *R v Alexander* [1994] 2 VR 249; *R v Brown* [2004] VSCA 59).
3. It is therefore possible for an adverse inference to be drawn from the accused's silence in response to a question asked, or accusation made, by a person other than a police officer or authority figure (see, e.g. *R v Salahattin* [1983] VR 521; *R v Alexander* [1994] 2 VR 249; *R v Gallagher* [1998] 2 VR 671; *R v Brown* [2004] VSCA 59).

When Can an Adverse Inference be Drawn

4. An adverse inference can be drawn from a person's silence where a statement was made in his or her presence, and in the circumstances an answer would have been expected (*Woon v R* (1964) 109 CLR 529; *R v Salahattin* [1983] VR 521; *R v Alexander* [1994] 2 VR 249; *R v Gallagher* [1998] 2 VR 671; *R v MMJ* (2006) 166 A Crim R 501).
5. In such circumstances, the jury may infer that by remaining silent, the person:

    i) Implicitly admitted the truth of the statement in whole or in part; or

    ii) Demonstrated a consciousness of guilt (*Woon v R* (1964) 109 CLR 529; *R v Salahattin* [1983] VR 521; *R v Alexander* [1994] 2 VR 249; *R v Gallagher* [1998] 2 VR 671; *R v MMJ* (2006) 166 A Crim R 501).

6. This topic focuses on using the accused's silence for the first-mentioned purpose. See 4.6 Incriminating Conduct (Post Offence Lies and Conduct) for information concerning the latter use of the accused's silence.

7. Even where silence is used only for the first purpose (implicitly admitting the truth of the statement), such a use involves using conduct as an implied admission of having committed an offence charged or an element of an offence charged. It is therefore incriminating conduct within the meaning of Jury Directions Act 2015 s 18, and the prosecution must give a notice under Jury Directions Act 2015 s 19, and the judge must give directions in accordance with s 21, regardless of any request (see *Stern v The King* [2023] VSCA 57, [57]–[58]). The directions outlined in this chapter are designed to adapt the requirements of s 21 to the particular context of admissions by silence.

Admissibility

8. A statement made in the accused's presence will only be admissible if, in all the circumstances, it is open to the jury to conclude that:

    - The accused heard the statement and had the opportunity to respond;
    - The occasion was one in which the accused might reasonably have been expected to respond; and
    - By his or her silence the accused has substantially admitted the truth of the statement in whole or in part, or has shown a consciousness of guilt (*R v Salahattin* [1983] VR 521; *R v MMJ* (2006) 166 A Crim R 501. See also *R v Thomas* [1970] VR 674; *Barca v R* (1975) 133 CLR 82; *R v Gallagher* [1998] 2 VR 671).

9. In most cases, evidence of the statement will be admitted solely to identify the subject matter of the accused's response (as the statement itself will have little probative value). However, unless a judge limits the use of the evidence under *Evidence Act 2008* s 136, the statement may be used as evidence of the truth of the facts it can reasonably be supposed the speaker intended to assert (*Evidence Act 2008* s 60).

10. Evidence of the accused's silence may be excluded under *Evidence Act 2008* ss 135 or 137. It may be appropriate to do so where:

    - It is not clear precisely what the accused was admitting by his or her silence (see, e.g. *R v MMJ* (2006) 166 A Crim R 501 (Buchanan JA)); or
    - The evidence has limited probative value (see, e.g. *R v Gallagher* [1998] 2 VR 671 (Callaway JA)).

Directions

11. As a form of incriminating conduct evidence, directions on silence to equal parties are mandatory and are not subject to the Part 3 request process. The judge must direct the jury that they may only treat the evidence as probative if it concludes that the conduct occurred and the only reasonable explanation of the conduct is that the accused believed he or she had committed the offence charged or an element of the offence charged. The judge must also direct that even if the jury finds the accused believed he or she committed the offence charged, it must still decide on the whole of the evidence whether the prosecution has proved the accused's guilt beyond reasonable doubt (*Jury Directions Act 2015* s 21).

12. Applying the principles in Jury Directions Act 2015 s 21 to the specific context of admissions by silence, the judge should instruct the jury about:

    - The nature of the statement made in the accused's presence, and the accused's response to that statement;
    - The expectation that the accused would respond to that statement;

- The inferences (if any) that could be drawn from the accused's failure to respond;
- The limited weight that it should give the evidence.

Nature of the Statement and Response

13. The jury must determine precisely what statement (if any) was made in the accused's presence (see, e.g. *R v MMJ* (2006) 166 A Crim R 501; *R v Salahattin* [1983] VR 521).
14. Where the timing of the statement is important, the jury may also need to determine approximately when the statement was made (*R v MMJ* (2006) 166 A Crim R 501).
15. The jury may also need to determine whether the statement contained an implicit allegation against the accused (e.g. that the accused had engaged in inappropriate sexual conduct with the complainant) (*R v MMJ* (2006) 166 A Crim R 501).
16. Once the jury has determined the nature of the statement made, they will need to determine how the accused responded to that statement (i.e., whether or not he or she remained silent) (*R v MMJ* (2006) 166 A Crim R 501).

Was a Response Expected?

17. The jury must determine whether the statement called for a response. An inference can only be drawn from the accused's silence if the circumstances were such that, in ordinary experience, the accused would have been expected to respond to the statement made in his or her presence (*R v Salahattin* [1983] VR 521; *R v MMJ* (2006) 166 A Crim R 501; *Sibanda v R* (2011) 33 VR 67).
18. This is a question of human experience – of the probability that a person would react in a certain way in particular circumstances (*R v Salahattin* [1983] VR 521. See also *R v Gallagher* [1998] 2 VR 671; *R v MMJ* (2006) 166 A Crim R 501; *R v Alexander* [1994] 2 VR 249; *Sibanda v R* (2011) 33 VR 67).
19. In determining this issue, the jury must consider all of the circumstances in the case. For example, it may be relevant:
    - That although the statement was made in the accused's presence, it was not made directly to the accused; or
    - That the accused was not invited to comment on the statement (see, e.g. *R v Thomas* [1970] VR 674; *R v Salahattin* [1983] VR 521).
20. The relationship between the relevant parties may also be relevant. There may have been something in the relationship or relative positions of the parties that precluded the accused from responding (*R v Salahattin* [1983] VR 521).

What Inference Can Be Drawn from the Accused's Silence?

21. If the jury finds that the accused failed to respond to a statement in circumstances where a person would ordinarily have been expected to respond, they must then determine what inference (if any) can be drawn from that fact (*R v Salahattin* [1983] VR 521; *R v MMJ* (2006) 166 A Crim R 501).
22. One inference the jury may draw is that the accused, by his or her silence, admitted the truth of the whole or some part of the statement made in his or her presence (*R v Salahattin* [1983] VR 521; *R v MMJ* (2006) 166 A Crim R 501).[201]

[201] The jury may also be able to infer a consciousness of guilt from the accused's silence. See 4.6 Incriminating Conduct (Post Offence Lies and Conduct) for further information.

23. To draw this inference, the jury must find that by remaining silent in the circumstances, the accused acknowledged the truth of the statement made in his or her presence. In other words, he or she adopted the statement, making it his or her own (*Woon v R* (1964) 109 CLR 529; *R v Thomas* [1970] VR 674).

24. The judge must direct the jury that they may only draw this inference if there is no other reasonable explanation for the accused's silence in the circumstances, and direct them about any other reasons the accused may have had for remaining silent in the circumstances. For example, the accused:

    - May not have heard the statement;
    - May not have understood the statement;
    - May not have had the opportunity to respond to the statement;
    - May have been physically, mentally or emotionally prevented from responding to the statement;
    - May have been confused by the statement or taken by surprise;
    - May have considered the allegation to be unworthy of an answer;
    - May have wished to conceal matters which are irrelevant to the case before the court;
    - May have lacked confidence in his or her ability to speak English fluently and in a manner capable of being understood; or
    - May have believed that he or she should speak only when directly spoken to (see, e.g. *R v Thomas* [1970] VR 674; *R v Salahattin* [1983] VR 521; *R v MMJ* (2006) 166 A Crim R 501).

25. Even if the accused had no specific reason for failing to respond, it is for the jury to decide whether or not to infer that he or she had adopted the whole or part of the statement by his or her silence (*R v Salahattin* [1983] VR 521; *R v MMJ* (2006) 166 A Crim R 501).

26. It may be appropriate to direct the jury that people react to allegations in different ways, and that care must be taken when drawing any inferences from the accused's silence.

27. The jury must determine precisely what the accused was admitting (if anything) by his or her silence (*R v MMJ* (2006) 166 A Crim R 501).

28. To a large extent, this will depend on the nature of the statement made in the accused's presence. For example, if the statement did not (explicitly or implicitly) allege that the accused had committed the particular offence with which he was charged, then the accused cannot have admitted his or her guilt of that offence by remaining silent (see, e.g. *R v MMJ* (2006) 166 A Crim R 501).

Direct the Jury About Possible Uses of the Admission

29. The judge must direct the jury about the ways in which they can use the accused's admission (*R v MMJ* (2006) 166 A Crim R 501).

30. This will depend on precisely what the accused admitted by his or her silence. For example:

    - If the accused was specifically asked about the offence with which he or she is charged, and the jury finds that by remaining silent the accused admitted his or her guilt of that offence, the jury can use that admission as direct proof of the relevant offence;

- If the accused was asked a question which does not directly relate to the offence with which he or she is charged, such as "have you been sexually involved with the complainant?", and the jury finds that by remaining silent the accused admitted that he had been sexually involved with the complainant, the jury can only use that as an admission of an improper sexual interest towards the complainant. They cannot use the admission as direct proof of the offence charged (*R v MMJ* (2006) 166 A Crim R 501).

31. Where an admission can only be used to demonstrate an improper sexual interest in the complainant, the judge may need to:
    - Instruct the jury about the limited ways in which evidence of improper sexual interest may be used (see 4.17 Tendency Evidence); and
    - Tell the jury that such evidence cannot be used in direct proof of the charged offence (*R v MMJ* (2006) 166 A Crim R 501).
32. The judge should direct the jury that they may only use the admission in the relevant way if they are satisfied that it is true (*R v MMJ* (2006) 166 A Crim R 501).

Other Directions

33. The judge must direct the jury that evidence from silence "has no great probative value" (*R v Alexander* [1994] 2 VR 249, 263; *Stern v The King* [2023] VSCA 57, [59]).
34. The judge may also need to warn the jury under *Jury Directions Act 2015* s 32 that evidence of admissions may be unreliable. See 4.21 Unreliable Evidence Warning for further information.
35. Where the judge limits the use of the evidence under *Evidence Act 2008* s 136 (see above), the judge may need to direct the jury that:
    - The statement provides no evidence of the truth of the allegation made or of the facts asserted in the statement;
    - The evidence consists of the accused's reaction to the statement by way of silence;
    - The statement was admitted only because it introduced or explained the accused's conduct on hearing that statement;
    - If they do not find that the accused, by his or her silence, made an admission, they must wholly disregard the statement; and
    - If they find that the accused only accepted part of the statement made to him or her, then they must disregard the other parts of the statement (see, e.g. *R v Grills* (1910) 11 CLR 400; *R v Thomas* [1970] VR 674; *Barca v R* (1975) 133 CLR 82; *R v MMJ* (2006) 166 A Crim R 501)
36. If the prosecution has improperly suggested that the jury can reason that the accused remained silent out of a consciousness of guilt, the judge may need to direct them not to do so (*Jury Directions Act 2015* ss 16, 23; *R v MMJ* (2006) 166 A Crim R 501).

Last updated: 22 March 2023

4.16.1 Charge: Admissions by Silence

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This charge may be given when it is alleged that by failing to respond to a statement made by a person with whom s/he was on equal terms, the accused admitted the truth of part or all of that statement.

The direction should not be given when the admission is:

i) An admission that the accused committed an offence charged or an element of an offence charged; or

ii) An admission which negates a defence to an offence charged.

Failure to Respond to Equal Parties

I must now give you some directions about NOW's evidence that NOA remained silent when [*identify statement made in accused's presence*].

The prosecution has argued that you should infer from NOA's silence that s/he admitted [*identify alleged admission*]. You will recall what I have told you about inferences.[202]

While you may draw this inference from NOA's silence, you must find three matters before you do.

First, you must find that NOW actually made the statement alleged, and that NOA failed to respond to that statement. [*Summarise any evidence and arguments on this issue.*]

Second, you must find that the statement made by NOW would usually call for a response of some kind. This is a question of ordinary human experience. It requires you to determine whether you think that a person in NOA's circumstances would normally have been expected to respond to NOW's statement. It is only if you find that s/he would that you can draw any inference from NOA's silence. [*Identify relevant circumstances and summarise evidence and arguments*.]

Third, you must find that by remaining silent in the circumstances, NOA acknowledged the truth of NOW's statement that [*identify relevant part of the statement*]. In other words, s/he adopted that statement, making it his/her own.

This will only be the case if there is no other reasonable explanation for NOA's silence in the circumstances. You must not draw an inference if you think it is reasonably possible that NOA did not respond to NOW's statement for another reason.

In considering this issue, you should bear in mind that people react to allegations in different ways. You should therefore take care when drawing any inferences from the accused's silence.

[*Summarise evidence and arguments concerning possible reasons for the accused's failure to respond, such as failing to hear or understand the statement. See* 4.16 Silence in Response to Equal Parties *for guidance.*]

It is only if you find all three of these matters that you can infer that by remaining silent, NOA admitted [*identify admission*].

If you do draw this inference, you can use NOA's admission to [*identify permissible uses of the admission. See* 4.16 Silence in Response to Equal Parties *for guidance*]. However, you may only do so if you are accept that the admission was true. Even then, you should not give this evidence great weight. Even if you find that the accused's silence was an admission, you must still decide, based on all the evidence, whether the prosecution has proved the accused's guilt beyond reasonable doubt.

[*If a s 165 Unreliability Warning is required, insert here. See* 4.21 Unreliable Evidence Warning *for further information.*]

It is important to note that NOW's statement that [*identify statement*] is not itself evidence of the facts alleged in that statement. The evidence about those facts comes from NOA's reactions to the statement. This means that if you do not find that NOA admitted the truth of NOW's statement by remaining silent, then you must completely disregard the statement. [*If relevant, add:* Similarly, if you find that s/he only accepted part of the statement, then you must disregard the other parts.[203]]

Last updated: 22 March 2023

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[202] This charge is based on the assumption that the judge has already instructed the jury about inferences. It will need to be modified if that has not been done.

[203] This paragraph is based on the assumption that a judge has limited the use of the evidence under *Evidence Act 2008* s 136. If this has not been done, it will need to be modified accordingly.

4.17 Tendency Evidence

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Overview

1. Part 4, Division 2, of the *Jury Directions Act 2015* regulates jury directions on 'other misconduct evidence'. This is defined as:
   (a) Coincidence evidence, as defined in the *Evidence Act 2008*;
   (b) Tendency evidence, as defined in the *Evidence Act 2008*;
   (c) Evidence of other discreditable acts and omissions of an accused that are not directly relevant to a fact in issue;
   (d) Evidence that is adduced to assist the jury to understand the context in which the offence charged or any alternative offence is alleged to have been committed (*Jury Directions Act 2015* s 26).
2. This topic examines tendency evidence as a form of 'other misconduct evidence'.

What is "Tendency Evidence"?

3. "Tendency evidence" is evidence that is used to prove that a person has or had a tendency to:
   - Act in a particular way; or
   - Have a particular state of mind (*Evidence Act 2008* s 97).
4. The following types of evidence may, in certain circumstances,[204] be used to prove that a person had such a tendency:
   - Evidence of a person's character;
   - Evidence of a person's reputation;
   - Evidence of a person's conduct; or
   - Evidence of a tendency that a person has or had (*Evidence Act 2008* s 97).

How do "tendency evidence" and "coincidence evidence" differ?

5. Care must be taken to distinguish "tendency evidence" from "coincidence evidence" (*R v Nassif* [2004] NSWCCA 433; *Gardiner v R* [2006] NSWCCA 190; *KJR v R* [2007] NSWCCA 165).
6. "Tendency evidence" is evidence that allows the jury to reason that:
   > he did it before; he has a propensity to do this sort of thing; the likelihood is that he did it again on the occasion in issue (*Hughes v The Queen* (2017) 344 ALR 187 at [70] per Gageler J).
7. "Coincidence evidence" is evidence which uses the improbability of two or more events occurring coincidentally to prove that a person performed a particular act or had a particular state of mind (*Evidence Act 2008* s 98).
8. While the evidence that constitutes "tendency evidence" and "coincidence evidence" may seem similar, the type of inferential reasoning used by the jury differs for each type of evidence:

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[204] See "Admissibility of Tendency Evidence" below.

- In relation to coincidence evidence, the jury relies on the *improbability of events occurring other than in the way suggested* to infer the fact in issue ("coincidence reasoning");
- In relation to tendency evidence, the jury relies on the fact that a person *has a tendency to act in a certain way* to infer the fact in issue ("tendency reasoning") (*R v Nassif* [2004] NSWCCA 433).[205]

9. Judges must therefore separately determine whether to admit evidence as tendency evidence and whether to admit evidence as coincidence evidence. In doing so, they must consider how the parties seek to use the evidence, as that will determine which admissibility test applies and what directions the jury must be given (*R v Nassif* [2004] NSWCCA 433; *Gardiner v R* [2006] NSWCCA 190; *KJR v R* [2007] NSWCCA 165).
10. See 4.18 Coincidence Evidence for further information concerning coincidence evidence.

How do "tendency", "relationship" and "context" evidence differ?

11. "Tendency evidence" must also be distinguished from:
    - "Relationship Evidence": Evidence that demonstrates the nature of a relevant relationship, which may be used as circumstantial evidence of the accused's guilt (see, e.g., *R v BJC* (2005) 13 VR 407; *Gipp v R* (1998) 194 CLR 106; *R v Vonarx* [1999] 3 VR 618); and
    - "Context Evidence": Evidence that provides essential background information, which may help the jury to assess and evaluate the other evidence in the case in a true and realistic context (see, e.g., *R v AH* (1997) 42 NSWLR 702; *R v Camilleri* [1999] VSC 159; *R v Sadler* (2008) 20 VR 69).

Determining whether evidence is "tendency evidence"

12. It is important for judges to determine whether evidence is sought to be admitted and used as tendency evidence, coincidence evidence, relationship evidence and/or context evidence. That determination will affect the admissibility test to apply and the directions to be given.
13. As this can be a difficult task, at the start of the trial the judge should ask the prosecution to characterise the evidence in question and explain how it is alleged the evidence is relevant (see *HML & Ors v R* (2008) 235 CLR 334 per Hayne J).
14. The prosecution should clearly articulate how it says the jury should use the relevant evidence. If that use would involve tendency reasoning (see above), then the evidence must be treated as tendency evidence (*Qualtieri v R* [2006] NSWCCA 95; *R v Li* [2003] NSWCCA 407; *R v AH* (1997) 42 NSWLR 702; *R v Ngatikaura* [2006] NSWCCA 161; *R v Cakovski* (2004) 149 A Crim R 21).

Admissibility of Evidence Capable of Proving a Tendency

15. Evidence which may show that a person has a particular tendency may be admitted:
    - In order to prove that tendency; or
    - For another purpose.

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[205] Thus, while tendency evidence and coincidence evidence are often referred to together (as though tendency evidence is invariably also coincidence evidence and vice versa), this is not correct. Sections 97 and 98 describe two different paths of reasoning (*R v Nassif* [2004] NSWCCA 433; *Gardiner v R* [2006] NSWCCA 190; *KJR v R* [2007] NSWCCA 165).

Admitting evidence in order to prove a tendency

16. The "tendency rule" states that evidence is generally[206] not admissible *as* tendency evidence (i.e., for the purposes of proving a tendency) unless:
    - The party seeking to adduce the evidence gave reasonable notice of its intention to do so; and
    - The court thinks that the evidence will have significant probative value (*Evidence Act 2008* s 97).
17. In determining the probative value of tendency evidence, the court must examine whether the evidence is capable of rationally affecting the probability of the existence of a fact in issue to a significant extent. The facts in issue are the facts which establish the elements of the offence (*Hughes v The Queen* (2017) 344 ALR 187 at [16]).
18. The probative value of tendency evidence depends on the issues the evidence is used to prove. Where the evidence is used to prove the identity of the offender for a known offence, close similarity between the prior conduct and the offending is necessary. However, different considerations arise where the fact in issue is whether the alleged offending occurred. Where the defence suggests that prosecution witnesses have fabricated their allegations, proof that the accused has a tendency to engage in the conduct alleged is likely to be influential in determining whether the prosecution has excluded the possibility that the witnesses have fabricated their accounts or been mistaken (*Hughes v The Queen* (2017) 344 ALR 187 at [39]–[40]. See also *Thrussell v R* [2017] VSCA 386 at [53]).
19. In assessing whether evidence has significant probative value, the court must consider:
    - The extent to which the evidence supports the alleged tendency; and
    - The extent to which the alleged tendency makes the facts alleged to prove the charged offence more likely (*Hughes v The Queen* (2017) 344 ALR 187 at [41]).
20. While conduct which has been repeated on multiple occasions will often have greater probative value, evidence of a single occasion is capable, in appropriate cases, of meeting the tests for admission as tendency evidence. Any delay between instances of the alleged conduct will also be relevant when assessing the probative value of the evidence (*Reeves v R* (2013) 41 VR 275; *GBF v R* [2010] VSCA 135).
21. Where it is the *prosecution* who seeks to lead tendency evidence about the *accused*, the evidence will only be admissible if its probative value substantially outweighs any prejudicial effect that it may have on the accused (*Evidence Act 2008* s 101).
22. The provisions concerning the admissibility of tendency evidence are a code which replaced the common law rules regarding propensity and similar fact evidence (*Hughes v The Queen* (2017) 344 ALR 187 at [31]; *Velkoski v R* (2014) 45 VR 680; *R v Ellis* (2003) 58 NSWLR 700; *Murdoch v R* (2013) 40 VR 451).
23. In determining whether tendency evidence has significant probative value, the possibility of collusion, collaboration or innocent infection is not relevant, unless those possibilities rise to a level where it would not be open to the jury rationally to accept the evidence (*R v Bauer* [2018] HCA 40 at [69]). Previous decisions holding that the possibility of collusion destroys the probative value of tendency evidence have been overruled (compare *Velkoski v R* (2014) 45 VR 680; *Murdoch v R* (2013) 40 VR 451; *PNJ v R* (2010) 27 VR 146; *BSJ v R* (2012) 35 VR 475).

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[206] The tendency rule is subject to a number of exceptions and exclusions. See, e.g., *Evidence Act 2008* ss 94, 97(2), 110, 111.

24. If judges decide to admit tendency evidence in circumstances where there is a risk of collusion, collaboration or innocent infection, the judge must warn that jury that it must find that the evidence from each witness was not affected by other witnesses before acting on the tendency evidence (*Velkoski v R* (2014) 45 VR 680; *Murdoch v R* (2013) 40 VR 451 at [134]; *PNJ v R* (2010) 27 VR 146; *BSJ v R* (2012) 35 VR 475).

Admitting evidence for another purpose

25. The "tendency rule" only governs the admission of evidence that is sought to be adduced *as* tendency evidence. It does not prevent the admission of evidence that may show that a person has a tendency (e.g., evidence of prior violent acts) for another purpose (e.g., to provide context for the offence) (see, e.g., *R v Quach* [2002] NSWCCA 519; *Conway v R* (2000) 98 FCR 204; *FDP v R* (2008) 74 NSWLR 645; *R v Cornwell* (2003) 57 NSWLR 82; *R v Lock* (1997) 91 A Crim R 356).

26. Such evidence does not need to comply with the tendency rule in order to be admitted. Instead, its admissibility is governed by the general test of relevance in Part 3.1 of the Evidence Act 2008, and the discretions contained in Part 3.11 of that Act (*R v Quach* [2002] NSWCCA 519; *Conway v R* (2000) 98 FCR 204; *FDP v R* (2008) 74 NSWLR 645; *R v Cornwell* (2003) 57 NSWLR 82; *R v Lock* (1997) 91 A Crim R 356).

27. While such evidence may be admitted for a non-tendency purpose, if it is not admissible under the tendency rule, it cannot be used to prove that a person has or had a relevant tendency (*Evidence Act 2008* s 95).

28. This means that where evidence is admitted for another purpose, the jury may only use it as tendency evidence if it also satisfies the requirements of s97 and s101 (*Evidence Act 2008* s 95; *R v OGD (No 2)* (2000) 50 NSWLR 433; *KJR v R* [2007] NSWCCA 165).

29. This issue can be important in trials involving multiple charges. In such trials, questions may arise as to whether evidence admitted to prove one charge can be used as tendency evidence to prove a matter relevant to one of the other charges. In answering this question, the court must determine whether that evidence would be admissible under the tendency rule if the charges were heard separately (*R v Nassif* [2004] NSWCCA 433; *R v Ellis* [2004] HCA Trans 488).

Uses of Tendency Evidence

30. Where evidence of a person's past behaviour is admissible under the tendency rule,[207] the jury may use that evidence to:

    - Infer that the person has or had a tendency to act in a particular way or have a particular state of mind; and
    - Infer that the person behaved in accordance with that tendency on another occasion (*R v Cittadani* [2008] NSWCCA 256; *R v Harker* [2004] NSWCCA 427. See *also Jacara v Perpetual Trustees WA* (2000) 106 FCR 51).

31. For example, if tendency evidence is led that proves that a person behaves in a violent manner when in a particular state of mind, the jury may use that evidence to find that that person acted in the same manner at the time of the alleged offence (*R v Andrews* [2003] NSWCCA 7; *R v Li* [2003] NSWCCA 407; c.f. *R v Cakovski* (2004) 149 A Crim R 21).

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[207] This includes evidence that is actually admitted under the tendency rule, as well as evidence that is admitted for another purpose but which is admissible under that rule (see above).

Demonstrating an improper sexual interest

32. One common type of tendency evidence is "guilty passion" evidence. This consists of evidence that the accused has acted in a sexual way towards the complainant on one or more other occasions (*Velkoski v R* (2014) 45 VR 680; *HML & Ors v R* (2008) 235 CLR 334; *R v Mckenzie-McHarg* [2008] VSCA 206; *R v AH* (1997) 42 NSWLR 702; *Rolfe v R* [2007] NSWCCA 155; *R v ELD* [2004] NSWCCA 219; *R v Greenham* [1999] NSWCCA 8).[208]

33. "Guilty passion" evidence may be admitted as tendency evidence, to prove that the accused had an improper sexual interest in the complainant and a willingness to express that interest (*HML & Ors v R* (2008) 235 CLR 334; *R v Mckenzie-McHarg* [2008] VSCA 206; *JLS v The Queen* (2010) 28 VR 328; *Rolfe v R* [2007] NSWCCA 155;).

34. The probative value of "guilty passion" stems from the:

> ordinary human experience that, where a person is sexually attracted to another and has acted on that sexual attraction and the opportunity presents itself to do so again, he or she will seek to gratify his or her sexual attraction to that other person by engaging in sexual acts of various kinds with that person (*R v Bauer* [2018] HCA 40 at [51]).

35. Evidence can only be used to show a sexual interest in the complainant if it is admitted as tendency evidence. Where evidence is relevant and admissible for another purpose, it cannot be used to show a sexual interest unless the conditions for admission as tendency evidence are met (*Evidence Act 2008* s 95; *Ritchie v R* [2018] VSCA 31 at [36]–[45]).

36. The tendency evidence that demonstrates the accused's sexual interest with the complainant does not need to constitute criminal acts (*R v EF* [2008] VSCA 213; *R v McKenzie-McHarg* [2008] VSCA 206).

37. Where the prosecution alleges a series of sexual acts over a period of time against a single complainant, both charged and uncharged acts may be admissible as tendency evidence to show the accused had a sexual interest in the complainant and was willing to act on that interest. Provided the conduct relied on as tendency evidence is not far removed in time, and is of similar gravity to the charged acts, it is not necessary for there to be special features or independent support for the tendency evidence (*R v Bauer* [2018] HCA 40 at [48]).

38. However, in the unusual case where there is only one uncharged act which is remote in time and of different gravity to the charged acts, then some special feature will be necessary to give that uncharged act significant probative value (*IMM v The Queen* (2016) 257 CLR 300 at [61]–[64]).

39. Although evidence of a single prior opportunistic incident will usually not be capable of supporting an inference that the accused had an improper sexual interest in the complainant (*R v Young* [1998] 1 VR 402), such evidence must be considered alongside the other evidence given in the case. The tendency evidence does not, by itself, need to prove the existence of a sexual interest (*R v DD* (2007) 19 VR 143).

Tendency Evidence and Multiple Sexual Complainants

40. Prior to *Hughes v The Queen* (2017) 344 ALR 187, Victorian jurisprudence had held that it was not permissible to speak in general terms about a sexual interest in multiple complainants. Instead, the focus was on the nature of the accused's conduct, rather than the accused's state of mind (*Velkoski v R* (2014) 45 VR 680, [173(f)], [234]).

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[208] In some cases this is described as an improper sexual "relationship" with the complainant. However, it is not the relationship *between* the parties that is of relevance here. It is the accused's (often unilateral) attraction to, or interest in, the complainant that is of importance. The term "sexual relationship" is therefore avoided wherever possible.

41. In *Hughes v The Queen* (2017) 344 ALR 187, the majority rejected this limitation, noting that s 97(1) explicitly provides for tendency evidence to prove a state of mind; a sexual interest in young children is a particular state of mind; and, in cases involving charges of sexual offending against young children, proof of that state of mind may have significant probative value (at [32]).

42. Where there are multiple complainants, some feature of the alleged acts will be necessary to link the allegations together before the evidence can have significant probative value. This may stem from a special, particular or unusual feature, such as a brazen disregard of the risk of discovery (*Hughes v The Queen* (2017) 344 ALR 187; *R v Bauer* [2018] HCA 40 at [58]–[59]; *Bauer v The Queen* [2017] VSCA 176 at [62]; *McPhillamy v The Queen* [2018] HCA 52).

Directions About Tendency Evidence and Reasoning

43. The need for directions about tendency evidence and reasoning depends on whether a direction is sought and whether, despite the absence of any request, there are substantial and compelling reasons for giving the direction (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

44. Tendency evidence is a form of 'other misconduct evidence'. The content of the direction is specified in *Jury Directions Act 2015* Part 4, Division 2.

Directions where tendency evidence adduced by prosecution

45. Where tendency evidence is adduced by the prosecution and a direction is necessary, the trial judge must:

    (a) Identify how the evidence is relevant to the existence of a fact in issue; and

    (b) Direct the jury not to use the evidence for any other purpose; and

    (c) Direct the jury that it must not decide the case based on prejudice arising from what it has heard about the accused; and

    (d) If the evidence only forms part of the case against the accused, inform the jury of this fact (*Jury Directions Act 2015* s 27(2)).

46. In giving the direction, the judge does not need to:

    (a) Explain what the jury should consider in deciding whether to use the evidence as tendency evidence;

    (b) Identify impermissible uses of the evidence;

    (c) Refer to any other matter (*Jury Directions Act 2015* s 27(3)).

47. The *Jury Directions Act 2015* abolishes the common law obligations in relation to directions on tendency evidence. This includes the obligation to warn the jury against substitution reasoning[209] or reasoning that the accused is the kind of person likely to have committed the offences charged (see *Alec v The King* [2023] VSCA 208, [78] and compare *R v Grech* [1997] 2 VR 609. But c.f. *Briggs v The King* [2024] VSCA 80, [54]).

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[209] A warning against substitution reasoning is a warning that the jury must not substitute evidence of other misconduct for the specific activity which is the subject of the offence charged. This can also be expressed as a warning that the offence charged can be proved only by evidence relating to it, and not by evidence of extraneous conduct (see *R v Beserick* (1993) 30 NSWLR 510, 516; *R v Grech* [1997] 2 VR 609, 614).

48. Judges should avoid using the term "uncharged acts" when describing tendency evidence, as it may invite speculation about why no charges were laid (*HML & Ors v The Queen* (2008) 235 CLR 334; *R v McKenzie-McHarg* [2008] VSCA 206).

49. The judge must explain to the jury how the tendency evidence is relevant in the case. This requires the judge to link the use of the evidence to the issues in the case. It is not sufficient for him or her merely to describe the evidence as giving rise to a tendency to act in a certain way (*R v Li* [2003] NSWCCA 407; *R v Martin* [2000] NSWCCA 332).

50. To assist with this task, it will usually be helpful to have the prosecutor describe each step along the path (or paths) of reasoning which the jury may follow to infer the accused's guilt from the evidence (*HML & Ors v The Queen* (2008) 235 CLR 334 per Hayne J).

51. If the tendency evidence may demonstrate the accused's sexual interest in the complainant, it is proper for the trial judge to tell the jury that they might use the evidence:

    - When assessing the other evidence and thereby determining the accused's guilt of the offences charged; and
    - To set the context in which the other evidence of the offences should be understood (*R v BJC* (2005) 13 VR 407).

52. The language of "guilty passion" is inappropriate and should not be used with the jury. The focus of the jury must be on whether the evidence proves that the accused had a sexual interest in the complainant and a willingness to act on that interest. Such evidence should be described as demonstrating a "sexual interest" (*HML & Ors v The Queen* (2008) 235 CLR 334; *R v Ball* [1911] AC 47; *R v BJC* (2005) 13 VR 407; *R v Sadler* (2008) 20 VR 69; *Rolfe v R* [2007] NSWCCA 155; *Velkoski v R* (2014) 45 VR 680).

53. Judges should also avoid use of the term "relationship evidence" to describe the respective positions of the parties and the unilateral actions of the accused (*HML & Ors v The Queen* (2008) 235 CLR 334 per Kiefel J; *Frawley v R* (1993) 69 A Crim R 208; *R v Nieterink* (1999) 76 SASR 56).

54. While tendency evidence can be used to demonstrate the accused had a sexual interest in the complainant and had acted on that interest, it cannot "be used in a more general way as demonstrating that an accused person was the sort of person who would commit the offences in question". Such reasoning is known as "impermissible propensity reasoning" (*Briggs v The King* [2024] VSCA 80, [52]).

Standard of proof

55. At common law it was once thought that tendency evidence adduced to show that the accused had a sexual interest in the complainant could not be used unless the jury was satisfied that the evidence proved that interest beyond reasonable doubt (*R v Sadler* (2008) 20 VR 69; *DJV v R* [2008] NSWCCA 272; *DTS v R* [2008] NSWCCA 329; *JDK v R* [2009] NSWCCA 76; *R v MM* (2000) 112 A Crim R 519). In relation to single complainant cases, this common law rule was abolished by *R v Bauer* [2018] HCA 40 at [80].

56. The requirement for proof of tendency evidence beyond reasonable doubt is also prohibited by the *Jury Directions Act 2015*. Under the Act, the only matters which must be proved beyond reasonable doubt are the elements of the offence and the absence of any defences. The judge may not direct the jury that any other matters need to be proved beyond reasonable doubt (*Jury Directions Act 2015* ss 61, 62). See Circumstantial Evidence and Inferences for further information.

57. No different principle applies between charged and uncharged acts relied on as tendency evidence. The question in each case will be whether the tendency is proved on the whole of the evidence and, if so, the tendency may be relied on in proof of the charges. In performing this exercise, it is not appropriate to invite the jury to apply any standard of proof to individual items of evidence relied on in proof of the tendency (*JS v The Queen* [2022] NSWCCA 145, [43]; *DPP v Roder* [2024] HCA 15, [26]–[28]).

Directions where tendency evidence adduced by the accused about a co-accused

58. Where tendency evidence is adduced by an accused about a co-accused, the prosecution or the co-accused may request a direction about that evidence.

59. In giving a direction about that evidence, the trial judge must

    (a) Identify how the evidence is relevant to the existence of a fact in issue; and

    (b) Direct the jury not to use the evidence for any other purpose; and

    (c) Direct the jury that it must not decide the case based on prejudice arising from what it has heard about the co-accused (*Jury Directions Act 2015* s 28(2)).

60. In giving the direction, the judge does not need to:

    (a) Explain what the jury should consider in deciding whether to use the evidence as tendency evidence

    (b) Identify impermissible uses of the evidence

    (c) Refer to any other matter (*Jury Directions Act 2015* s 28(3)).

Directions where evidence is *not* admissible as tendency evidence

61. Under the *Jury Directions Act 2015* 'other misconduct evidence' is defined as:

    (a) Coincidence evidence;

    (b) Tendency evidence;

    (c) Evidence of other discreditable acts and omissions of an accused that are not directly relevant to a fact in issue;

    (d) Evidence that is adduced to assist the jury to understand the context in which the offence charged or any alternative offence is alleged to have been committed (*Jury Directions Act 2015* s 26).

62. The defence may ask the judge to warn the jury not to use other misconduct evidence which is not tendency evidence as tendency evidence (*Jury Directions Act 2015* s 29).

63. The judge may also warn the jury against the risk of misusing evidence as tendency evidence where the evidence does not fall within the definition of 'other misconduct evidence'.

64. A warning against using evidence as tendency evidence warns the jury *not* to infer from the evidence that the accused is the kind of person who is likely to have committed the offence charged, and to use that conclusion as evidence of guilt (*R v ODG (No 2)* (2000) 50 NSWLR 433; *Martin v State of Tasmania* [2008] TASSC 66; *Qualtieri v R* [2006] NSWCCA 95; *R v Chan* [2002] NSWCCA 217; *R v Conway* (2000) 98 FCR 204; *Gipp v The Queen* (1998) 194 CLR 106; *R v ATM* [2000] NSWCCA 475; *FMT v R* [2011] VSCA 165; *R v M, BJ* (2011) 110 SASR 1).

65. If uncharged acts are led as part of a multiple charge indictment, the judge should make it clear that the warning against tendency reasoning applies to both the charged and uncharged acts (see *R v CF* [2004] VSCA 212; *R v DD* (2007) 19 VR 143).

66. When giving a warning against tendency reasoning, the judge should not refer to the accused having a "propensity" or a "criminal propensity" or a "tendency". Instead, judges should describe the evidence as demonstrating a "pattern of behaviour" or, in sexual offence cases, a "sexual interest".

67. When evidence is admitted which discloses paedophilia, but which is not admitted as tendency evidence (because the requirements of ss97 and 101 have not been met), directions against tendency reasoning are especially important. This is because such evidence is highly prejudicial (see *R v J (No 2)* [1998] 3 VR 602; *R v DCC* (2004) 11 VR 129; *R v T* (1996) 86 A Crim R 293; *R v DD* (2007) 19 VR 143).

68. It may not be necessary to warn the jury against tendency reasoning when the accused is charged with a "course of conduct" offence (such as persistent sexual abuse), and the component acts are separately charged (*KRM v The Queen* (2001) 206 CLR 221). See also 7.3.23 Persistent Sexual Abuse of Child (From 1/7/17).

69. There also may not be any need to warn the jury against tendency reasoning when there is little or no risk that the jury will use the evidence to engage in such reasoning (*Jury Directions Act 2015* s 29(2)). In some cases, a warning against tendency reasoning can increase the risk of the jury engaging in impermissible tendency reasoning and defence counsel may ask the judge not to give the direction (*FDP v R* (2008) 74 NSWLR 645; *R v DH* [2000] NSWCCA 360; *R v Bastan* [2009] VSCA 157.

Timing of the Charge

70. Short directions on the use of tendency evidence which are consistent with *Jury Directions Act 2015* Part 4, Division 2, should be given at the time the evidence is led. Detailed directions may also be given in the final charge (see *Jury Directions Act 2015* s 10; *R v Grech* [1997] 2 VR 609; *R v Beserick* (1993) 30 NSWLR 510; *Qualtieri v R* [2006] NSWCCA 95).

Last updated: 14 May 2024

4.17.1 Charge: Tendency Evidence (General Charge)

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This charge may be given where a direction has been requested regarding tendency evidence called by the prosecution.

A short direction based on this charge should be given at the time the evidence is led.

Use of Tendency Evidence

Members of the jury, part of the prosecution case is that NOA has demonstrated a tendency, or in other words, a pattern of behaviour, to [*describe alleged tendency*].

[*Identify relevant tendency evidence.*]

The prosecution argues that [*summarise prosecution arguments on the use of tendency evidence*]. In response, the defence says [*summarise defence arguments on the use of tendency evidence*].

If you find that NOA had a tendency to [*describe relevant tendency*], then you can use that to find that it is more likely that NOA committed [*identify relevant offences*].[210]

[210] In some cases, it will be necessary to identify intermediate steps through which the tendency evidence makes NOA's guilt more likely, such as by enhancing the credibility of the complainant.

You must keep this evidence in perspective. It is only one part of the prosecution's case.[211] It is not enough to convict the accused that you find [he/she] [*identify the tendency evidence*] or [*identify the alleged tendency*]. You can only find NOA guilty of a charge if you are satisfied of [his/her] guilt of that charge beyond reasonable doubt, based on the whole of the evidence.

As I have told you, you must not decide the case on the basis of feelings of sympathy or prejudice because of what you learn about the accused. The evidence has been led for the limited purpose of showing that [*describe relevant tendency*] and so is more likely to have committed the offence(s) charged. You must not use the evidence for any other purpose.

Last updated: 2 October 2018

4.17.2 Charge: Tendency Evidence (Sexual Interest Evidence)

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This charge may be given if evidence that the accused had an improper sexual interest in a single complainant has been admitted as tendency evidence. See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

A short direction based on this charge should be given at the time the evidence is led.

Permissible Uses of "Sexual Interest" Evidence

Members of the jury, part of the prosecution case is that NOA has demonstrated a sexual interest in the complainant and a willingness to act on that interest.[212]

[*Identify relevant tendency evidence*.]

The prosecution argues that [*summarise prosecution arguments on the use of tendency evidence*]. In response, the defence says [*summarise defence arguments on the use of tendency evidence*].

If you find that NOA had a sexual interest in the complainant and was willing to act on that interest, then you can use that to find that it is more likely that NOA committed [*identify relevant offences*].[213]

The prosecution also says that this evidence sets the scene in which the alleged offences took place. Without the evidence, there is a risk that NOC's evidence would be incomplete and may even be incomprehensible.[214]

[*Explain how the provision of contextual information can assist the jury. Possibilities include helping the jury to understand*:

[211] If the tendency evidence is the whole of the prosecution case, then this sentence should be omitted.

[212] This statement should be adapted based on the specific tendency alleged, including any circumstances which are said to form part of the circumstances in which the accused acts on the alleged tendency.

[213] In some cases, it will be necessary to identify intermediate steps through which the tendency evidence makes NOA's guilt more likely, such as by enhancing the credibility of the complainant.

[214] If the unhealthy sexual interest evidence is not relevant on a contextual basis, this section of the charge must be omitted.

- The *complainant's alleged conduct or state of mind* at the time of the offence, such as why s/he might have submitted to the accused's demands or did not complain about the alleged offending);
- The *accused's alleged conduct or state of mind* at the time of the offence, such as why s/he felt able to act in a particularly brazen manner);
- The *circumstances* of the alleged offence, such as to show that the complainant does not say that the offence occurred "out of the blue".]

You must keep this evidence in perspective. It is only one part of the prosecution's case.[215] It is not enough to convict the accused that you find [he/she] [*identify the tendency evidence, e.g.* "committed the uncharged acts"] or had acted on a sexual interest in NOC in the past. You can only find NOA guilty of a charge if you are satisfied of [his/her] guilt of that charge beyond reasonable doubt, based on the whole of the evidence.

As I have told you, you must not decide the case on the basis of feelings of sympathy or prejudice because of what you learn about the accused. The evidence has been led for the limited purpose of helping you understand the circumstances surrounding the alleged offending and to show that NOA had a sexual interest in NOC and a willingness to act on that interest, and so s/he is more likely to have committed the offence(s) charged. You must not use the evidence for any other purpose.

Last updated: 14 May 2024

4.17.3 Charge: Tendency Evidence (General Defence Evidence)

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This charge may be given where a direction has been requested regarding tendency evidence called by the defence.

A short direction based on this charge should be given at the time the evidence is led.

This charge should be adapted if the defence calls other forms of other misconduct evidence.

Use of Tendency Evidence

Members of the jury, you have heard evidence that NO3P[216] has demonstrated a tendency, or in other words, a pattern of behaviour, to [*describe alleged tendency, e.g.* "behave violently after drinking alcohol"].

[*Identify relevant tendency evidence.*]

The defence argues that [*summarise defence arguments on the use of tendency evidence*]. In response, the prosecution says [*summarise defence arguments on the use of tendency evidence*].

You must take this evidence into account when deciding whether the prosecution has proved, beyond reasonable doubt, that [*identify relevant fact in issue*].

Last updated: 29 June 2015

4.17.4 Charge: Warning against Tendency Reasoning

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I now need to give you a warning not to misuse some of the evidence.

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[215] If the tendency evidence is the whole of the prosecution case, then this sentence should be omitted.

[216] Name of third person.

You will remember that the prosecution has led evidence that [*identify relevant evidence*].

As a matter of law, you must not use this evidence to reason that the accused has a shown a pattern of behaviour to commit crimes such as [*identify relevant offence*], or to [*identify other relevant tendency*].

This evidence is only relevant to prove [*identify permissible use of the evidence*].

You must decide the case only on the evidence of what NOA has done. Do not be tempted to reason that s/he's done something similar before, and so s/he is the kind of person who would commit this kind of offence. That would be unfair to the accused. You would be judging the case on the accused's history, rather than on the evidence of what s/he did or did not do on this occasion. Remember, you must not decide the case on the basis of feelings of sympathy or prejudice because of what you learn about the accused.

Last updated: 22 March 2023

4.18 Coincidence Evidence

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Overview

1. Part 4, Division 2 of the *Jury Directions Act 2015* regulates jury directions on 'other misconduct evidence'. This is defined as:
   (a) Coincidence evidence, as defined in the Evidence Act 2008;
   (b) Tendency evidence, as defined in the Evidence Act 2008;
   (c) Evidence of other discreditable acts and omissions of an accused that are not directly relevant to a fact in issue;
   (d) Evidence that is adduced to assist the jury to understand the context in which the offence charged or any alternative offence is alleged to have been committed (Jury Directions Act 2015 s 26).
2. This topic examines coincidence evidence as a form of 'other misconduct evidence'.

What is "Coincidence Evidence"?

3. "Coincidence evidence" is evidence which uses the improbability of two or more events occurring coincidentally to prove that:
   - A person performed a particular act; or
   - A person had a particular state of mind (*Evidence Act 2008* s 98).
4. The use of "coincidence evidence" relies on a process of inferential reasoning, in which the jury:
   - Infers from evidence of similarities between two or more events, and the circumstances in which the events occurred, that is improbable that the events occurred coincidentally; and
   - Infers from the improbability of such a coincidence the existence of a relevant fact in issue (*Evidence Act 2008* s 98. See also *R v DCC* (2004) 11 VR 129).[217]

[217] See "Use of Coincidence Evidence" below for a discussion of some of the facts in issue that coincidence evidence can be used to prove.

5. One of the events relied upon may be an event the occurrence of which is a fact in issue in the proceeding (*Evidence Act 2008* s 98).

How do "coincidence evidence" and "tendency evidence" differ?

6. Care must be taken to distinguish "coincidence evidence" from "tendency evidence" (*R v Nassif* [2004] NSWCCA 433; *Gardiner v R* [2006] NSWCCA 190; *KJR v R* [2007] NSWCCA 165).

7. "Tendency evidence" is evidence of a tendency that a person has or had, which the jury can use to infer a fact in issue (*Evidence Act 2008* s 97).

8. While the evidence that constitutes "tendency evidence" and "coincidence evidence" may seem similar, the type of inferential reasoning used by the jury differs for each type of evidence:

    - In relation to coincidence evidence, the jury relies on the *improbability of events occurring other than in the way suggested* to infer the fact in issue ("coincidence reasoning");
    - In relation to tendency evidence, the jury relies on the fact that a person *has a tendency to act in a certain way* to infer the fact in issue ("tendency reasoning") (*R v Nassif* [2004] NSWCCA 433).[218]

9. Judges must therefore separately determine whether to admit evidence as coincidence evidence and whether to admit evidence as tendency evidence. In doing so, they must consider how the parties seek to use the evidence, as that will determine which admissibility test applies and what directions the jury must be given (*R v Nassif* [2004] NSWCCA 433; *Gardiner v R* [2006] NSWCCA 190; *KJR v R* [2007] NSWCCA 165).

10. See 4.17 Tendency Evidence for further information concerning tendency evidence.

How do "coincidence", "relationship" and "context" evidence differ?

11. "Coincidence evidence" must also be distinguished from:

    - "Relationship Evidence": Evidence that demonstrates the nature of a relevant relationship, which may be used as circumstantial evidence of the accused's guilt (see, e.g. *R v BJC* (2005) 13 VR 407; *Gipp v R* (1998) 194 CLR 106; *R v Vonarx* [1999] 3 VR 618); and
    - "Context Evidence": Evidence that provides essential background information, which may help the jury to assess and evaluate the other evidence in the case in a true and realistic context (see, e.g. *R v AH* (1997) 42 NSWLR 702; *R v Camilleri* [1999] VSC 159; *R v Sadler* (2008) 20 VR 69).

12. See 4.19 Other Forms of Other Misconduct Evidence for further information concerning relationship and context evidence.

Determining whether evidence is "coincidence evidence"

13. It is important for judges to determine whether evidence is sought to be admitted and used as coincidence evidence, tendency evidence, relationship evidence and/or context evidence. That determination will affect the admissibility test to apply and the directions to be given.

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[218] Thus, while tendency evidence and coincidence evidence are often referred to together (as though tendency evidence is invariably also coincidence evidence and vice versa), this is not correct. Sections 97 and 98 describe two different paths of reasoning (*R v Nassif* [2004] NSWCCA 433; *Gardiner v R* [2006] NSWCCA 190; *KJR v R* [2007] NSWCCA 165).

14. As this can be a difficult task, at the start of the trial the judge should ask the prosecution to characterise the evidence in question and explain how it is alleged the evidence is relevant (see *HML & Ors v R* (2008) 235 CLR 334 (Hayne J)).

15. The prosecution should clearly articulate how it says the jury should use the relevant evidence. This will involve identifying the fact in issue and how the evidence is relevant to that fact in issue. If that use would involve coincidence reasoning (see above), then the evidence must be treated as coincidence evidence (see, e.g. *Qualtieri v R* [2006] NSWCCA 95; *R v Li* [2003] NSWCCA 407; *R v AH* (1997) 42 NSWLR 702; *R v Ngatikaura* [2006] NSWCCA 161; *R v Cakovski* (2004) 149 A Crim R 21; *Jacobs v R* [2017] VSCA 309, [15]).

Admissibility of Evidence of Similar Events

16. Evidence that two or more similar events occurred may be admitted:

    - In order to prove a fact in issue, due to the improbability that the events occurred coincidentally; or
    - For another purpose.

Admitting evidence to prove the improbability of coincidence

17. The "coincidence rule" states that evidence is generally[219] not admissible *as* coincidence evidence (i.e., for the purposes of proving a fact in issue due to the improbability of events occurring coincidentally) unless:

    - The party seeking to adduce the evidence gave reasonable notice of its intention to do so; and
    - The court thinks that the evidence will have significant probative value (*Evidence Act 2008* s 98).

18. Where it is the *prosecution* who seeks to lead coincidence evidence about the *accused*, the evidence will only be admissible if its probative value substantially outweighs any prejudicial effect that it may have on the accused (*Evidence Act 2008* s 101).

19. There does not need to be an exact parallel of circumstances (a "striking similarity") before two or more events may be admitted as coincidence evidence. Instead, the admissibility of coincidence evidence depends on the facts in issue, the nature and circumstances of the other acts, the degree of similarity between the events, the relationship between any relevant parties and all the circumstances of the case (*PG v R* [2010] VSCA 289; *CW v R* [2010] VSCA 288. See also *S v R* [2008] NSWCCA 330; *AE v R* [2008] NSWCCA 52; *R v Ellis* (2003) 58 NSWLR 700).

20. The provisions concerning the admissibility of coincidence evidence replace the common law rules regarding similar fact evidence (*R v Ellis* (2003) 58 NSWLR 700; *CW v R* [2010] VSCA 288).

21. Care should be taken when examining older cases on the scope of the coincidence rule. Before 2007, the coincidence rule in *Uniform Evidence* jurisdictions only applied to "related events", which were defined as events that were substantially and relevantly similar and where the circumstances were substantially similar. The new coincidence rule has broader application.[220]

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[219] The coincidence rule is subject to a number of exceptions and exclusions. See, e.g. *Evidence Act 2008* ss 94, 98(2).

[220] See *Uniform Evidence Law: Report*, ALRC Report 102, 11.19–11.25 for a discussion of the change and the reasons behind it.

Admitting evidence for another purpose

22. The "coincidence rule" only governs the admission of evidence that is sought to be adduced *as* coincidence evidence. It does not prevent evidence of similar events being admitted for another purpose (e.g. to provide context for the offence) (see, e.g. *R v Quach* [2002] NSWCCA 519; *Conway v R* (2000) 98 FCR 204; *FDP v R* (2008) 74 NSWLR 645; *R v Cornwell* (2003) 57 NSWLR 82; *R v Lock* (1997) 91 A Crim R 356).

23. Such evidence does not need to comply with the coincidence rule in order to be admitted. Instead, its admissibility is governed by the general test of relevance in Part 3.1 of the *Evidence Act 2008*,and the discretions contained in Part 3.11 of that Act (*R v Quach* [2002] NSWCCA 519; *Conway v R* (2000) 98 FCR 204; *FDP v R* (2008) 74 NSWLR 645; *R v Cornwell* (2003) 57 NSWLR 82; *R v Lock* (1997) 91 A Crim R 356).

24. While evidence of prior similar events may be admitted for a non-coincidence purpose, if that evidence is not admissible under the coincidence rule, it cannot be used to prove a fact in issue due to the improbability that the events occurred coincidentally (*Evidence Act 2008* s 95).

25. This means that where evidence is admitted for another purpose, the jury may only use it as coincidence evidence if it also satisfies the requirements of ss 98–101 (*Evidence Act 2008* s 95; *R v OGD (No 2)* (2000) 50 NSWLR 433; *KJR v R* [2007] NSWCCA 165).

26. This issue can be important in trials involving multiple charges. In such trials, questions may arise as to whether evidence admitted to prove one charge can be used as coincidence evidence to prove a matter relevant to one of the other charges. In answering this question, the court must determine whether that evidence would be admissible under the coincidence rule if the charges were heard separately (*R v Nassif* [2004] NSWCCA 433; *R v Ellis* [2004] HCA Trans 488).

Uses of Coincidence Evidence

27. Where evidence is admissible under the coincidence rule, that evidence can be used to prove a number of matters, including:

    - That an offence was committed;
    - That it was the accused who committed the offence;
    - That the accused was acting voluntarily;
    - That the accused had a particular state of mind; or
    - That several independent witnesses or complainants have given truthful evidence;
    - That several witnesses have made the same errors because of collusion (see, e.g. *Makin v Attorney-General of New South Wales* [1894] AC 57; *Pfennig v R* (1995) 182 CLR 461; *DPP v Boardman* [1975] AC 421; *R v Anderson* (2000) 1 VR 1; *Wilson v R* (1970) 123 CLR 334; *R v Buckley* (2004) 10 VR 215).

Coincidence Reasoning and Identity

28. Coincidence evidence may be used to establish the identity of the offender where the *modus operandi* used makes it likely that the same person is responsible for two or more particular offences (*Pfennig v R* (1995) 182 CLR 461; *R v Straffen* [1952] 2 QB 911; *Thompson and Wran v R* (1968) 117 CLR 313; *R v Dupas (No 2)* (2005) 12 VR 601).

29. In such cases, the evidence can only be used if the jury is satisfied that both offences were committed by the same person *and* that the accused committed one of the offences (*Pfennig v R* (1995) 182 CLR 461; *Sutton v R* (1984) 152 CLR 528).

30. For evidence of *modus operandi* to be admitted to establish the identity of the offender (due to a connection between the *modus operandi* used on other occasions and the *modus operandi* of the charged offence), that evidence must demonstrate more than the "stock in trade" of that type of offending (*Sutton v R* (1984) 152 CLR 528; *R v Clune* [1995] 1 VR 489; *CW v R* [2010] VSCA 288. See also *R v Rajakaruna* (2004) 8 VR 340; *Thompson and Wran v R* (1968) 117 CLR 313; *CGL v DPP* (2010) 24 VR 486; *PNJ v DPP* (2010) 27 VR 146).

Coincidence Reasoning and Credit

31. Coincidence evidence may be used to support the credibility of witnesses (see, e.g. *R v Buckley* (2004) 10 VR 215; *R v DCC* (2004) 11 VR 129; *R v Papamitrou* (2004) 7 VR 375; *R v Rajakaruna* (2004) 8 VR 340; *R v Glennon (No 2)* (2001) 7 VR 631).

32. This use of coincidence evidence relies on the improbability of independent witnesses making similar allegations against the accused. The jury may reason that the similarities are more than can be explained by coincidence, and so their evidence is mutually supporting (*R v Buckley* (2004) 10 VR 215; *R v DCC* (2004) 11 VR 129; *R v Papamitrou* (2004) 7 VR 375; *R v Rajakaruna* (2004) 8 VR 340; *R v Glennon (No 2)* (2001) 7 VR 631; *Saoud v The Queen* (2014) 87 NSWLR 481, [43]; *Addo v The Queen* (2022) 108 NSWLR 522, [67]–[69]; *Page v The Queen* [2015] VSCA 357).

33. In determining whether coincidence evidence has significant probative value, the possibility of collusion, collaboration or innocent infection is not relevant, unless those possibilities rise to a level where it would not be open to the jury rationally to accept the evidence (*R v Bauer* [2018] HCA 40, [69]). Previous decisions holding that the possibility of collusion destroys the probative value of coincidence evidence have been overruled (compare *Velkoski v R* [2014] VSCA 121; *Murdoch v R* (2013) 40 VR 451; *PNJ v R* (2010) 27 VR 146; *BSJ v R* (2012) 35 VR 475).

34. If judges decide to admit coincidence evidence in circumstances where there is a risk of collusion, collaboration or innocent infection, the judge must warn that jury that it must find that the evidence from each witness was not affected by other witnesses before acting on the coincidence evidence (*Murdoch v R* (2013) 40 VR 451, [134]; *PNJ v R* (2010) 27 VR 146; *BSJ v R* (2012) 35 VR 475).

35. Whether coincidence evidence can be used to support credit will depend in part on what facts are in issue in the trial. Where the fact in issue is the state of mind of an alleged victim or third party (such as whether a complainant consented to sexual penetration), it is not permissible to use the evidence of other complainants to draw an inference about a particular complainant's state of mind (see *Jacobs v R* [2017] VSCA 309; *Phillips v R* (2006) 225 CLR 303).

Directions About Coincidence Evidence and Reasoning

36. The need for a direction about coincidence evidence and reasoning will depend on whether a direction is sought and whether, despite the absence of any request, there are substantial and compelling reasons for giving the direction (*Jury Directions Act 2015* ss 12, 14, 15, 16, 17). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

37. Coincidence evidence is a form of 'other misconduct evidence'. The content of the direction is specified in *Jury Directions Act 2015* Part 4, Division 2.

Directions where coincidence evidence adduced by prosecution

38. Where coincidence evidence is adduced by the prosecution and a direction is necessary, the trial judge must:

    (a) Identify how the evidence is relevant to the existence of a fact in issue; and

    (b) Direct the jury not to use the evidence for any other purpose; and

    (c) Direct the jury that it must not decide the case based on prejudice arising from what it has heard about the accused; and

(d) If the evidence only forms part of the case against the accused, inform the jury of this fact (Jury Directions Act 2015 s 27(2)).

39. In giving the direction, the judge does not need to:

(a) Explain what the jury should consider in deciding whether to use the evidence as coincidence evidence

(b) Identify impermissible uses of the evidence

(c) Refer to any other matter (Jury Directions Act 2015 s 27(3)).

40. The *Jury Directions Act 2015* abolishes the common law obligations in relation to directions on coincidence evidence. This includes the obligation to warn the jury against substitution reasoning (compare *R v Grech* [1997] 2 VR 609).

41. The judge will need to explain the concept of "coincidence reasoning" to the jury. For examples on how this can be done, see *R v Straffen* [1952] 2 QB 911; *Pfennig v R* (1995) 182 CLR 461.

42. See "Uses of Coincidence Evidence" above for an outline of how coincidence evidence may be relevant to the existence of a fact in issue.

43. As part of directing the jury about coincidence reasoning, the judge must identify the similarities that are relied upon to support coincidence reasoning. This requires more than giving a short and generic summary of each of the occasions relied upon, and expecting the jury to pick out the relevant similarities from those summaries (*Feng v The King* [2023] VSCA 196, [63]).

44. Where evidence is admitted allowing different uses of coincidence reasoning, the judge must carefully direct the jury about how to keep those different types of reasoning separate (see *Feng v The King* [2023] VSCA 196, [64]).

45. The directions must also give effect to any restrictions on the admissibility and use of the evidence, directing the jury not to use the evidence for identified impermissible purposes (see *Feng v The King* [2023] VSCA 196, [65]–[67]).

46. The judge must not direct the jury to use coincidence evidence in a manner which is not relevant in the circumstances of the case. For example, judges must not invite the jury to use coincidence reasoning to determine whether the acts were voluntary and intentional when the only issue was whether the acts were committed at all (*Murdoch v R* (2013) 40 VR 451).

47. Similarly, where the probative value lies in the improbability of similar false accounts (see the fifth bullet at paragraph [27] above), it is not appropriate to direct the jury that the coincidence evidence can prove the identity of the offender, or that it was unlikely the accused's acts occurred by chance, where those matters are not in issue. It may also risk inviting the jury to reason that the accused has a tendency to commit acts in a particular manner, even if the evidence has not been admitted for a tendency purpose (*Addo v The Queen* (2022) 108 NSWLR 522, [84]–[88]).

48. Reasoning by reference to identity, or the accused's actions is, in that context, likely to involve tendency reasoning (*Addo v The Queen* (2022) 108 NSWLR 522, [84]–[88]).

49. To assist with this task, it will usually be helpful to have the prosecutor describe each step along the path (or paths) of reasoning which the jury may follow to infer the accused's guilt from the evidence (see, e.g. *HML & Ors v R* (2008) 235 CLR 334 (Hayne J)).

50. Judges should avoid using the term "uncharged acts" when describing coincidence evidence, as it may invite speculation about why no charges were laid (*HML & Ors v R* (2008) 235 CLR 334; *R v McKenzie–McHarg* [2008] VSCA 206).

51. As coincidence reasoning is a particular species of inferential reasoning, the judge should give a direction on inferences and relate the topic of inferences to the coincidence reasoning direction (*R v Buckley* (2004) 10 VR 215. See also 3.6 Circumstantial Evidence and Inferences).

52. The judge should not direct the jury that they must be satisfied that the evidence reveals a "striking similarity" or other such feature before they can use the evidence. The direction must focus on the purposes for which the evidence may be used and not the reasons for its admissibility (*R v Papamitrou* (2004) 7 VR 375).

Standard of proof

53. As coincidence evidence is circumstantial evidence, it generally does not need to be proved beyond reasonable doubt (*Jury Directions Act 2015* ss 61, 62).

54. An exception to this rule may exist where the evidence involves sequential reasoning from other charged offences. In *Dempsey v The Queen*, the prosecution involved two alleged instances of armed robbery. The jury was invited to use the similar method in which the offender lured the victims to the relevant location as coincidence evidence to prove the identity of the offender. The Court held that the jury could not use the method of committing the first offence as coincidence evidence showing that the accused committed the second offence unless the jury was satisfied beyond reasonable doubt that the accused committed the first offence. The court noted any direction which allowed the jury to use the commission of the first offence as coincidence evidence without proof to the criminal standard would undermine the standard of proof required to convict in relation to the first offence (*Dempsey v The Queen* [2019] VSCA 224, [76]).

Directions where coincidence evidence adduced by the accused about a co-accused

55. Where coincidence evidence is adduced by an accused about a co-accused, the prosecution or the co-accused may request a direction about that evidence.

56. In giving a direction about that evidence, the trial judge must

    (a) Identify how the evidence is relevant to the existence of a fact in issue; and

    (b) Direct the jury not to use the evidence for any other purpose; and

    (c) Direct the jury that it must not decide the case based on prejudice arising from what it has heard about the co-accused (Jury Directions Act 2015 s 28(2)).

57. In giving the direction, the judge does not need to:

    (a) Explain what the jury should consider in deciding whether to use the evidence as coincidence evidence;

    (b) Identify impermissible uses of the evidence;

    (c) Refer to any other matter (Jury Directions Act 2015 s 28(3)).

Directions where evidence is *not* admissible as coincidence evidence

58. Where evidence is *not* admissible as coincidence evidence, but there is a risk that the jury will use the evidence to engage in coincidence reasoning, the judge may need to warn the jury not to do so (see *R v OGD (No 2)* (2000) 50 NSWLR 433; *Martin v State of Tasmania* [2008] TASSC 66; *Qualtieri v R* [2006] NSWCCA 95; *R v Chan* [2002] NSWCCA 217; *R v Conway* (2000) 98 FCR 204; *Gipp v R* (1998) 194 CLR 106; *R v ATM* [2000] NSWCCA 475).

59. If uncharged acts are led as part of a multiple charge indictment, the judge should make it clear that the warning against coincidence reasoning applies to both the charged and uncharged acts (see *R v CF* [2004] VSCA 212; *R v DD* (2007) 19 VR 143; [2007] VSCA 317).

60. There may not be any need to warn the jury against coincidence reasoning when there is little or no risk that the jury will use the evidence to engage in such reasoning. In some cases, a warning against coincidence reasoning can increase the risk of the jury engaging in impermissible coincidence reasoning (*FDP v R* (2008) 74 NSWLR 645; *R v DH* [2000] NSWCCA 360; *R v Bastan* [2009] VSCA 157).

61. The need for a direction against coincidence reasoning depends on whether the direction is sought and whether, despite the absence of any request, there are substantial and compelling reasons for giving the direction (*Jury Directions Act 2015* ss 12, 14, 16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

Relationship with separate consideration warning

62. The warning against coincidence reasoning does not need to use different language to that used in the separate consideration warning, and does not need to be clearly distinct from that warning. The basic requirement is that the warning sufficiently protect against the risk of the jury using impermissible reasoning (see *R v DCC* (2004) 11 VR 129; *R v LRG* (2006) 16 VR 89).

63. A discrete warning against coincidence reasoning will not normally be required when a separate consideration warning is given, as the separate consideration warning will usually protect against such reasoning (*KRM v R* (2001) 206 CLR 221; *R v Loguancio* (2000) 1 VR 235; *R v Ellul* [2008] VSCA 106. See also 1.8.1 Charge: Separate Consideration – Multiple Accused and/or 1.8.2 Charge: Separate Consideration – Multiple Counts).

64. When both a warning against coincidence reasoning and a separate consideration warning are given, it will generally not be necessary to expressly relate the warnings. The separate consideration warning will usually adequately protect against the dangers of impermissible reasoning in relation to other *charged* acts. However, in some cases, it may be necessary to explicitly explain to the jury that the prohibition on coincidence reasoning applies to both charged and uncharged acts (*R v PLK* [1999] 3 VR 567; *R v DCC* (2004) 11 VR 129).

Warning Against Tendency Reasoning

65. When evidence is led as "coincidence evidence" and not as "tendency evidence", defence counsel may request a warning that the jury not use the evidence as tendency evidence (Jury Directions Act 2015 s 29).

66. See 4.17 Tendency Evidence for information concerning the content of such a warning.

Timing of the Charge

67. Short directions on the use of coincidence evidence which are consistent with the *Jury Directions Act 2015* Part 4 Division 2 should be given at the time the evidence is led. Detailed directions may also be given in the final charge (see *Jury Directions Act 2015* s 10(2); *R v Grech* [1997] 2 VR 609; *R v Beserick* (1993) 30 NSWLR 510; *Qualtieri v R* [2006] NSWCCA 95).

Last updated: 13 October 2023

4.18.1 Charge: Coincidence Evidence

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This charge may be given where a direction has been requested regarding coincidence evidence called by the prosecution.

A short direction based on this charge should be given at the time the evidence is led.

Members of the jury, the prosecution has led evidence that [*identify relevant coincidence evidence*].

Using Coincidence Evidence to bolster credit

[*If the evidence is used to bolster the credit of witnesses or complainants, add the following shaded section.*]

The prosecution says that this evidence is relevant because it is most unlikely that several [witnesses/complainants], each of whom seems to be independent of the other, would give such similar accounts unless those accounts were both truthful and accurate. In other words, the prosecution says that it is most unlikely that several such [witnesses/complainants] would

independently have told the same lie.

I direct you that it is open to you to reason in this way. However, before you can do so, you must first accept that such similarities as you find in the witness' evidence are not the product of any collusion on their part, or of innocent contamination.[221]

Using Coincidence Evidence to Prove a Voluntary Act

[*If the evidence is used to prove that the accused acted voluntarily, add the following shaded section.*]

The prosecution say that this evidence is relevant to prove that the accused acted voluntarily when s/he [*describe relevant act*]. The prosecution argues that there is such a similarity between [*describe relevant coincidence evidence*] and the evidence of [*identify relevant act*] that it is most unlikely that the accused was not acting voluntarily when [*describe relevant acts*].

Using Coincidence Evidence to Rebut a Defence Argument

[*If the evidence is used to rebut a defence argument, add the following shaded section*.]

The prosecution say that this evidence is relevant because it allows you to conclude that [*describe relevant defence argument in the negative, e.g.* "the deceased did not die of natural causes"]. The prosecution argues that there is such a similarity between this evidence and the evidence of [*identify relevant evidence*] that it is most unlikely that [*describe relevant defence argument in the positive*, e.g. that the deceased died of natural causes]. Remember that, while the accused raised this matter as a defence, the onus of proof rests on the prosecution.

Using Coincidence Evidence to Prove the Identity of the Offender

[*If evidence of several separate offences is used to prove the identity of the offender, add the following shaded section*.]

The prosecution say the similarities between [*identify similarly committed offence*] and the [*describe charged offence*] are so great that you should find that the same person is responsible for each offence. The prosecution then say that if you find NOA committed [*identify similarly committed offence*], then you can use that to conclude that s/he also committed [*identify charged offence*].

[*Identify relevant prosecution and defence evidence and arguments on whether the jury should use the coincidence evidence.*]

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[221] If evidence emerges of an opportunity for contamination between the witnesses, the judge may add that following sample direction:

You will recall that NOW1 said, during examination in chief, that he spoke to NOW2 about the allegations for 10 minutes on the day he went to the police station. In cross-examination, NOW1 admitted that the conversation may have taken half an hour. There is no suggestion that NOW1 and NOW2 have jointly fabricated their accounts. However, before you can use the existence of similarities in their accounts, you must exclude a reasonable possibility that NOW1 or NOW2 subconsciously changed his account, and introduced those similarities, because of that conversation.

You must keep this evidence in perspective. It is only one part of the prosecution's case.[222] As I have told you, you must not decide the case on the basis of feelings of sympathy or prejudice because of what you learn about the accused. The evidence has been led for the limited purpose of showing that [*describe relevant purpose*]. You must not use the evidence for any other purpose.

Last updated: 9 March 2017

4.19 Other Forms of Other Misconduct Evidence

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Overview

1. Part 4, Division 2 of the *Jury Directions Act 2015* regulates jury directions on 'other misconduct evidence'. This is defined as:
   (a) coincidence evidence, as defined in the Evidence Act 2008;
   (b) tendency evidence, as defined in the Evidence Act 2008;
   (c) evidence of other discreditable acts and omissions of an accused that are not directly relevant to a fact in issue;
   (d) evidence that is adduced to assist the jury to understand the context in which the offence charged or any alternative offence is alleged to have been committed (Jury Directions Act 2015 s 26).
2. This topic examines the forms of 'other misconduct evidence' identified in paragraphs (c) and (d) above.
3. See 4.17 Tendency Evidence and 4.18 Coincidence Evidence for further information on the admissibility and uses of those other forms of 'other misconduct evidence'.

Evidence of discreditable acts which are indirectly relevant or which provides context

4. At common law, evidence of previous wrongdoing by the accused may be admissible as indirectly relevant to show that the accused's acts were for a guilty purpose, rather than an innocent purpose. This might include:
   - previous acts of drug trafficking by the accused (see, e.g. *Harriman v R* (1989) 167 CLR 590; *R v Quach* (2002) 137 A Crim R 345; *Ivanoff v R* [2015] VSCA 116);
   - previous acts of violence by the accused towards the complainant (*R v PFD* (2001) 124 A Crim R 418; *R v Basten* [2009] VSCA 157; *Wilson v R* (1970) 123 CLR 324).
5. These forms of evidence have been treated at common law as 'relationship evidence' falling outside the requirements of the tendency rule and the coincidence rule and may qualify as 'other misconduct evidence' under paragraph (c) of the definition.
6. In addition, evidence that provides the jury with essential background information that allows the jury to assess and evaluate the other evidence may be admissible at common law as 'context evidence' (see, e.g. *R v AH* (1997) 42 NSWLR 702).
7. Such evidence may help the jury assess and evaluate other evidence given in the case in a complete and realistic context. In particular, the evidence can be used:

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[222] If the other misconduct evidence is the whole of the prosecution case, then this sentence should be omitted.

(a) to explain the complainant's conduct or state of mind. For example, such evidence may explain conduct that would otherwise seem surprising or unlikely, such as submitting to the accused's demands or failing to complain about the accused's actions (B v R (1992) 175 CLR 599; R v Beserick (1993) 30 NSWLR 510; Rodden v R [2008] NSWCCA 53; KTR v R [2010] NSWCCA 271).

(b) to explain the accused's conduct or state of mind. For example, the history between the accused and the complainant may explain why the accused felt able to act in a particularly brazen manner (R v Josifoski [1997] 2 VR 68; Gipp v R (1998) 194 CLR 106; c.f. Qualtieri v R [2006] NSWCCA 95, [121]). Similarly, previous exposure to the criminal law may demonstrate that the accused knew or was reckless about some matter, such as prescribed quantities for drug offences, dangers of accepting imports from unknown persons, or the $10,000 threshold for reportable transactions under the Cash Transactions Reports Act 1988 (Ivanoff v R [2015] VSCA 116; Lin v R [2018] VSCA 100).

(c) to explain the circumstances of the alleged offence. This may prevent the jury from forming a false impression that the complainant's allegations arose 'out of the blue'. That is, it may remove the implausibility that might otherwise be attributed to the complainant's account due to the way each party is said to have behaved if the conduct alleged were thought to be isolated events (R v Leonard (2006) 67 NSWLR 545, [48]–[52] (Hodgson JA); R v Loguancio (2000) 1 VR 235; KRM v R (2001) 206 CLR 221; B v R (1992) 175 CLR 599).

8. There is not yet any guidance on the meaning of the phrase 'other discreditable acts … that are not directly relevant'. The definition of 'other misconduct evidence' appears designed to have a wide scope and operate where there is a risk that the jury may misuse the evidence and decide the case based on the prejudicial quality of the evidence rather than its legitimate probative purpose (see *Jury Directions Act 2015* s 27).

9. Based on the explanatory material, the section appears designed to cover the forms of evidence previously recognised at common law as 'relationship evidence' and 'context evidence' (see *Jury Directions Bill 2015*, Explanatory Memorandum, clause 26.

10. Where evidence would be considered 'relationship evidence' at common law but does not fit within the definition of 'other misconduct evidence', judges will need to develop suitable directions based on the submissions of the parties and the needs of the case and may be informed by Division 2 of Part 4 of the *Jury Directions Act 2015* (see, for example, *Lin v R* [2018] VSCA 100; *R v Iuliano* [1971] VR 412; *Wilson v R* (1970) 123 CLR 334).

11. In doing so, judges must take care to avoid giving directions based only on the label applied to the evidence, rather than the issues in the case, the relevance of the evidence and any risk of misuse (see *BBH v R* (2012) 245 CLR 499 (Hayne J)).

Admissibility of 'Other Misconduct Evidence'

12. Under the *Evidence Act 2008*, evidence is admissible if it is relevant (directly or indirectly) to a fact in issue (*Evidence Act 2008* s 56).

13. This will depend on the nature of the evidence and the issues in the case. For example, evidence of previous acts of violence when one of the parties is intoxicated may not be relevant to a case where there is no evidence of intoxication (*R v Lubik* [2010] VSC 465).

14. The court must refuse to admit evidence adduced by the prosecution if its probative value is outweighed by the danger of unfair prejudice to the accused (*Evidence Act 2008* s 137).

15. The court may also exclude or limit the use of such evidence using the general discretions contained in *Evidence Act 2008* ss 135–136.

16. The party tendering the evidence must precisely identify the uses of the evidence (see above), and demonstrate how the evidence is relevant to issues in the case (*Gipp v R* (1998) 194 CLR 106; *Tully v R* (2006) 230 CLR 234; *HML & Ors v R* (2008) 235 CLR 334).

17. Evidence of 'relationship' or 'context' is admissible under the *Evidence Act 2008* provided it meets the test of relevance. The evidence does not need to satisfy the tendency rule or the coincidence rule (*DPP v Martin* [2016] VSCA 219, [105]–[106]; *R v Murdoch* (2013) 40 VR 451 (Redlich and Coghlan JJA; Priest JA contra)).

18. 'Context evidence' must be admitted only with great caution.[223] While such evidence may be relevant, it may only be minimally probative and may be highly prejudicial. A judge must carefully weigh the probative value of context evidence against the prejudicial effect of disclosing unlawful or disreputable conduct of the accused on other occasions (*Tully v R* (2006) 230 CLR 234; *R v AN* (2000) 117 A Crim R 176; *R v Marsh* [2000] NSWCCA 370).

19. However, in other cases, context evidence may be evidence of 'cogency or force', such that the exclusion of context evidence could ground an interlocutory appeal on the basis that the exclusion of the evidence substantially weakens the prosecution case (*DPP v Martin* [2016] VSCA 219, [116]–[117]).

20. The context and relationship evidence must not relate to a state of affairs which is too remote in time from the alleged offending. The court must consider the particular circumstances and the length of delay between the last observed event and the alleged offending (*R v Iuliano* [1971] VR 412; *R v Lubik* [2010] VSC 465; *R v Tsingopoulos* [1964] VR 676; *Ellis v R* (2010) 30 VR 428; *R v Basten* [2009] VSCA 157).

21. In general, it is more difficult for the Crown to establish that a single incident is relevant as context evidence, compared to multiple acts (compare *CA v R* [2017] NSWCCA 324, [79] and *R v Young* (1996) 90 A Crim R 80).

22. In some cases, evidence of 'relationship' or 'context' may be admissible for some charges and inadmissible for other charges. The judge must examine the relevance, probative value and prejudice separately for each charge to determine whether the evidence is relevant to a fact in issue (*R v McNamara* [2002] NSWCCA 248).

23. Evidence of prior convictions should generally not be admitted as relationship or context evidence. Due to the extreme prejudice attaching to such evidence, it is unlikely to be admissible on this basis even if it is indispensable to the prosecution case (*Mokbel v R* [2010] VSCA 354).

24. Evidence of other sexual activity between the complainant and the accused can be admissible as context evidence, provided it meets the tests of relevance and is not excluded under *Evidence Act 2008* s 137 (*DPP v Martin* [2016] VSCA 219. See also *R v Bauer* [2018] HCA 40).

25. The fact that other misconduct evidence does not need to be proved to the criminal standard is not a relevant source of unfair prejudice for the purpose of determining the admissibility of the evidence (*DPP v Martin* [2016] VSCA 219, [113]).

26. In determining the relevance of other misconduct evidence led as context evidence, it will not be necessary to consider the accused's criminal responsibility. Issues such as doli incapax are not relevant to the admissibility of context evidence, because the relevance of the evidence must be assessed from the perspective of the victim, not the accused (*DPP v Martin* [2016] VSCA 219, [110]–[111]).

27. Where evidence is not led to enable tendency or coincidence reasoning, it is not subject to the admissibility requirements in *Evidence Act 2008* ss 97, 98 or 101 (*FDP v R* (2008) 74 NSWLR 645). However, the evidence cannot be used to prove a tendency or a coincidence (*Evidence Act 2008* s 95).

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[223] It has been suggested that courts may have previously admitted context evidence too readily. For example, where there are multiple charges on the indictment in relation to the one complainant, the context of the offences may be sufficiently established by the evidence presented in relation to the charged offences (*R v LRG* (2006) 16 VR 89; *Tully v R* (2006) 230 CLR 234; *R v GAE* (2000) 1 VR 198).

Determining the Relevance of Evidence

28. It is important for judges to determine whether the evidence is sought to be admitted and used as 'relationship evidence', 'context evidence', tendency evidence' or 'coincidence evidence', and if so, how the evidence is relevant to the facts in issue. These determinations will affect the admissibility of the evidence, how the jury may use the evidence and the directions the judge may need to give.

29. As it can be difficult to differentiate between these types of evidence, at the start of the trial the judge should ask the prosecution to characterise the evidence in question and explain how it is alleged the evidence is relevant (see, e.g. *HML & Ors v R* (2008) 235 CLR 334 per Hayne J).

Directions About Other Misconduct Evidence

30. The need for any directions about other misconduct evidence will depend on whether a direction is sought or whether, despite the absence of any request, there are substantial and compelling reasons for giving the direction (*Jury Directions Act 2015* ss 12, 14, 16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

31. Where 'other misconduct evidence' is admitted, the content of directions is specified in *Jury Directions Act 2015* Part 4, Division 2. In other cases, the judge will need to tailor a direction to the needs of the case.

32. Under *Jury Directions Act 2015* Part 4, Division 2, when giving directions on other misconduct evidence the trial judge must:

    (a) identify how the evidence is relevant to the existence of a fact in issue; and

    (b) direct the jury not to use the evidence for any other purpose; and

    (c) direct the jury that it must not decide the case based on prejudice arising from what it has heard about the accused; and

    (d) if the evidence only forms part of the case against the accused, inform the jury of this fact (Jury Directions Act 2015 s 27(2)).

33. In giving the direction, the judge does not need to:

    (a) explain what the jury should consider in deciding whether to use the evidence;

    (b) identify impermissible uses of the evidence;

    (c) refer to any other matter (Jury Directions Act 2015 s 27(3)).

34. It is not sufficient for the judge to simply say that the evidence provides the jury with the context for the offences or evidence of a relationship. The judge must explain how such information is relevant to the facts in issue (*R v Nieterink* (1999) 76 SASR 56).

35. Where evidence is led to show the context of the alleged offending, the judge should tell the jury that they may use the evidence to place the offences within a complete and realistic context. This may assist the jury to appreciate and evaluate other evidence in the case or make that evidence intelligible. Depending on the nature of the case, the evidence may do this by:

    - helping the jury understand the complainant's alleged conduct or state of mind;
    - helping the jury understand the accused's alleged conduct or state of mind; or
    - dispelling the erroneous impression that the conduct occurred 'out of the blue' (*R v VN* (2006) 15 VR 113; *R v Vonarx* [1999] 3 VR 618; *R v Loguancio* (2000) 1 VR 235; *R v Dolan* (1992) 58 SASR 501; *Rodden v R* [2008] NSWCCA 53).

36. Any directions that suggest that 'context evidence' may support a complainant's credibility must be carefully limited:

- the judge must describe the precise way in which the evidence may be used (e.g. to explain the complainant's failure to complain or protest, or to show that the complainant does not allege that the offences occurred 'out of the blue'); and
- the judge must not suggest that the evidence provides general support for the conclusion that the accused acted in a similar manner on the occasion alleged, as that would be a form of tendency reasoning (*Qualtieri v R* [2006] NSWCCA 95).

37. No particular form of words is required for the direction. It must be tailored to the demands of the case, and must be clear, precise and directed (*R v Grech* [1997] 2 VR 609; *HML & Ors v R* (2008) 235 CLR 334; *R v McKenzie–McHarg* [2008] VSCA 206).

38. Judges should avoid using the term 'uncharged acts' when describing other misconduct evidence, as it may invite speculation about why no charges were laid (*HML & Ors v R* (2008) 235 CLR 334; *R v McKenzie–McHarg* [2008] VSCA 206; *DPP v Martin* [2016] VSCA 219, [101]).

Standard of proof

39. As other misconduct evidence is circumstantial evidence, it will not need to be proved beyond reasonable doubt (*Jury Directions Act 2015* s 61).

40. The *Jury Directions Act 2015* expressly overrides common law to the contrary, including the rule attributed to *R v Sadler* (2008) 20 VR 69 (*Jury Directions Act 2015* s 62).

41. Where evidence is relied on as context evidence, the judge should not give any instruction on the standard of proof (*DPP v Martin* [2016] VSCA 219, [113]).

42. Judges must not instruct the jury that they only need to be satisfied of the evidence on the balance of probabilities (*R v Werry* [2009] VSCA 94; *R v FJB* [1999] 2 VR 425; *R v Loguancio* (2000) 1 VR 235; *Gipp v R* (1998) 194 CLR 106).

Directions where other misconduct evidence adduced by the accused about a co-accused

43. Where 'other misconduct evidence' is adduced by an accused about a co-accused, the prosecution or the co-accused may request a direction about that evidence (*Jury Directions Act 2015* s 28).

44. In giving a direction about that evidence, the trial judge must

    (a) identify how the evidence is relevant to the existence of a fact in issue; and

    (b) direct the jury not to use the evidence for any other purpose; and

    (c) direct the jury that it must not decide the case based on prejudice arising from what it has heard about the co-accused (*Jury Directions Act 2015* s 28(2)).

45. In giving the direct, the judge does not need to:

    (a) explain what the jury should consider in deciding whether to use the evidence as coincidence evidence;

    (b) identify impermissible uses of the evidence;

    (c) refer to any other matter (*Jury Directions Act 2015* s 28(3)).

Warning Against Tendency Reasoning

46. When 'other misconduct evidence' which is not 'tendency evidence' is adduced, defence counsel may request a warning that the jury not use the evidence as tendency evidence (*Jury Directions Act 2015* s 29).

47. See 4.17 Tendency Evidence for information concerning the content of such a warning.

Timing of the Charge

48. Short directions on the use of relationship evidence which are consistent with *Jury Directions Act 2015* Part 4, Division 2 should be given at the time the evidence is led. Detailed directions may then be given in the final charge (see, e.g. *Jury Directions Act 2015* s 10(2); *R v Beserick* (1993) 30 NSWLR 510; *R v Grech* [1997] 2 VR 609; *Qualtieri v R* [2006] NSWCCA 95).

Last updated: 2 October 2018

4.19.1 Charge: Other Forms of Other Misconduct Evidence

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This charge may be given if 'other misconduct evidence within the meaning of s 26 of the *Jury Directions Act 2015* is led and the evidence is not tendency evidence or coincidence evidence.

A short direction based on this charge should be given at the time the evidence is led.

Use of Other Misconduct Evidence

Members of the jury, the prosecution has led evidence that [*list all relevant other misconduct evidence*]. This evidence is not directly related to [the offence charged/any of the offences charged].

The prosecution says that this evidence is relevant because it shows [*explain the relevance of the evidence*. *Examples of relevant purposes include:*

- The *complainant's alleged conduct or state of mind* at the time of the offence, such as why s/he might have submitted to the accused's demands or did not complain about the alleged offending;
- The *accused's alleged conduct or state of mind* at the time of the offence, such as why s/he felt able to act in a particularly brazen manner;
- The *circumstances* of the alleged offence, such as to show that the complainant does not say that the offence occurred "out of the blue";
- The *accused's intention or motive* (e.g. by establishing that a state of animosity existed between the parties, thus making it less likely that the accused's acts were accidental);
- The *nature of the accused's conduct* on a particular occasion (e.g. by establishing a history of drug transactions between the accused and another person that were likely to continue, thus making it less likely that the accused's association with that person on a particular occasion was innocent);
- The *complainant's state of mind* at the time of the offence (e.g. by establishing that the complainant in a sexual offence case hated the accused, making it less likely that s/he would consent to sexual intercourse)].

You must keep this evidence in perspective. It is only one part of the prosecution's case.[224] As I have told you, you must not decide the case on the basis of feelings of sympathy or prejudice because of what you learn about the accused. The evidence has been led for the limited purpose of showing that [*describe relevant purpose*]. You must not use the evidence for any other purpose.

Last updated: 29 June 2015

[224] If the other misconduct evidence is the whole of the prosecution case, then this sentence should be omitted.

4.19.2 Charge: Other forms of Other Misconduct Evidence (Evidence about a Co-Accused)

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This charge may be given when the accused adduces other misconduct evidence about a co-accused.

A short direction based on this charge should be given at the time the evidence is led.

Use of Other Misconduct Evidence

Members of the jury, NOA1[225] has led evidence about NOA2[226] that [*describe relevance of other misconduct evidence*].

[*Identify relevant other misconduct evidence.*]

NOA1 argues that this evidence shows that [*describe relevance of other misconduct evidence to a fact in issue and identify relevant defence arguments*]. NOA2 responds that [*describe NOA2's response, including relevant defence arguments*]. The prosecution says that [*describe relevant prosecution evidence and arguments*].

This evidence has been led only for the purpose of [*describe relevant purpose*]. You must not use the evidence for any other purpose. As I have told you, you must not decide the case on the basis of feelings of sympathy or prejudice because of what you learn about NOA2.

Remember that while NOA1 has led this evidence, the onus of proof remains on the prosecution to prove its case against NOA1 and NOA2 beyond reasonable doubt. The fact that NOA1 has called this evidence does not mean that this shifts to NOA1 in any way.

Last updated: 29 June 2015

4.20 Unfavourable Witnesses

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Common Law Has Been Abrogated

1. The common law concerning hostile witnesses has been abrogated by *Evidence Act 20008* s 38 (*R v Milat*, NSWSC, 23/4/1996).
2. This means that it is no longer necessary for judges to differentiate between expected and unexpected evidence from a witness. Section 38 draws no such distinction (*R v Milat*, NSWSC, 23/4/1996).

A Party May Cross-Examine Its Own Witnesses

3. With the leave of the court, a party who calls a witness may cross-examine that witness about:
    - Evidence the witness gives that is unfavourable to the party;
    - Matters about which the witness may reasonably be supposed to have knowledge, and which it appears the witness is not making a genuine attempt to give evidence about; or

[225] Name of accused who led other misconduct evidence about a co-accused.

[226] Name of co-accused.

- Whether the witness has, at any time, made a prior inconsistent statement (*Evidence Act 2008* s 38).

4. Cross-examination under s 38 must be *about* one of the three matters listed above. A party cannot undertake wide-ranging cross-examination on any matter it wishes (*R v Le* (2002) 54 NSWLR 474; *R v Hogan* [2001] NSWCCA 292).
5. However, cross-examination under s 38 is not limited to *directly* questioning the witness about one of the three listed matters. A party may question the witness about topics related to the three listed matters (*R v Le* (2002) 54 NSWLR 474; *R v Hogan* [2001] NSWCCA 292).
6. A party may also (with the leave of the court) question the witness about matters relevant only to the witness' credibility, with a view to shaking the witness' credibility on the listed matters (*Evidence Act 2008* s 38(3); *R v Le* (2002) 54 NSWLR 474).[227]

Leave of the Court is Required

7. A party may only cross-examine a witness under s 38 with the leave of the court (*Evidence Act 2008* s 38(1)).
8. The court's leave is also required to question a witness about matters relevant only to the witness' credibility (*Evidence Act 2008* s 38(3)).
9. Applications under s 38 may be made in the absence of the jury and in the absence of the witness (see *Adam v R* (2001) 207 CLR 96; *R v Hogan* [2001] NSWCCA 292).
10. In determining whether to grant leave, the court must take into account the matters specified in ss 38(6) and 192(2) of the *Evidence Act 2008* (*Stanoevski v R* (2001) 202 CLR 115).
11. This topic addresses the directions the judge may give the jury when he or she grants leave under s 38. For information on when the judge should grant leave, and any limitations on cross-examination, see S Odgers, *Uniform Evidence Law*, [1.2.3240]–[1.2.3400].[228]

Jury Directions

12. There are three main directions a judge may give when a witness is cross-examined under s 38:

    i) A direction about his or her decision to grant leave under s 38;

    ii) A direction about prior inconsistent statements;

    iii) A warning about the unreliability of the evidence.

13. The need for any directions on an unfavourable witness will depend on whether a direction is sought or whether there are substantial and compelling reasons for giving a direction in the absence of any request (*Jury Directions Act 2015* ss 14–16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

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[227] Any cross-examination about a witness's credibility must comply with the provisions in Part 3.7 of the *Evidence Act 2008* ('Credibility').

[228] Under s 38(1)(a), a judge may grant leave where the witness gives evidence that is 'unfavourable' to a party. Evidence is 'unfavourable' for this purpose when it is 'not favourable'. This includes evidence of a witness who has genuinely forgotten the events in question (*R v Lozano*, NSWCCA, 10/6/97, *R v Souleyman* (1996) 40 NSWLR 712; *R v McRae* [2010] VSC 114).

Decision to grant leave

14. A judge does not always need to inform the jury of his or her decision to grant leave under s 38 (*Lee v R* [2009] NSWCCA 259).

15. If the judge chooses to comment on the grant of leave, he or she may explain that cross-examination under s 38 is an unusual process, in that the witness gives evidence in response to leading questions, rather than providing an account in evidence-in-chief in response to non-leading questions (*R v Lam (Ruling No 9)* [2005] VSC 283).

16. In explaining the decision to grant leave, the judge must be careful not to suggest that the decision involves an adverse reflection on the witness' credit (*Lee v R* [2009] NSWCCA 259).[229]

17. It is not necessary to inform the jury of the detail of the decision to grant leave (*Lee v R* [2009] NSWCCA 259).

18. In some cases, it may necessary to warn the jury not to speculate on the reasons why the witness gave unfavourable or inconsistent evidence and must not draw any inference adverse to the accused from the witness' behaviour (see *R v Sekhon*, Vic CA, 23/10/92).

Prior inconsistent statements

19. Where cross-examination under s 38 leads to evidence of a prior inconsistent statement being admitted, it may be appropriate to direct the jury about the use of that statement (see, e.g. *R v Lam (Ruling No 9)* [2005] VSC 283).

20. At common law, there was a particular need for directions on the weight of the evidence when the prior statement was more damaging to the accused than the witness' evidence in court (*Morris v R* (1987) 163 CLR 454; *R v Perea* (1986) 2 Qd R 431; *R v Nguyen* (1989) 2 Qd R 72).

21. A grant of leave under s 38 does not neutralise the witness' evidence or render it inherently worthless. The jury must decide what weight it will place on the witness' evidence in light of any inconsistent statements and any other matters that may affect the witness' reliability (*R v Zorad* [1979] 2 NSWLR 764; *Morris v R* (1987) 163 CLR 454).

22. See 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements) for information concerning the circumstances in which a direction about prior inconsistent statements should be given, and the content of the direction.

Unreliability warning

23. While a judge may be required to give an unreliability warning about evidence admitted under s 38, the mere fact that leave to cross-examine a witness has been granted under s 38 does not mean that an unreliability warning must be given (*Lee v R* [2009] NSWCCA 259).

24. Unreliable evidence warnings are governed by *Jury Directions Act 2015* s 32. A s 32 warning may be given if:

    i) The evidence in question is "of a kind that may be unreliable"; and

    ii) The party requesting the warning has identified the significant matters that may make the

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[229] For example, while the judge may inform the jury that he or she has determined that the witness has given evidence that is unfavourable (as that will usually be obvious), it would be dangerous to tell the jury of the terms of s 38(1)(b) or (c).

evidence unreliable (*Jury Directions Act 2015* s 32).[230]

25. Where evidence of a prior inconsistent statement is admitted, the judge may need to warn the jury about the unreliability of hearsay evidence (see 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements)).

26. Depending on the circumstances, an unreliable evidence warning may also be required on another ground (e.g. if the witness is criminally concerned in the events giving rise to the proceeding). See 4.21 Unreliable Evidence Warning for information about the grounds on which a warning may be required.

Limiting the Use of Evidence Under s 136

27. A judge may limit the use of evidence given under s 38 if there is a danger that a particular use of the evidence might be:
    - Unfairly prejudicial to a party; or
    - Misleading or confusing (*Evidence Act 2008* s 136).

28. It will usually only be necessary to consider this matter when counsel applies for a s 136 order (*Pavitt v R* (2007) 169 A Crim R 452).

29. At common law, juries were generally prohibited from using hearsay evidence (such as a prior inconsistent statement) to prove the existence of the facts asserted in the representation, due to the potential unreliability of that evidence. It was the intention of the *Evidence Act 2008* to change this position, and allow evidence that was admitted either as an exception to the hearsay rule, or for a non-hearsay purpose, to be used to prove the existence of asserted facts (see *Evidence Act 2008* s 60).

30. Judges should therefore not automatically prevent previous representations that are admitted under the *Evidence Act 2008* from being used to prove the existence of any asserted facts. To do so would be to constrain the legislation by reference to common law rules and distinctions which the legislature has discarded (*Papakosmas v R* (1999) 196 CLR 297).

31. In determining whether to limit the use of previous representations, the judge should consider whether any warning under s 32 regarding the dangers of relying on hearsay evidence (see above) would limit the risk of unfair prejudice (see *R v BD* (1997) 94 A Crim R 131).

32. If the judge decides to limit the use of evidence under *Evidence Act 2008* s 136, he or she may instruct the jury about the effect of that decision (see *Jury Directions Act 2015* ss 14–16; *Aslett v R* [2006] NSWCCA 49; *R v Robinson* [2003] NSWCCA 188).

33. In contrast, if the judge does not limit the use of the evidence, there is generally no need to instruct the jury that it may use the evidence for a hearsay purpose. The jury will usually assume that it can use the evidence for a hearsay purpose without the need for a direction of law (*R v Hilder* (1997) 97 A Crim R 70).

Last updated: 29 June 2015

4.20.1 Charge: Unfavourable Witnesses

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This charge is designed to be given in cases where:

[230] See 4.21 Unreliable Evidence Warning for further information concerning each of these requirements.

i) The prosecution has cross-examined one of its own witnesses under Evidence Act 2008 s 38;

ii) The witness has been cross-examined about a prior inconsistent statement (s 38(1)(c));

iii) Evidence of the prior inconsistent statement can be used for both a hearsay and non-hearsay purpose; and

iv) The evidence adduced in the cross-examination of the witness forms a significant part of the prosecution's case.

The charge will need to be modified if:

i) The cross-examination was solely about one of the matters listed in ss 38(1)(a) or (b), and did not relate to a prior inconsistent statement;

ii) It was the defence who cross-examined one of its witnesses; or

iii) The judge has used s 136 to limit the use of the statement to a non-hearsay purpose.

The judge should discuss the proposed charge with counsel before instructing the jury. See 3.1 Directions Under Jury Directions Act 2015 for information on when the direction is required.

Decision to Grant Leave

[*The following two paragraphs may be adapted and given immediately after the witness has given evidence.*]

You may have noticed that NOW gave evidence in a different manner from the other prosecution witnesses. Instead of providing an account in response to non-leading questions asked by the prosecution, his/her evidence was given in response to leading questions, as though the prosecution was cross-examining him/her. That is an unusual process, that was permitted due to a ruling I made.

You must not speculate on the reasons why this process was necessary in this case, or draw any inference adverse to the accused from this process. You must base your decision on the evidence you hear in court and must not allow different processes of questioning witnesses to distract you from the issues in the case and the need to assess the evidence objectively and impartially.

Prior Inconsistent Statement

One of the things NOW said in the evidence s/he gave in court was [*insert details of inconsistent statement made in court*]. However, the prosecution alleged that NOW had previously given a different version of events. [*Describe prior statement and identify alleged inconsistencies.*]

If you accept that NOW made this statement, there are two ways you can use it.

First, you can use the contents of the statement as evidence in the case. For example, you could use NOW's statement that [*describe part of the statement*] as evidence that [*describe relevant asserted fact*].

Secondly, if you find that NOW's statement is inconsistent with his/her account in court, you may use the statement when assessing his/her credibility and reliability. You may find that the fact that NOW had previously given an inconsistent account means that the evidence s/he gave in court is less likely to be truthful or accurate. You may therefore be less willing to accept his/her evidence. It is for you to determine whether or not to draw this conclusion from any inconsistencies you find.

You should keep in mind the fact that a witness who gives inconsistent accounts is not necessarily lying. While dishonest witnesses are more likely to introduce inconsistencies in their stories, truthful witnesses may make mistakes about details.

If you do find that NOW's statement is inconsistent with his/her evidence in court, you will have two different accounts from the same witness. It is for you to determine which account, if any, to believe.

[*If the witness may have had a reason or motive for giving inconsistent evidence, add the following shaded section.*]

In making your determination, you should take into account [*identify relevant factors, e.g.* "any reasons NOW may have to give inconsistent evidence" or "any motive NOW may have to conceal or misinterpret facts"].

[*Summarise relevant evidence and arguments*.]

Unreliability Warning

[*In some cases it will be necessary to warn the jury about the* potential unreliability *of the evidence under Jury Directions Act 2015 s 32*. See 4.14.1 Charge: Unreliability of Hearsay Evidence *for an example of such a warning.*]

Need for Caution

[*Where a full s 32 warning is not necessary, but the jury should be warned about the need for caution before acting on a previous representation, add the following shaded section.*]

However, you should be cautious before acting on NOW's out-of-court statement, rather than the evidence s/he gave in court on [oath/affirmation].

Last updated: 29 June 2015

4.21 Unreliable Evidence Warning

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Overview

1. A party may request that the trial judge give a direction to the jury on evidence that may be unreliable, pursuant to *Jury Directions Act 2015* s 12 (*Jury Directions Act 2015* s 32(1)). This direction is referred to in this Charge Book as a 'section 32 direction'.
2. Such a request must specify:
    - The significant matters which may make the evidence unreliable; or,
    - If the request relates to a child, the significant matters (other than solely the age of the child) which may make the evidence of the child unreliable (*Jury Directions Act 2015* s 32(2)).
3. If a party makes such a request, the trial judge must:
    - Warn the jury that the evidence may be unreliable
    - Inform the jury of the significant matters identified by the party (or the significant matters other than solely the age of the child, as the case requires) that the judge considers may cause the evidence to be unreliable
    - Warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it (*Jury Directions Act 2015* s 32(3)).
4. The judge need not give this direction if he or she considers that there are good reasons for not giving the direction (*Jury Directions Act 2015* s 15)
5. The parties and the trial judge must not warn or suggest to the jury that:
    - Children as a class are unreliable witnesses, or that children's evidence is inherently less reliable or credible than that of adults;
    - A particular child's evidence may be unreliable solely because of the age of the child; or
    - It may be dangerous to convict on the uncorroborated evidence of a witness because that witness is a child (*Jury Directions Act 2015* s 33).
6. This topic addresses the general unreliability direction. For information on directions in relation to children, see 4.2 Child Witnesses.

When must a s 32 unreliability warning be given?

7. A s 32 unreliability warning usually must be given if:
    - A party in a jury trial requests such a warning; and
    - The evidence in question is "of a kind that may be unreliable".
8. However, a judge need not give such a warning if there are "good reasons" for not doing so (*Jury Directions Act 2015* s 15).
9. These issues are discussed in turn below.

There must be a request for a warning

10. Generally, a judge is only required to give an unreliability warning pursuant to s 32 of the *Jury Directions Act 2015* if a party requests the warning (*Jury Directions Act 2015* s 32(1); *Singh v DPP (NSW)* (2006) 164 A Crim R 284, [38]).
11. Such a request must specify:
    - The significant matters which may make the evidence unreliable; or,
    - If the request relates to a child, the significant matters (other than solely the age of the child) which may make the evidence of the child unreliable (*Jury Directions Act 2015* s 32(2)).
12. A judge is also required to give this direction in the absence of a request where there are substantial and compelling reasons for giving a direction despite the absence of a request (*Jury Directions Act 2015* ss 12, 14, 15, 16). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.

The evidence must be "of a kind that may be unreliable"

13. Section 32 applies to "evidence of a kind that may be unreliable". This is defined in s 31 to include the following kinds of evidence:
    - Hearsay evidence (s 31(a));[231]
    - Admissions (s 31(a));[232]
    - Evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like (s 31(b);[233]

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[231] While evidence of a person's previous representations is generally not admissible to prove a fact asserted by the representation (*Evidence Act 2008* s 59), there are a number of exceptions to this rule (*Evidence Act 2008* ss 65–74). See 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements) for further information.

[232] An "admission" is a previous representation made by a party to a proceeding (including the defendant in a criminal proceeding) that is adverse to the person's interest in the outcome of the proceeding (*Evidence Act 2008*, Dictionary "admission"). While admissions will often be inadmissible due to the hearsay and opinion rules, there are a number of exceptions listed in *Evidence Act 2008* ss 81–83. See 4.5 Confessions and Admissions for further information.

[233] This category includes people of old age, people with psychiatric or similar conditions, and people who were affected by alcohol or drugs at the time of the relevant incident. It does not, however, include people of bad character (*R v Chan* [2002] NSWCCA 217).

- Evidence given by a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the trial (s 31(c));[234]
- Evidence given by a witness who is a prison informer (s 31(d));[235]
- Oral evidence of questioning by an investigating official (within the meaning of the Evidence Act 2008) of an accused where the questioning has not been acknowledged by the accused (s 31(e)).[236]

14. The types of evidence described in ss 31(a), (c)–(e) all correspond to types of evidence where a warning was required at common law. In addition, such evidence can be readily identified without any evaluative judgment by the trial judge. Therefore, where a request concerns one of those four categories, the judge should accept that the evidence "is of a kind that may be unreliable" (*Hudson v R* [2017] VSCA 122, [46]).
15. In contrast, evidence under s 31(b) requires the court to assess whether the reliability of the evidence "may be affected" by the considerations described (*Hudson v R* [2017] VSCA 122, [47]).
16. Where a request is made in relation to s 31(b), the requesting party must demonstrate that there is a reasonable possibility that the evidence is of a kind that a jury acting rationally may consider the evidence to be unreliable (*Hudson v R* [2017] VSCA 122, [47]; *Allen v R* (2013) 39 VR 629, [37]).
17. In New South Wales, the courts have adopted two different elaborations on the test for deciding whether the equivalent to s 31(b) applies. Under one approach, the judge must examine the evidence to decide whether the witness' reliability "may be affected" by one of the listed features. This is a test of possibility and does not require the judge to find that the evidence is unreliable (*R v Flood* [1999] NSWCCA 198).
18. Under the other approach, the judge should give a requested direction if the court has special knowledge about the deficiencies in the evidence which could not be expected of the general experience and understanding of the jury (*R v Stewart* (2001) 52 NSWLR 301).
19. Victorian courts have not needed to resolve this issue, and have instead adopted the test of whether is a reasonable possibility that the evidence is of a kind that a jury acting rationally may consider to be unreliable (*Hudson v R* [2017] VSCA 122, [47]; *Allen v R* (2013) 39 VR 629, [37]).

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[234] This class of witnesses includes most witnesses previously covered by the rule of practice that required corroboration warnings in respect of "accomplices", as well as including witnesses with accomplice–like interests. While unclear, it may extend further (e.g. to include accessories after the fact) (*R v Stewart* (2001) 52 NSWLR 301; *Kanaan v R* [2006] NSWCCA 109). See 4.22 Criminally Concerned Witness Warnings for further information.

[235] A "prison informer" is a prisoner who gives evidence of an oral confession made to him or her by another prisoner. "Prison informers" differ from "prisoner witnesses" who are witnesses to events that occur in prison. A "prisoner witness" should not be treated as a "prison informer" (*R v Ton* (2002) 132 A Crim R 340 (NSWCCA), *R v Ali (No.2)* (2005) 13 VR 257). See 4.23 Prison Informer Warnings for further information.

[236] While evidence of a confession or admission made by a criminal suspect to an investigating official is inadmissible unless mandatory audio recording requirements are met (*Crimes Act 1958* s 464H(1)), in exceptional circumstances a court may admit evidence of a confession or admission to an investigating official that does not meet these recording requirements (*Crimes Act 1958* s 464H(2)). *Jury Directions Act 2015* s 31(e) applies to evidence adduced in these exceptional circumstances, which is "oral evidence of questioning by an investigating official (within the meaning of the *Evidence Act 2008*) of an accused where the questioning has not been acknowledged by the accused".

Non-Listed Categories

20. The listed categories of evidence are not exhaustive. Section 32 of the *Jury Directions Act 2015* also applies to any other evidence which is "of a kind that may be unreliable" (*R v Stewart* (2001) 52 NSWLR 301; *R v Covill* (2000) 114 A Crim R 111; *Hudson v R* [2017] VSCA 122, [40]).[237]

21. This phrase is likely to cover any of the kinds of evidence that were accepted as potentially unreliable by the common law, such as:

    - Evidence of a witness with an accomplice–like motive to lie (*R v Ali* [2002] VSCA 194);
    - Evidence from a prosecution witness who has received an indemnity from prosecution, or a sentencing benefit conditioned on his or her co-operation (*R v Stewart* (2001) 52 NSWLR 301; *R v Calabro* 12/11/1984 CCA Vic; *R v Checconi* (1988) 34 A Crim R 160; *R v Powercor* (Australia) Ltd [2005] VSCA 163; *R v Smith & Turner* (1995) 80 A Crim R 491; *R v Heaney* [1999] VSCA 169; *R v Sharp* [2005] VSCA 44; *R v Strawhorn* (2008) 19 VR 101);
    - Evidence of identification or description that would attract a common law warning but does not fall within the definition of "identification evidence" under the *Evidence Act 2008* or the *Jury Directions Act 2015* (*R v Rose* (2002) 55 NSWLR 701; *Kanaan v R* [2006] NSWCCA 109);
    - Evidence from a police informer (*R v Reardon & Ors* [2002] NSWCCA 203; *R v Dellapatrona and Duffield* (1993) 31 NSWLR 123);
    - Evidence of an alternative suspect (*R v Faure* [1993] 2 VR 497; *R v Mitchell* [2006] VSCA 289; *R v Campbell* 14/11/1994 CCA Vic);
    - Evidence based on memories asserted to have been recovered during hypnotherapy (*R v WB* (2009) 23 VR 319; [2009] VSCA 173; *R v McFelin* [1985] 2 NZLR 570; *R v Horsfall* (1989) 51 SASR 489; *R v Jenkyns* (1993) 32 NSWLR 712; *R v Tillott* (1995) 38 NSWLR 1);
    - Evidence based on the recollection of events alleged to have occurred many years earlier, where those memories may have been distorted by the passage of time (*Longman v R* (1989) 168 CLR 79; *Robinson v R* (1999) 197 CLR 162; *Crampton v R* (2000) 206 CLR 161);
    - Evidence of a witness who has a poor criminal record or who is otherwise part of the criminal milieu (*R v Latina* 2/4/1996 Vic CCA; *R v Hickey* (1995) 89 A Crim R 554);
    - Evidence of a witness who was alcohol or drug-affected at time of the events, whether voluntarily or by the alleged actions of the accused (*R v Maple* [1999] VSCA 52; *Hudson v R* [2017] VSCA 122);
    - Evidence of a witness who is hostile towards the accused (*R v Faure* [1993] 2 VR 497; *R v Kotzmann* [1999] 2 VR 123; *R v Hickey* (1995) 89 A Crim R 554);
    - Evidence of a witness with a proven history of dishonesty (*R v Holt & Merriman* (1996) 87 A Crim R 82; *R v Hickey* (1995) 89 A Crim R 554).

22. Evidence may also be "of a kind that may be unreliable" because of a combination of circumstances (*Hudson v R* [2017] VSCA 122, [40]).

23. The phrase "evidence of a kind that may be unreliable" is not limited to the kinds of evidence that were accepted as potentially unreliable by the common law. It may also cover other types of evidence (*R v Stewart* (2001) 52 NSWLR 301; *R v Baartman* [2000] NSWCCA 298).

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[237] Subject to limitations on the application of the section to the evidence of children (*Jury Directions Act 2015* s 33).

24. Although the phrase "evidence of a kind that may be unreliable" is a phrase of great generality, potentially capable of capturing all contested evidence (because all evidence is "potentially unreliable"), in NSW it has been read down by reference to the purposes of the unreliable witness warning. In that jurisdiction, s 165 of the *Evidence Act 1995* (NSW) is the statutory equivalent of *Jury Directions Act 2015* ss 31 and 32. New South Wales courts have held that the section is concerned only with sources of unreliability in respect of which the courts have developed special knowledge or experience, but which fall outside the experience of juries (*R v Stewart* (2001) 52 NSWLR 301; *R v Baartman* [2000] NSWCCA 298; *Young & Ors v R* [2015] VSCA 265).[238]

25. According to this line of authority, kinds of evidence that do not fall within this special knowledge category are not to be regarded as "evidence of a kind that may be unreliable", and so will not require a s 32 unreliability warning (*R v Stewart* (2001) 52 NSWLR 301; *R v Baartman* [2000] NSWCCA 298; *Young & Ors v R* [2015] VSCA 265).[239]

26. Where evidence does not fall within one of the categories accepted at common law or defined in s 31(a)–(e), it will be a question of judgment for the trial judge whether a warning is required. A warning will be necessary where the danger of the jury acting upon the evidence is real and substantial, and the potential unreliability of the evidence might not be fully perceived by the jury in the absence of a warning (*Hudson v R* [2017] VSCA 122, [52]; *R v Baartman* [2000] NSWCCA 298, [69]; *Young & Ors v R* [2015] VSCA 265; *Wade v The Queen* [2019] VSCA 168).

27. In assessing the risk that the jury will not appreciate the potential unreliability without a judicial warning, the court must consider both whether the jury can understand the individual bases of unreliability and the cumulative impact of the bases of unreliability (*Hudson v R* [2017] VSCA 122, [56]).

28. Assessing the risk that the jury will not appreciate the potential unreliability also requires the court to consider the context and significance of the evidence in question. For example, in Hudson v R, the Court pointed to the fact that the warning concerned the central Crown witness, the case depends on an assessment of the credibility and reliability of that witness and the witness had made prior inconsistent statements in his reporting to police, as factors that contributed to its conclusion that the unreliable evidence warning was required (see *Hudson v R* [2017] VSCA 122, [57]–[61]).

29. A s 32 warning is likely to significantly influence the jury's assessment of the witness in question. For this reason careful reflection is necessary before applying s 32 to evidence that falls outside the categories described in s 31(a)–(e) (*RELC v R* (2006) 167 A Crim R 484, [80]). However, it is erroneous to elevate this need for reflection to a test of requiring good reasons before giving a warning in relation to a non-listed category. Imposing such a test will mean the judge will fail to consider properly whether the evidence is of a kind that may be unreliable before moving to consider under Jury Directions Act 2015 s 14 whether there are good reasons for not giving a warning (*Hudson v R* [2017] VSCA 122, [43]).

30. The need for caution before applying s 32 to types of evidence which is not listed in s 31 may be overcome where the circumstances in question are closely analogous to an accepted category of unreliable evidence (*R v Baartman* [2000] NSWCCA 298, [70]).

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[238] In *R v Stewart* (2001) 52 NSWLR 301 Hulme and Howie JJ declined to follow earlier cases that had taken a less restricted view, including *R v V* (1998) 100 A Crim R 488 and *R v Mayberry* [2000] NSWCCA 531.

[239] In Uniform Evidence Law (12th Ed, 2016), Odgers expresses strong doubts about the validity of this interpretation: see [EA.165.450].

Categories of evidence that are not of an "unreliable kind"

31. Courts have identified a number of categories of evidence that should not generally attract a s 32 unreliability warning:

    - Evidence of a witness asserted to be biased;
    - Evidence of a witness asserted to have an interest in the result of proceedings;
    - Evidence of a witness alleged to have a motive to lie (other than an accomplice–like motive to lie) (*R v Stewart* (2001) 52 NSWLR 301, [37], [99]);[240]
    - Evidence of a conversation that occurred a substantial period before it was reported (*R v Fowler* (2003) 151 A Crim R 166);
    - Evidence that the witness was affected by drugs at the time of the events in question (*Young & Ors v R* [2015] VSCA 265, [72]).

32. While these matters should generally not attract a s 32 unreliability warning, they should usually be addressed by way of comments in the judge's summing up (*R v Stewart* (2001) 52 NSWLR 301, [37], [99]).[241]

33. At least in the case of children, the fact that evidence is unsworn is not a basis for finding that the evidence may be unreliable. The *Evidence Act 2008* and the *Jury Directions Act 2015* do not treat unsworn evidence as a kind that may be unreliable. There was also no requirement or rule of practice under the common law that judges warn the jury to take into account the differences between sworn and unsworn evidence when assessing reliability (*R v GW* (2016) 258 CLR 108, [55]–[57]).

34. An attack on a witness's honesty does not by itself bring the witness's evidence within s 32 (*R v Fowler* (2003) 151 A Crim R 166).

Good reasons for not warning the jury

35. The judge need not give a requested direction "if there are good reasons for not doing so" (*Jury Directions Act 2015* s 14). For information on the matters a judge must consider when determining whether there are good reasons for not giving a requested direction, see 3.1 Directions Under Jury Directions Act 2015.

36. Section 14 sets up an exception to the general rule that the judge must give requested directions. It is erroneous to invert the rule and require good reasons before giving a s 32 direction (*Hudson v R* [2017] VSCA 122, [43]).

37. Some circumstances[242] in which it has been held that there may be good reasons for not giving an unreliability warning include:

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[240] R v Stewart also identified the making of a prior inconsistent statement, or internal inconsistencies as factors that do not generally attract an unreliability warning. In *Hudson v R* [2017] VSCA 122, [58], the complainant's prior inconsistent statement was treated as a significant matter that contributed to requiring an unreliability warning.

[241] In each of these examples, a judicial warning may be unnecessary because the factor tending to show unreliability and the consequences of accepting that factor would commonly be within the understanding of the jury. It may be these are example of the "good reason for not warning" exception.

[242] For other potentially "good reasons" for not giving an unreliable evidence warning, see S Odgers, *Uniform Evidence Law* (12th Ed, 2016) [EA.165.240].

- Where, in the context of the trial and counsel's addresses, the effect of the relevant circumstance on the witness's reliability would have been obvious to the jury (*R v Stewart* (2001) 52 NSWLR 301 (Howie J in dissent, [151]); *Bromley v R* (1986) 161 CLR 315; *R v Reardon & Ors* [2002] NSWCCA 203; *Elmaghraby v R* [2016] VSCA 326, [23]–[25]);
- Where it was objectively unlikely that the sources of unreliability, if they existed, could have logically had any impact on the reliability of the evidence the witness gave (*Elmaghraby v R* [2016] VSCA 326, [26]);
- Where the giving of the warning would cause unfair prejudice a co-accused's case, such as where a co-accused's evidence suffers from the same alleged deficiencies as the impugned witness (*Young & Ors v R* [2015] VSCA 265);
- Where the judge instead gives tailored directions that were capable of alerting the jury to the reasons for the witness's potential unreliability (*R v Covill* (2000) 114 A Crim R 111, [29]; *R v Flood* [1999] NSWCCA 198, [16]);
- The potentially unreliable evidence was undisputed or unimportant (*R v Reardon & Ors* [2002] NSWCCA 203, [136]; *R v Fowler* (2003) 151 A Crim R 166);
- The "request" for a warning was made without enthusiasm and was not subsequently pressed (*R v Reardon & Ors* [2002] NSWCCA 203);
- The evidence fell within an accepted category of evidence of "a kind that may be unreliable", but in circumstances where no real issue of unreliability was raised (*R v Flood* [1999] NSWCCA 198; *R v Stewart* (2001) 52 NSWLR 301; *R v Fowler* (2003) 151 A Crim R 166).

38. The structure of s 32 is designed to encourage judges to give unreliability directions where there is a reasonable possibility of unreliable evidence. Applying the good reasons exception depends on the circumstances of the case and requires judges to remember that the default position is that a direction should be given (*Wade v The Queen* [2019] VSCA 168, [39]).
39. A risk of confabulation is a matter that may not be fully appreciated by a jury in the absence of a judicial direction. This risk may persist even if the suggested causes of confabulation, or the evidence of confabulation, is thoroughly ventilated in cross-examination (*Wade v The Queen* [2019] VSCA 168, [37]–[38]).
40. Under equivalent provisions in the *Evidence Act*, courts have held that the fact that potentially unreliable evidence supports the defence may provide good reasons for not giving a warning (*R v Salama* [1999] NSWCCA 105; *R v Rose* (2002) 55 NSWLR 701. See also *Anile v The Queen* [2018] VSCA 235R, [206]–[207]).
41. The jury must not be warned about the interest of the accused in the outcome of the case (*Jury Directions Act 2015* s 44H; *R v Haggag* (1998) 101 A Crim R 593; *R v Brown* [1995] 1 Qd R 287).
42. Even if there are arguably good reasons for not complying with s 32, it will rarely be appropriate for a judge to decide not to comply with that provision if a warning is to be given in respect of other evidence with similar characteristics (*RELC v R* (2006) 167 A Crim R 484).
43. Where the judge determines that there are good reasons for not giving a warning, or for doing so in the terms other than those required by legislation or authority, he or she should generally state those reasons (*R v Stewart* (2001) 52 NSWLR 301, [46], [124]).

Content of the Warning

44. A s 32 unreliability warning must:

(a) Warn the jury that the evidence may be unreliable;

(b) Inform the jury:

(i) of the significant matters that may cause the evidence to be unreliable; or

(ii) if the direction concerns evidence given by a child, of the significant matters (other than just the age of the child) that the trial judge considers may make that child's evidence unreliable; and

(c) Warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it (*Jury Directions Act 2015* s 32(3)).

45. These requirements are mandatory, subject to the qualification that the judge may decide not to give the warning if there are good reasons for not doing so (*Jury Directions Act 2015* s 15).

46. The judge is not required to adopt a particular form of words in giving a s 32 unreliable evidence warning (*Jury Directions Act 2015* s 6).

47. However, it has been suggested that the three matters which the judge is required to warn about should be addressed in the same part of the charge, although splitting these directions would not necessarily constitute error (*R v Stewart* (2001) 52 NSWLR 301, [44], [154]).

48. It is common practice for all of these matters to be addressed when the evidence is admitted in the trial, as well as in the judge's summing up (S Odgers, *Uniform Evidence Law* (12th Ed, 2016), [EA.165.210]).

49. While no particular form of words is required for a s 32 unreliability warning, it must be properly expressed as a warning (*Brown v R* [2006] NSWCCA 69, [40]).

50. It is not sufficient for the judge to merely refer to a submission about the matter made by counsel when addressing the jury. The warning must come from the judge, with the authority of the judge being used to impress the significance of the matter on the jury (*R v TJF* [2001] NSWCCA 127; *R v Yates* [2002] NSWCCA 520; *R v Sullivan* [2003] NSWCCA 100).

51. In fairness to the party adducing the evidence, the judge should make it clear that the warning is given because of the nature of the evidence, and that he or she is not expressing a personal opinion about it (*R v Stewart* (2001) 52 NSWLR 301).

52. While a judge may emphasise that the law requires the direction to be given (*KNP v R* (2006) 67 NSWLR 227), he or she should not repeatedly indicate to the jury that the warning is always given where evidence of that nature is before the court. Such an approach runs the risk that the warning will not be effective in bringing home to the jury the caution with which they must treat the evidence (*R v Roddom* [2001] NSWCCA 168; *R v Stewart* (2001) 52 NSWLR 301).

53. The precise content of the warning will depend upon the facts before the jury and counsel's addresses (*R v Johnston* (1998) 45 NSWLR 362 at 369; *R v Stewart* (2001) 52 NSWLR 301, [87], [130]; *Kanaan v R* [2006] NSWCCA 109, [183]).

Warning the jury about potential unreliability

54. The judge must warn the jury that the evidence in question may be unreliable (*Jury Directions Act 2015* s 32(3)(a)).

55. A simple repetition of the language of s 32(3), incorporating the significant matters which may make the evidence unreliable, is likely to be sufficient to comply with this requirement (see, e.g. the direction approved in this respect in *R v Stewart* (2001) 52 NSWLR 301, [135]).

56. It is not necessary to use any particular form of words in giving this warning. In some circumstances there may be good reason instead to give a direction that focuses on the issues of "deliberate falsehood", or "honestly mistaken evidence" (*Jury Directions Act 2015* s 6; *R v Fowler* (2003) 151 A Crim R 166).

Informing the jury about significant sources of unreliability

57. The judge must inform the jury of significant matters that may cause the evidence to be unreliable (*Jury Directions Act 2015* s 32(3)).

58. This obligation differs from that which applied under *Evidence Act 2008* s 165. Under that section, trial judges were required to "inform the jury of matters that may cause it to be unreliable". The provisions in the *Jury Directions Act 2015* now include the qualifier significant.

59. The effect of this change in terminology means that, under the *Jury Directions Act 2015* s 32(3), it is explicit that the trial judge is not required to inform the jury of all matters that may cause particular evidence to be unreliable. He or she is only obliged to inform the jury of significant matters which may cause the evidence to be unreliable.

60. The party requesting the direction must also specify the significant matters that may make the evidence unreliable. The role of the judge is to determine which of those matters are significant, and then direct the jury accordingly.

61. As part of this process, the judge should discuss with the party any other matters which the judge considers are significant and invite submissions on whether those matters should be identified in the warning (see *Jury Directions Act 2015* ss 15, 16).

62. The *Jury Directions Act 2015* offers no guidance as to when a matter will be "significant". The Oxford English Dictionary notes that the term means "sufficiently great or important to be worthy of attention; noteworthy".

63. While the requirement in s 32 of the *Jury Directions Act 2015* is expressed as a duty to "inform the jury", this does not mean that the information can be treated as a mere comment. The judge must communicate this information with the full weight of judicial authority (*R v Stewart* (2001) 52 NSWLR 301, [117]).

64. The purpose of this direction is to inform the jury of matters which may be outside their general experience and understanding. Those matters need be stated only with such detail as is required to achieve that purpose (*Kanaan v R* [2006] NSWCCA 109, [182]).

65. While courts must exercise caution in construing s 32 by reference to the common law, the experience of the common law may guide the content of the information provided to the jury about potential sources of unreliability. That experience can reveal the significant matters that may cause the evidence to be unreliable (*Robinson v R* (2006) 162 A Crim R 88, [7]).

66. See the following topics for a discussion about the particular sources of unreliability posed by the respective kinds of evidence:

    - 4.14 Previous Representations (Hearsay, Recent Complaint and Prior Statements);
    - 4.5 Confessions and Admissions;
    - 4.22 Criminally Concerned Witness Warnings;
    - 4.23 Prison Informer Warnings.

Warning the jury about the need for caution

67. A s 32 warning must alert the jury to the need for caution in determining whether to accept potentially unreliable evidence, and the weight to be given to it (*Jury Directions Act 2015* s 32(3)(c)).

68. Repeating the words of s 32(3)(c) may be adequate to convey this need.

69. The warning must alert the jury to the need to exercise caution, but it need not tell them how to exercise that caution (*R v Stewart* (2001) 52 NSWLR 301, [166]).

Common law rules regarding unreliable evidence abolished

70. Previously, *Evidence Act 2008* s 165 did not affect any other power of the judge "to give a warning to, or to inform, the jury" (*Evidence Act 2008* s 165(5)).

71. Under that provision, the common law requirement to give a warning where the inherent unreliability of a witness created a perceptible risk of a miscarriage of justice survived, subject to some limitations (*Singh v DPP (NSW)* (2006) 164 A Crim R 284; *R v Stewart* (2001) 52 NSWLR 301).

72. The *Jury Directions Act 2015* has abolished this common law obligation. The Act is now the only source of obligations on a judge to direct a jury about evidence of a kind that may be unreliable (*Jury Directions Act 2015* s 34).

Residual Duty to Warn

73. Under *Jury Directions Act 2015*, a judge must give a warning in the absence of a request if there are 'substantial and compelling' reasons to do so.

74. At common law, a warning in relation to unreliability was considered necessary where:

    - Evidence was given by a witness who is "inherently unreliable"; and
    - Such a warning was necessary and practical, in the circumstances of the case, to avoid a perceptible risk of miscarriage of justice (*Bromley v R* (1986) 161 CLR 315; *R v Miletic* [1997] 1 VR 593).

75. These principles may continue to provide guidance on the operation of the residual obligation to warn.

Witness Must be Inherently Unreliable

76. An unreliable witness warning was not required because of the mere possibility of a witness's error. Such a warning was only required where a witness was considered to be "inherently unreliable" (*R v Brooks* (1999) 103 A Crim R 234).

77. For a witness to be "inherently unreliable", there must a pre-existing proneness to (or likelihood of) unreliability, which is inherent in the general nature of the witness, or in his or her relationship to the accused, the victim or the events (*R v Brooks* (1999) 103 A Crim R 234; *R v Kotzmann* [1999] 2 VR 123).

78. A warning was therefore not required simply because:

    - There had been an attack on the credibility of a witness or a group of witnesses (*R v Campbell* 14/11/1994 CCA Vic);
    - There were inconsistencies or discrepancies in the evidence of a witness (*R v Minaoui* [2004] VSCA 126); or
    - The impugned witnesses had convictions or bear some characteristics which may, on one view of the evidence, render them unreliable (*R v Campbell* 14/11/1994 CCA Vic).

79. It was generally not possible to determine the necessity for an unreliable witness warning by reference to collections of categories of witnesses (*R v Lowe* 13/11/95 CA Vic).

80. Instead, the necessity for an unreliable witness warning was determined on a witness by witness basis (*R v Minaoui* [2004] VSCA 126).

81. The need for a warning was more likely to arise in a case where the factors which make the witness's evidence unreliable exist independently of what view the jury takes of the witness's evidence (*R v Campbell* 14/11/1994 CCA Vic).

Circumstances Relevant to Determining Witness Unreliability

82. Evidence of any of the following matters may be relevant to the assessment of whether a witness is "inherently unreliable":

- The witness is a prison informer (giving evidence of an oral confession) (*Pollitt v R* (1991) 174 CLR 558);
- The witness has an accomplice–like motive to lie (*R v Ali* [2002] VSCA 194);
- The witness has received an indemnity from the prosecution, or a sentencing or other benefit for co-operation (*R v Calabro* 12/11/1984 CCA Vic; *R v Checconi* (1988) 34 A Crim R 160; *R v Powercor (Australia) Ltd* [2005] VSCA 163; *R v Smith & Turner* (1995) 80 A Crim R 491; *R v Heaney* [1999] VSCA 169; *R v Sharp* [2005] VSCA 44; *R v Strawhorn* (2008) 19 VR 101);
- The witness is an alternative suspect (*R v Faure* [1993] 2 VR 497; *R v Mitchell* [2006] VSCA 289; *R v Campbell* 14/11/1994 CCA Vic);
- The witness has poor criminal record or is otherwise part of the criminal milieu (*R v Latina* 2/4/1996 Vic CCA; *R v Hickey* (1995) 89 A Crim R 554);
- The witness was drug-affected at time of the events (*R v Maple* [1999] VSCA 52);
- The witness is hostile towards the accused (*R v Faure* [1993] 2 VR 497; *R v Kotzmann* [1999] 2 VR 123; *R v Hickey* (1995) 89 A Crim R 554);
- The witness has a proven history of dishonesty (*R v Holt & Merriman* (1996) 87 A Crim R 82; *R v Hickey* (1995) 89 A Crim R 554);
- The witness has a cognitive impairment (including impaired memory) which may have affected his or her capacity to give reliable evidence (*Bromley v R* (1986) 161 CLR 315; *R v Sharp* [2005] VSCA 44; *R v Challoner* (2000) 110 A Crim R 102; *R v Hickey* (1995) 89 A Crim R 554; *R v Maple* [1999] VSCA 52).

83. At common law, the presence of any one or combination of these factors was not enough to indicate a warning was necessary. That assessment needed to be informed by all the circumstances of the case (See for example *R v Morgan* 13/8/1996 CCA Vic; *R v Brooks* (1999) 103 A Crim R 234; *R v Sotiropoulos* [1999] VSCA 115; *R v Kotzmann* [1999] 2 VR 123; *R v Heaney* [1999] VSCA 169; *R v Campbell* 14/11/1994 CCA Vic; *R v Strawhorn* (2008) 19 VR 101).

84. The first three circumstances outlined above are addressed in more detail below.

Examples of Potentially Unreliable Witnesses

Prison Informers Giving Evidence of Oral Confessions

85. While each case must be assessed on an individual basis, where a prison informer gives evidence of an oral confession made to him or her, there will usually be substantial and compelling reasons for giving an unreliable witness warning (see *Pollitt v R* (1991) 174 CLR 558).

86. There was no rule of law or practice requiring a warning to be given in such cases. However, at common law, it was only be in an exceptional case that a full unreliable witness warning was not necessary (*Pollitt v R* (1991) 174 CLR 558).

87. A prison informer's evidence of an oral confession was generally regarded as inherently unreliable for the following reasons:

- This evidence is easily concocted;
- Where this evidence is concocted, an accused's denial will ordinarily have no possibility of corroboration;
- Prison informers (if convicted criminals) are of bad character;
- The law acknowledges that the prison informer's position creates motives to fabricate such evidence, including:
    - the perception that they will derive some benefit in terms of sentence, treatment or release on parole; and

- by reason of a variety of common prison environment pressures which may not be apparent to a jury (*Pollitt v R* (1991) 174 CLR 558).

88. There is a difference between a "prison informer" who gives evidence of an oral confession made to him or her, and a "prisoner witness" who is a witness to events that occur in prison. A "prisoner witness" should not be treated as a "prison informer" (*R v Ton* (2002) 132 A Crim R 340 (NSWCCA); *R v Ali (No.2)* (2005) 13 VR 257).

89. An accomplice who, in order to receive favourable treatment, gives evidence of an oral confession made to him or her by the accused (becoming an "informer"), should commonly be treated in the same way as a prison informer (*R v Tamme* [2004] VSCA 44; *Grey v R* (2001) 184 ALR 593).

Witnesses with Similar Motives to Accomplices

90. An unreliable witness warning may be required for witnesses who are not accomplices, but nonetheless have an accomplice–like motivation to give false testimony exculpating themselves and inculpating the accused (*R v Parsons* (2004) 145 A Crim R 519; *R v Mitchell* [2006] VSCA 289; *R v Ali (No.2)* (2005) 13 VR 257).

91. While accessories after the fact may fall within this category (*R v Parsons* (2004) 145 A Crim R 519), it cannot be assumed that they have such a motivation. Historically, the law has declined to treat accessories after the fact as accomplices because their assumed interest lies in exculpating rather than implicating the accused. However, every case must be considered on its own facts (*R v Ready and Manning* [1942] VLR 85; *R v Weiss* (2004) 8 VR 388).

92. Witnesses with an accomplice–like motivation do not form a special category, and the need for a warning should be determined by reference to all of the circumstances of the case (*R v Ali (No.2)* (2005) 13 VR 257).

93. If it is suggested that a non-accomplice, who has not been charged with an offence, has an accomplice–like motive to lie (so as to shift blame from themselves), the fact that they have not been charged will militate against the giving of a warning (*R v Parsons* (2004) 145 A Crim R 519).

Indemnified and Co-operating Witnesses

94. Warnings are often requested in respect of indemnified witness and witnesses who have received a benefit for co-operation (*R v Calabro* 12/11/1984 CCA Vic; *R v Checconi* (1988) 34 A Crim R 160; *R v Powercor (Australia) Ltd* [2005] VSCA 163; *R v Smith & Turner* (1995) 80 A Crim R 491).

95. Many indemnified or co-operating witnesses will be accomplices who attract the need for an accomplice warning.

96. At common law, there was no rule that an unreliable witness warning must be given for every non-accomplice who is indemnified or co-operating. These cases must be assessed on their individual circumstances (*R v Powercor (Australia) Ltd* [2005] VSCA 163; *R v Smith & Turner* (1995) 80 A Crim R 491).

97. In some circumstances an indemnity will create no risk of unreliability. In other cases, any risks that are created will be sufficiently obvious to the jury that there will be no need for a warning (*R v Powercor (Australia) Ltd* [2005] VSCA 163; *R v Smith & Turner* (1995) 80 A Crim R 491).

98. Where there is evidence that a critical witness was indemnified or benefited from co-operation, the circumstances in which the evidence was given, and their consequences may need to be fully explained to the jury. This explanation may be required even if no unreliable witness warning is required (*R v Checconi* (1988) 34 A Crim R 160).

99. This explanation may describe:

    - The terms of the indemnity or undertaking to co-operate; and
    - The statutory consequences for the witness if he or she does not fulfil the terms of an undertaking to co-operate

Children and Cognitively Impaired Witnesses are not Presumptively Unreliable

100. Historically the law regarded child witnesses as an inherently unreliable class of witness and a corroboration warning was required for their evidence as a rule of practice (*DPP v Hester* [1973] AC 296).

101. By contrast, the law never regarded cognitively impaired witnesses as inherently unreliable, and there was never any rule of practice that a corroboration warning should be given in every case involving such a witness. Instead, the law required simply that such a warning should be given where necessary in the particular circumstances of the case (*Bromley v R* (1986) 161 CLR 315).

102. Judges are now prohibited by statute from warning, or suggesting to the jury in any way, that the law regards children as an unreliable class of witness (*Jury Directions Act 2015* s 33).

103. Judges may give a warning if it is directed to particular features of the evidence, rather than stereotypical assumptions about the class of witness in issue (*R v WEB* (2003) 7 VR 200; *R v NRC* [1999] 3 VR 537).

104. See 4.2 Child Witnesses for further discussion of directions about evidence from children.

Warning Must be Necessary to Avoid a Risk of Miscarriage of Justice

105. An unreliable witness warning should only be given where it is necessary and practical, in the circumstances of the case, to avoid a perceptible risk of miscarriage of justice (*Bromley v R* (1986) 161 CLR 315; *R v Miletic* [1997] 1 VR 593).

106. A perceptible risk is one that is real or of substance, as opposed to a risk that is insignificant or theoretical (*R v Miletic* [1997] 1 VR 593).

107. A warning may be given when:

- The danger in acting upon the evidence is real and substantial; and
- The conduct of the trial and evidence are such that the jury may not have fully perceived the danger, or the jury's attention may have been diverted from the danger (*Bromley v R* (1986) 161 CLR 315).

The Warning Must Address Concealed Dangers

108. A warning will only be necessary where there is a possibility that either the unreliability of the evidence, or the full significance of that unreliability, will not be apparent to the jury (*R v Sharp* [2005] VSCA 44; *R v Miletic* [1997] 1 VR 593; *R v Maple* [1999] VSCA 52; *R v Brooks* (1999) 103 A Crim R 234; *R v Williams* [2007] VSCA 208; *R v Strawhorn* (2008) 19 VR 101).

109. In other words, the warning is only necessary if it presents a concealed trap that has been identified by judicial experience, but which will not be within the experience and understanding of jurors (*R v Miletic* [1997] 1 VR 593; *R v Maple* [1999] VSCA 52; *R v Strawhorn* (2008) 19 VR 101).

110. Even if the relevant dangers are likely to be "outside the experience" of most jurors, if those dangers have been clearly placed before the jury and explained in detail by counsel, a warning may not be necessary (*R v Strawhorn* (2008) 19 VR 101).

Reasons for Not Giving a Warning

111. An unreliable witness warning should not be given where, because of short-comings in the evidence, it would be an invitation to speculate about matters not in evidence (*R v Minaoui* [2004] VSCA 126).

112. Where there is substantial supporting evidence, it will be a legitimate forensic decision to seek no warning, and there are less likely to be substantial and compelling reasons to give the direction (*R v Sotiropoulos* [1999] VSCA 115).

113. The need for a warning may be vitiated where the relevant evidence is not vital to the prosecution case, but rather is directed more to context and detail (*R v Sotiropoulos* [1999] VSCA 115).

A Warning Should be Given Only When Truly Necessary

114. At common law, it was considered that the unreliable witness warning was reserved for special cases (*R v Latina* 2/4/1996 Vic CCA; *R v Weiss* (2004) 8 VR 388).

115. Such a warning was only be given where truly necessary because:

- It tends to blur the division of responsibility between the judge as the arbiter of the law and the jury as the tribunal of fact (*R v Weiss* (2004) 8 VR 388); and
- A person compelled to give evidence in a court of law should not be publicly branded as an unreliable witness unless that is truly necessary for the attainment of justice (*R v Holt & Merriman* (1996) 87 A Crim R 82).

116. The Court of Appeal has therefore shown a strong reluctance to find that it was necessary for a trial judge to give an unreliable witness warning where:

- The circumstances suggesting unreliability were fully exposed in the evidence and addresses; or

117. Those circumstances were otherwise fully understandable on a common-sense basis (*R v Morgan* 13/8/1996 CCA Vic; *R v Brooks* (1999) 103 A Crim R 234; *R v Sotiropoulos* [1999] VSCA 115; *R v Kotzmann* [1999] 2 VR 123; R v Latina 2/4/1996 Vic CCA; *R v Challoner* (2000) 110 A Crim R 102; R v Sharp [2005] VSCA 44; *R v Strawhorn* (2008) 19 VR 101).

118. The need to give warnings in respect of some witnesses in a trial is not a basis for giving a warning for a witness in the same trial who would not otherwise require a warning. The warnings that are given do not elevate the value of the evidence given by witnesses who are not the subject of warnings (*R v Strawhorn* (2008) 19 VR 101).

Interpretation of s 32 by reference to the common law and Evidence Act 2008 s 165

119. When construing *Jury Directions Act 2015* s 32, care should be taken in referring to its common law predecessors. However, cases which consider the statutory predecessor to s 32, s 165 of the *Evidence Act 2008*, will continue to be of assistance, due to the similarities between the provisions.

120. Despite the need for caution in respect of common law authorities, the experience of the common law may provide guidance as to the risks of unreliability posed by different forms of evidence, and the directions necessary to respond to those risks (*Papakosmas v R* (1999) 196 CLR 297; *R v Stewart* (2001) 52 NSWLR 301, [2]–[9], [70]; *Robinson v R* [2006] NSWCCA 192).

Supporting evidence

121. With the exception of perjury offences, any previously persisting requirement that evidence be corroborated is now abolished (*Evidence Act 2008* s 164).

122. The rules of law or practice that previously required directions concerning the absence of corroboration, including directions about the dangers of acting on uncorroborated evidence, have also been abolished (*Evidence Act 2008* s 164(3)).

123. Further, *Evidence Act 2008* s 164(4) prohibits a trial judge from warning the jury that it is dangerous to act on uncorroborated evidence in a criminal proceeding. It also prohibits trial judges from directing a jury about the absence of corroboration.

124. As part of the obligation to identify relevant evidence, judges commonly invite the jury to consider whether there is evidence that can independently support the impugned evidence, and to identify potentially supporting evidence, as was done as part of corroboration directions at common law.

125. However, it is not appropriate to invite the jury to look for supporting evidence when the warning concerns exculpatory evidence, especially when the warning concerns exculpatory evidence from an accomplice (*Anile v The Queen* [2018] VSCA 235R, [206]–[207]).

126. In a criminal proceeding for perjury or related offences, the judge must direct the jury that it may find the accused guilty only if it is satisfied that the evidence which proves guilt is corroborated (*Evidence Act 2008* s 164(5)).

Last updated: 17 February 2020

4.21.1 Charge: Unreliable Evidence Warning

Click here to download a Word version of this charge

This is a generic charge that can be adapted for use in cases where:

i) A party has requested a *Jury Directions Act 2015* s 32 unreliability warning; and

ii) The evidence in question is "of a kind that may be unreliable"; and

iii) No specific warning addressing the dangers presented by that type of evidence has been included in the Charge Book (see below).

This charge may be adapted where the witness is a child. See Child Witnesses for guidance.

Introduction

I have already told you the general rules for assessing witnesses' evidence. I must now warn you about the need for caution when considering the evidence of NOW. I must give you this warning because [*identify bases of unreliability, e.g.* "NOW's evidence may have been affected by her history of drug use"].

Significant matters that may cause unreliability

My warning to you is as follows. It is the experience of the law that the evidence of a witness [*identify basis of unreliability, e.g.* "who was drug affected at the time of the events"] may be unreliable. This unreliability can arise due to [*list significant reasons for potential unreliability, e.g.* "the effects drug use can have on the user's perceptions and recollections"].

[*If necessary, explain the grounds of potential unreliability in further detail, and relate to the facts and arguments in the case.*]

Warning

The law says that every jury must take this potential unreliability into account when considering the [type of evidence given by NOW/evidence of a witness such as NOW]. You must take it into account in determining whether you accept NOW's evidence at all, and if you do accept it, in whole or in part, in deciding what weight to give to that evidence.

Supporting evidence

[*If there is evidence capable of "supporting" the witness's evidence, add the following shaded section.*]

In considering whether it is safe to rely upon NOW's evidence, you should have regard to any supporting evidence led in this trial that you accept. By "supporting evidence" I mean evidence from a source that is independent of NOW, and that tends to show the truth of NOW's evidence of the accused's guilt.

In this case the prosecution relied upon [*insert number*] items of evidence as supporting NOW's

evidence. These were [*identify evidence capable of supporting the unreliable witness's evidence*].

[*If there is a danger that the jury might mistakenly believe certain evidence to be supportive, add the following darker shaded section.*]

There was other evidence given in this case that you might have thought at first glance could support NOW's evidence. This includes the evidence [*broadly identify non-supporting evidence*].

I direct you that this other evidence is not capable of supporting NOW's account, because [*explain why the evidence is not capable of supporting, e.g.* "it does not come from an independent source".]

[*If the issue of mutual support has arisen, and there is a possibility of joint fabrication, add the following darker shaded section.*]

You will see that the prosecution relies upon the evidence of [two/a number of] [allegedly] unreliable witnesses to support each other. The law accepts that unreliable witnesses can support each other in this way.

However, you may only accept their evidence as mutually supporting if you accept that their accounts are truly independent of each other. That is, you must accept that they did not put their heads together and fabricate their evidence.

Last updated: 9 March 2017

4.22 Criminally Concerned Witness Warnings

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Overview

1. Under s 32 of the *Jury Directions Act 2015*, a judge may be required to warn the jury about the potential unreliability of evidence if that evidence has been given by a witness who might reasonably be supposed to have been "criminally concerned" in the events giving rise to that proceeding.
2. A "criminally concerned witness" warning is a particular form of an unreliable evidence warning. This topic should therefore be read in conjunction with *Unreliable Evidence Warning.*

Jury Directions Act 2015 s 32 Unreliability Warning

When must a s 32 unreliability warning be given?

3. A judge must give a s 32 unreliability warning if:
    - A party in a jury trial requests such a warning;
    - The evidence in question is "of a kind that may be unreliable"; and
    - There are no good reasons for not doing so (*Jury Directions Act 2015* s 32).
4. See *Unreliable Evidence Warning* for information concerning the first and third requirements.
5. In relation to the second requirement, *Jury Directions Act 2015* s 31(c) states that evidence given by a witness in a criminal proceeding who "might reasonably be supposed to have been criminally concerned in the events giving rise to the trial" is evidence "of a kind that may be unreliable".

Who is a "criminally concerned" witness?

6. To fall within the scope of s 31(c), a witness may have been criminally concerned in the relevant events in any way. He or she does not need to be facing the same charges as the accused, or to have been charged with any criminal offence (*Jury Directions Act 2015 s 31(c)*).

7. However, the witness must have been "criminally concerned" in the relevant events. Section 31(c) does not apply to witnesses who had some innocent involvement in the events giving rise to the proceeding.

8. It is therefore doubtful that s 31(c) would apply to witnesses who were legitimately involved in the events giving rise to the proceeding, but who engaged in collateral crime (e.g. police officers who investigate an offence, but who steal property from the crime scene) (*R v Lonie & Groom* [1999] NSWCCA 319, [63]).

9. The category of witnesses covered by s 31(c) includes most[243] of the witnesses who were previously covered by the rule of practice that required corroboration warnings in respect of "accomplices" (*R v Lonie & Groom* [1999] NSWCCA 319).

Accessories after the fact

10. It is not clear whether accessories after the fact (e.g. people who conceal an offence) fall within the scope of s 31(c) (*Kanaan v R* [2006] NSWCCA 109, [203]; *R v Clark* (2001) 123 A Crim R 506, [53]).

11. This may depend on the interpretation given to the phrase "the events giving rise to the trial". If it is held that this phrase only covers events that occurred prior to the completion of the offences alleged against the accused, then accessories after the fact will not fall within the scope of s 31(c) (*R v Clark* (2001) 123 A Crim R 506 [70] (Heydon JA)).

12. Even if it is decided that accessories after the fact are not covered by s 31(c), this does not mean that a s 32 unreliability warning need not be given. Such a warning may still be required if the evidence is "of a kind that may be unreliable". See the discussion of "Non-Listed Categories" in *Unreliable Evidence Warning.*

13. When a judge is considering whether or not a warning is necessary, special attention should be paid to the accessory witness's possible interest in the outcome of the proceedings:

    - In many cases, accessories after the fact will have no special interest in falsely blaming the accused. Where this is the case, their evidence may not be "of an unreliable kind" (see *R v Clark* (2001) 123 A Crim R 506, [66]–[69]; *GAR v R* (No 2) [2010] NSWCCA 164, [101]. For the common law position see *R v Ready & Manning* [1942] VLR 85; *R v Carranceja & Asikin* (1989) 42 A Crim R 402; *R v Parsons* (2004) 145 A Crim R 519; *R v Heaney* [1999] VSCA 169; *R v Sharp* [2005] VSCA 44).
    - However, in some cases accessories after the fact may have the same motivations for blaming the accused as an accomplice, and their evidence may be regarded as potentially unreliable (see, e.g. the common law case of *R v Parsons* (2004) 145 A Crim R 519).

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[243] While it is clear that "true accomplices" (those who were participants in the accused's alleged offence) fit within s 31(c), some secondary categories of "accomplice" may not. For example, it seems likely that accomplices in respect of uncharged offences that have been led in evidence against the accused, or receivers of stolen goods (if they give evidence against the alleged thief of those goods), do not fall within the scope of s 31(c), despite being classified as "accomplices" at common law by *Davies v DPP* [1954] AC 378.

Determining whether the accused is "criminally concerned"

14. Where a s 32 unreliability warning is requested, and the question of whether or not a witness "might reasonably be supposed to have been criminally concerned" in the relevant events (and thus falls within the scope of s 31(c)) is in issue, that matter must initially be determined by the trial judge as a question of fact (*R v Stewart* (2001) 52 NSWLR 301, [125]; *R v Taranto* [1999] NSWCCA 396).

15. For a witness to fall within the scope of s 31(c), the judge does not need to find that he or she actually was criminally concerned in the relevant events, either on the balance of probabilities or beyond reasonable doubt. The judge only needs to find that there is evidence capable of raising a "reasonable supposition" that the witness was tainted in this way (*Jury Directions Act 2015* s 31(c)).

16. A judge who finds that the factual conditions for the warning are not met, and thus refuses a request for a warning under s 31(c), should give reasons for that refusal (unless it is obvious that the witness does not fall within the suggested category) (*R v Taranto*[1999] NSWCCA 396).

17. Even if the judge decides that the witness was not criminally concerned in the relevant events, this does not mean that a s 32 unreliability warning need not be given. Such a warning may still be required if the evidence is "of a kind that may be unreliable."[244] See the discussion of "Non-Listed Categories" in *Unreliable Evidence Warning.*

Being a criminally concerned witness is not conclusive

18. In rare and exceptional cases, a judge may have good reasons for not giving a warning despite the fact that the witness is a 'criminally concerned witness' (see *R v Clark* (2001) 123 A Crim R 506 (Heydon JA)).

19. Where a criminally concerned witness gives evidence for the defence exculpating the accused, it is unlikely to be evidence "of a kind that may be unreliable" in the sense addressed by s 32. If the witness does not implicate the accused, the danger that the witness is shifting his or her own blame to the accused in order to diminish his or her own culpability does not arise (*R v Ayoub* [2004] NSWCCA 209 at 216. See also *Anile v The Queen* [2018] VSCA 235R, [206]).

Content of the s 32 unreliability warning

20. A s 32 unreliability warning must:

    - Warn the jury that the evidence may be unreliable;
    - Inform the jury of the significant matters that may cause it to be unreliable;
    - If the direction concerns evidence giving by a child, inform the jury of the significant matters (other than the solely the child's age) that may make the evidence unreliable; and

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[244] Examples of similar kinds of evidence which may require a *Jury Directions Act 2015* s 32 unreliability warning due to being "of a kind that may be unreliable" include:

Evidence of a witness with an accomplice–like motive to lie (see, e.g. *R v Ali* [2002] VSCA 194);

Evidence from a police informer (see, e.g. *R v Reardon & Ors* [2002] NSWCCA 203; *R v Dellapatrona and Duffield* (1993) 31 NSWLR 123);

Evidence of an alternative suspect (see, e.g. *R v Faure* [1993] 2 VR 497; *R v Mitchell* [2006] VSCA 289; *R v Campbell* 14/11/1994 CCA Vic);

Evidence of a witness who has a poor criminal record or who is otherwise part of the criminal milieu (see, e.g. *R v Latina* 2/4/1996 Vic CCA; *R v Hickey* (1995) 89 A Crim R 554).

- Warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it (*Jury Directions Act 2015* s 32(3)).

21. See *Unreliable Evidence Warning* for information concerning the first and last requirements.

22. In informing the jury about the significant matters that may cause s 31(c) evidence to be unreliable (the second (and third, in the case of child witnesses) requirement), the judge should refer to the matters identified by the party requesting the direction which are significant (*Jury Directions Act 2015* s 32(3)).

23. The risk factors identified in the common law accomplice warning can provide guidance for judges and practitioners on risks which may be significant (*Kanaan v R* [2006] NSWCCA 109, [164]–[166], [217]).[245]

24. The principal danger addressed by the common law accomplice warning was the natural tendency of an accomplice to minimise his or her role in a criminal episode, and to exaggerate the role of others, including the accused (*Jenkins v R* (2004) 211 ALR 116).

25. Prior to the introduction of the UEA, judges in New South Wales also used to warn juries that it was the court's experience that accomplices who give a false version of events to police may feel locked into that version, and for that reason feel bound to relate the same version when giving evidence. This warning remains part of the model *Evidence Act 1995* s 165(1)(d) warning in New South Wales, on which s 31(c) is based. Whether a judge needs to direct the jury on this matter will depend on whether it is identified in the request as a significant matter (see the directions endorsed in *R v Stewart* (2001) 52 NSWLR 301, [135]).

26. The fact that the witness was involved in criminal activity may be relevant to his or her credit, and it may be appropriate to direct juries about this. However, if the jury is otherwise aware of the impact of this factor on the witness's credibility, there will be no need to refer to it in the s 32 warning (*Kanaan v R* [2006] NSWCCA 109, [164]).

27. Judges are not required to inform the jury that people who are involved in the commission of an offence may make false claims about the involvement of others out of motives of revenge or antipathy. The existence of this possibility will be obvious to any jury (*R v Stewart* (2001) 52 NSWLR 301, [128]; *R v Wood* [2001] NSWCCA 228).

28. *Jury Directions Act 2015* s 31(c) does not use the term "accomplice", and it should not be used in jury directions. The use of that word may convey to the jury that the judge believes that the witness is an accomplice of the accused and, therefore, that the judge has formed the view that the accused is guilty (*R v Stewart* (2001) 52 NSWLR 301, [21] & [126]).

29. While the judge may invite the jury to look for other evidence to support the evidence of a criminally concerned witness, the judge must not tell the jury that, if they find the witness's evidence to be supported, they are entitled to treat it like the evidence of any other witness. A criminally concerned witness remains a person with a potential motive to lie, and his or her evidence remains potentially unreliable (*Sonnet v R* (2010) 30 VR 519; *R v Parsons* (2004) 145 A Crim R 519).

Indemnities and sentencing benefits

30. It will often be the case that a witness who was criminally concerned in the relevant events will give evidence in return for receiving a sentencing benefit or an indemnity from prosecution (either in general or in relation to specific charges). This fact may affect the reliability of his or her evidence.

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[245] It may be "inappropriate" to refer to a risk factor recognised at common law where that factor clearly does not arise in the circumstances of the case.

31. In Victoria, the common law recognised that it would sometimes be appropriate for these additional matters to be raised in the accomplice warning. However, as the risks these considerations created would often be sufficiently apparent from the evidence and counsel's addresses, this was not seen to be mandatory in every case (*R v Weiss* (2004) 8 VR 388).

32. In New South Wales, the current tendency is to require judges to incorporate an explanation of the detail and consequences of any benefit given to a co-operating witness within the *Evidence Act 1995* (NSW) s 165 warning. One rationale for this is the requirement that the s 165 warning inform the jury of all the matters that may cause evidence to be unreliable (*R v Stewart* (2001) 52 NSWLR 301; *Kanaan v R* [2006] NSWCCA 109; *R v Sullivan* [2003] NSWCCA 100).

33. However, it has been recognised that not every indemnity will be a "matter that may cause evidence to be unreliable". For example, there may be no need to make reference to an indemnity that protects the witness from prosecution for unimportant crimes (see *R v Clark* (2001) 123 A Crim R 506, [37]; *R v Powercor (Australia) Ltd* [2005] VSCA 163; *R v Smith & Turner* (1995) 80 A Crim R 491).

34. Under the *Jury Directions Act 2015*, it is likely that courts will adopt a flexible approach based on the views of the parties. Where a party does not identify the indemnity or sentencing benefit as a significant matter, the judge may ask whether this direction is required.

The jury's role in determining the need for caution

35. In many cases it will be accepted without issue that the witness in question falls within the scope of *Jury Directions Act 2015* s 31(c). In such cases the judge should simply warn the jury that his or her evidence may be unreliable, inform them of the significant matters that may cause it to be unreliable, and warn them of the need for caution in determining whether to accept the evidence and the weight to be given to it (*Jury Directions Act 2015* s 32).

36. However, in some cases it will not be clear whether or not the witness actually does fall within the s 31(c) category. In such cases, the judge must determine if it "might reasonably be supposed" that the witness was criminally concerned in the events giving rise to the proceeding. If so, and if the prosecution or defence counsel requests a direction, a s 32 unreliability warning should generally be given.[246]

37. At common law, a direction made in this circumstance would have been conditional upon the jury being satisfied that the witness was an accomplice. It is possible that a warning under s 31(c) should be subject to a similar condition. That is, it is possible that the jury should be warned that they need only have regard to the warning if they are satisfied that the witness was (or alternately, "might be", or "might reasonably be supposed to be") criminally concerned in the events giving rise to the proceeding.

38. There is no authoritative guidance on this issue.[247] However, it is doubtful that this approach would be consistent with the policy of s 32 of the *Jury Directions Act 2015* and its statutory predecessor, s 165 of the *Evidence Act 2008*. Following this approach would reintroduce a requirement similar to the common law requirement to direct on the identification of accomplices. It would also reintroduce complexities about onuses and standards of proof, and the distraction of a collateral issue.

39. The preferable approach is to permit the need for the direction to turn solely on the judge's assessment under s 31(c). Thus even in cases where the witness's status is in issue, the jury should be warned in the simple terms described above.

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[246] See "Determining whether the accused is 'criminally concerned'" above.

[247] In *R v Taranto* [1999] NSWCCA 396 Hidden J stated in passing at [38] "Whether the witness was in fact criminally concerned in the relevant events, of course, would be a matter for the jury to determine."

Residual Duty to Warn

40. Under *Jury Directions Act 2015*, a judge must give a warning in the absence of a request if there are 'substantial and compelling' reasons to do so.

41. Prior to the introduction of the *Jury Directions Act 2015* there were two common law bases upon which a warning might have been required in such circumstances:

    - There was a rule of practice requiring an accomplice warning to be given in certain circumstances; and
    - There was general duty to give any warning necessary to avoid a perceptible risk of miscarriage of justice.

42. It seems likely that the rule of practice concerning accomplices (which required judges to warn the jury about the dangers of convicting on the uncorroborated evidence of an accomplice) has been abrogated by *Evidence Act 2008* s 164(4) (which prohibits judges from warning the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect).

43. Under the second basis, the common law recognised that a warning may be necessary and practical to avoid a perceptible risk of a miscarriage of justice (*Bromley v R* (1986) 161 CLR 315; *R v Miletic* [1997] 1 VR 593; *Robinson v R* (2006) 162 A Crim R 88, [10]).

44. The need for this warning was not determined by reference to categories of witness. It was only required when:

    - The witness was inherently unreliable (*R v Brooks* [1999] VSCA 5; *R v Kotzmann* [1999] 2 VR 123);
    - There was a possibility that the unreliability of the evidence, or the full significance of that unreliability, may not be apparent to the jury (*R v Sharp* [2005] VSCA 44; *R v Miletic* [1997] 1 VR 593; *R v Strawhorn* (2008) 19 VR 101; [2008] VSCA 101); and
    - The factors calling for the warning were sufficient to overcome the court's reluctance to give a warning that tends to trespass upon the jury's function as the tribunal of fact (*R v Latina* 2/4/1996 Vic CCA; *R v Weiss* (2004) 8 VR 388).

45. The circumstances in which a common law warning was required closely resemble the circumstances in which a s 32 unreliability warning is required (see above). This was noted by the court in *Robinson*, which observed that the equivalent section under the *Evidence Act 2008* gave effect to the principles stated in *Bromley v R* (1986) 161 CLR 315 (*Robinson v R* (2006) 162 A Crim R 88, [10]–[13]).

46. Judges must therefore consider the need to warn the jury about the potential unreliability of evidence, even if the parties have not requested such a warning.

Last updated: 27 March 2019

4.22.1 Charge: Criminally Concerned Witnesses

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This charge may be used where:

i) A party has requested a s 32 unreliability warning; and

ii) The witness in question might reasonably be supposed to be criminally concerned in the events giving rise to the trial; and

iii) The evidence in question is "of a kind that may be unreliable".

Introduction

I have already told you the general rules for assessing witnesses' evidence. I must now warn you about the need for caution when considering the evidence of NOW.

I must give you this warning because of the evidence [suggesting] that NOW [was/may have been] criminally concerned in the events giving rise to these proceedings.[248]

[*Briefly describe the basis upon which the witness was asserted to be criminally concerned in the relevant events*.]

Matters that may cause unreliability

My warning to you is as follows. It is the experience of the law that the evidence of witnesses who were criminally concerned in the events before the court may be unreliable. This is because [*inform jury of the significant matters which make the evidence potentially unreliable, such as:*

- There is a risk that such witnesses will seek to shift the blame for the offending, in whole or in part, from themselves onto others. In the process, the witnesses may construct untruthful stories, which tend to excuse the guilty and incriminate the innocent.
- The evidence of such witnesses may seem plausible because of the witness's detailed knowledge of the circumstances in which the crime was committed. This plausibility may add undeserved weight to what the witness says about the part played by the accused.
- Such witnesses may initially give a false version of events to the police, and may then feel locked in to that account. The risk of the witness feeling locked in may be increased where [as here] the witness committed to the initial version in a document that could attract criminal penalties if admitted to be false.
- Such witnesses may make false claims about the involvement of others out of motives of revenge or feelings of dislike or hostility.
- People who are involved in criminal activities may be of bad character, and may therefore be considered to be less trustworthy than other people.]

Associated cautions

Sentencing benefit

[*If the witness has received a sentencing benefit, and, in the circumstances of the case, this is a significant matter which may cause the evidence to be unreliable, add the following shaded section*.]

The reliability of NOW's evidence may also be affected by the fact that, in return for assisting the prosecution in these proceedings, s/he received a less severe sentence than s/he otherwise would have.

[*Summarise evidence relevant to the witness's undertaking to the prosecution and the sentencing benefit received.*]

I must inform you that, while it is common and proper for judges to give sentencing benefits to co-operating witnesses, the receipt of a benefit is a circumstance that you must take into account in assessing the reliability of a benefiting witness.

This is because the desire to receive a sentencing benefit may motivate a witness to give false evidence in order to qualify for a reduction in his or her own sentence.

In addition, once a sentencing benefit has been received, it may provide a strong incentive for a

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[248] If the accused disputes that an offence was committed at all, care should be taken to avoid any appearance of prejudgment of that issue.

witness to stand by a false, mistaken or misleading account. This is because the Director of Public Prosecutions can go to the Court of Appeal and seek to take back that benefit if s/he considers that the witness has failed wholly or partly to fulfil his or her undertaking to assist the prosecution.

Indemnity from prosecution

[*If the witness has received an indemnity from prosecution, and, in the circumstances of the case, this is a significant matter which may cause the evidence to be unreliable, add the following shaded section*.]

The reliability of NOW's evidence may also be affected by the fact that, in return for assisting the prosecution in these proceedings, s/he was granted an indemnity from prosecution.

This means, according to the indemnity document you have received as exhibit [*identify exhibit*] that the Director of Public Prosecutions has undertaken that s/he will not prosecute NOW for his/her participation in the offences that are the subject matter of this trial. The only condition placed on that indemnity is that NOW must give evidence truthfully and frankly, withholding nothing of relevance.

[*Summarise evidence relevant to the indemnity*.]

I must inform you that, while there are often good reasons for prosecutorial authorities to indemnify co-operating witnesses, the witness's interest in the receipt of an indemnity is a circumstance that you must take into account in assessing the reliability of an indemnified witness.

This is because the desire to avoid prosecution may motivate a witness to give false evidence in order to qualify for the indemnity.

[*Inform the jury of any other risks that arise from the indemnity in the circumstances of the case, having regard to counsel's arguments and the form of the indemnity. For example:*

In addition, once an indemnity has been received, it may provide a strong incentive for a witness to stand by a false, mistaken or misleading account. This is because of the risk to the witness of losing the benefit of the indemnity if he or she does not maintain the original account.]

Warning

The law says that every jury must take the potential unreliability of the evidence a witness who was criminally concerned in the events before the court [and who has received a sentencing benefit/indemnity from prosecution] into account when considering that evidence.

You must take this potential unreliability into account in determining whether you accept NOW's evidence at all, and if you do accept it, in whole or in part, in deciding what weight to give to that evidence.

Supporting evidence

[*If there is evidence capable of "supporting" the witness's evidence, add the following shaded section.*]

In considering whether it is safe to rely upon NOW's evidence, you should have regard to any supporting evidence led in this trial that you accept. By "supporting evidence" I mean evidence from a source that is independent of NOW, and that tends to show the truth of NOW's evidence of the accused's guilt.

In this case the prosecution relied upon [*insert number*] items of evidence as supporting NOW's evidence. These were [*identify evidence capable of supporting the unreliable witness's evidence*].

[*If there is a risk that the jury might mistakenly believe certain evidence to be supportive, add the following darker shaded section.*]

There was other evidence given in this case that you might have thought at first glance could support NOW's evidence. This includes the evidence [*broadly identify non-supporting evidence*].

I direct you that this other evidence is not capable of supporting NOW's account, because [*explain why the evidence is not capable of supporting, e.g.* "it does not come from an independent source".]

[*If the issue of mutual support has arisen, and there is a possibility of joint fabrication, add the following darker shaded section.*]

You will see that the prosecution relies upon the evidence of [two/a number of] [allegedly] unreliable witnesses to support each other. The law accepts that unreliable witnesses can support each other in this way.

However, you may only accept their evidence as mutually supporting if you accept that their accounts are truly independent of each other. That is, you must accept that they did not put their heads together and fabricate their evidence. Otherwise, you must not rely on their evidence as providing any support for each other's accounts.

Last updated: 9 March 2017

4.23 Prison Informer Warnings

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Overview

1. A judge may be required to warn the jury about the potential unreliability of evidence that has been given by a "prison informer".
2. The duty to warn the jury about the potential unreliability of such evidence may arise under s 32 of the *Jury Directions Act 2015*.
3. This topic examines the need for a warning under s 32 and the content of such a warning.
4. A "prison informer" warning is a particular form of an unreliable evidence warning. This topic should therefore be read in conjunction with 4.21 Unreliable Evidence Warning.

Section 32 Unreliability Warning

When must a s 32 unreliability warning be given?

5. A judge must give a s 32 unreliability warning if:
    - A party in a jury trial requests such a warning;
    - The evidence in question is "of a kind that may be unreliable"; and
    - There are no good reasons for not doing so (Jury Directions Act 2015 s 32).
6. See *Unreliable Evidence Warning* for information concerning the first and third requirements.
7. In relation to the second requirement, *Jury Directions Act 2015* s 31(d) states that evidence may be "of a kind that may be unreliable" if it is given by a "prison informer".

Who is a "prison informer"?

8. The term "prison informer" is not defined in the *Jury Directions Act 2015*. In cases considering the statutory predecessor to s 31(d), *Evidence Act 2008* s 165(1)(e), the term was given its common law meaning (see, e.g. *R v Ton* (2002) 132 A Crim R 340, [34], [70]).

9. At common law, a "prison informer" is a prisoner who gives evidence of an oral confession or admission made by another prisoner while in custody (*Pollitt v R* (1991) 174 CLR 558; *R v Ton* (2002) 132 A Crim R 340, [34]).

10. The following witnesses were identified at common law as falling outside the "prison informer" category:

    - Prisoners who witness events that occur in prison ("prisoner witnesses") (*R v Ton* (2002) 132 A Crim R 340 (NSWCCA); *R v Ali (No.2)* (2005) 13 VR 257);
    - Prisoners who give exculpatory evidence of a confession or admission made by a person other than the accused (*R v Ayoub* [2004] NSWCCA 209);
    - Former prisoners who, after their release from prison, give evidence of a confession or admission made by the accused in prison (*Marlow & Kelly v R* (2001) 129 A Crim R 51 (Tas SC)).

11. Even though the witnesses listed above may not be "prison informers" (and thus not fall within the scope of s 31(d)), if their evidence is "of a kind that may be unreliable" a s 32 unreliability warning may nevertheless be required.[249] See the discussion of "Non-Listed Categories" in 4.21 Unreliable Evidence Warning for further information.

Being a prison informer is not conclusive

12. In rare and exceptional cases, a judge may have good reasons for not giving a warning despite the fact that the witness is a "prison informer" (*R v Clark* (2001) 123 A Crim R 506 (Heydon JA); *Pollitt v R* (1991) 174 CLR 558; *R v Clough* (1992) 28 NSWLR 396).

Content of the s 32 unreliability warning

13. A Jury Directions Act 2015 s 32 unreliability warning must:

    - Warn the jury that the evidence may be unreliable;
    - Inform the jury of matters that may cause it to be unreliable; and
    - Warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it (*Jury Directions Act 2015* s 32).

14. See *Unreliable Evidence Warning* for information concerning the first and third requirements.

15. In informing the jury about the matters that may cause s 31(d) evidence to be unreliable (the second requirement), the judge should, where appropriate, refer to the risk factors identified in the common law cases (see below) (*Robinson v R* (2006) 162 A Crim R 88, [7]).[250]

16. In doing so, care must be taken if the accused is also a prisoner. In such cases the judge must avoid undermining the benefit of the presumption of innocence by portraying the accused as an unreliable witness (*R v Ton* (2002) 132 A Crim R 340 (NSWCCA); *R v Robinson (No. 2)* (1991) 180 CLR 531).

Risk factors identified at common law

17. At common law, a prison informer's evidence was regarded as inherently unreliable for the following reasons:

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[249] This may be the case if, for example, that type of witness has a motive to distance him or herself from blame, by slanting his or her evidence to blame others (see, e.g. *R v Ali (No.2)* (2005) 13 VR 257).

[250] It may be "inappropriate" to refer to a risk factor recognised at common law where that factor clearly does not arise in the circumstances of the case.

- Prison informers (if convicted criminals) are of bad character;
- Evidence of an oral confession or admission is easily concocted;
- Prisoners may have a motive to concoct evidence if they believe that, in return for giving evidence, they are going to receive a benefit in terms of sentence, treatment or release on parole;
- The pressures of the prison environment may also create a motive to concoct evidence; and
- Where evidence is concocted, there will usually be no possibility of corroborating the accused's denial (*Pollitt v R* (1991) 174 CLR 558; *R v Clough* (1992) 28 NSWLR 396).

18. In addition, in some cases a prison informer may actually receive a benefit from giving evidence against the accused. This may affect the reliability of his or her evidence (*R v Stewart* (2001) 52 NSWLR 301; *Kanaan v R* [2006] NSWCCA 109; *R v Sullivan* [2003] NSWCCA 100).
19. Any identifiable benefit a prison informer has received or will receive from testifying will usually be a 'significant matter that may make the evidence unreliable' (see *R v Stewart* (2001) 52 NSWLR 301; *Kanaan v R* [2006] NSWCCA 109; *R v Sullivan* [2003] NSWCCA 100).
20. A prison informer warning must be adapted to address the true dangers of the situation (*Pollitt v R* (1991) 174 CLR 558; *Orman v R* [2010] VSCA 246R).
21. It will normally not be sufficient to simply direct the jury to look for evidence from some other acceptable source which implicates the accused. Even if such evidence exists (which it usually will), its mere existence does not address the dangers posed by relying on the evidence of prison informers (*Pollitt v R* (1991) 174 CLR 558; *Orman v R* [2010] VSCA 246R).

Supporting evidence and informers

22. At common law, judges were generally required to warn the jury about the dangers of convicting on the uncorroborated or unsupported evidence of a prison informer (*Pollitt v R* (1991) 174 CLR 558).
23. It is now the case that a judge must not warn the jury about the dangers of convicting on the uncorroborated evidence of a prison informer (*Evidence Act 2008* s 164(4)).
24. If a "supporting evidence" warning is to be of real use in this context, it must direct the jury to look for evidence which confirms the fact that the accused made a confession or admission to the witness (*Pollitt v R* (1991) 174 CLR 558).
25. An example of this would be evidence that establishes that the disputed material in the alleged confession is accurate, and that that material would not have been known to the witness if the alleged confession had not been made (*Pollitt v R* (1991) 174 CLR 558; *R v Kuster* (2008) 21 VR 407).
26. It is only in exceptional cases that a fellow prisoner can support the evidence of a prison informer (*Pollitt v R* (1991) 174 CLR 558).

Other directions about confessions and admissions

27. A s 32 prison informer warning is a warning about the *reliability* of alleged confessions or admissions.
28. In some cases, the jury may also need to be directed about the circumstances in which they can use evidence of alleged confessions or admissions (see 4.5 Confessions and Admissions).[251]
29. If a judge directs the jury on the use of a confession or admission allegedly made to a prison informer, it will often be appropriate to incorporate the s 32 warning into that direction.

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[251] The jury may need to be told that they may only use an alleged confession or admission if they are satisfied that it was made by the accused, and that its substance is truthful (*Burns v R* (1975) 132 CLR 258).

Residual Duty to Warn

30. Under *Jury Directions Act 2015*, a judge must give a warning in the absence of a request if there are 'substantial and compelling' reasons to do so.

31. This may occur where neither party has requested a warning pursuant to s 32, but the judge considers that there are 'substantial and compelling' reasons for giving the warning (*R v Stewart* (2001) 52 NSWLR 301, [86],[94]; *Singh v DPP* (NSW) (2006) 164 A Crim R 284, [39]]; *Kanaan v R* [2006] NSWCCA 109, [130]; *Robinson v R* (2006) 162 A Crim R 88, [5]).

32. At common law, it was considered that a warning was required whenever a prison informer had given oral evidence of a confession or admission and that it was only in exceptional cases that a warning was not required (*Pollitt v R* (1991) 174 CLR 558).

Last updated: 29 June 2015

4.23.1 Charge: Confession to Prison Informer

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This warning should be given where a "prison informer" has given evidence of an alleged oral confession or admission made by the accused whilst in custody, and a warning is required under *Jury Directions Act 2015* s 32.

This warning incorporates a direction on confessions and admissions. For discussion of the content of that direction, see Confessions and Admissions.

If the accused is also a prisoner, great care should be taken to avoid saying anything that may undermine the presumption of innocence by portraying the accused as an unreliable witness.

Confessions to Prison Informers

In this case, you heard NOW's evidence that NOA confessed[252] that s/he had [*describe the content of the confession*].

Before you can use this evidence, you must accept two matters.

First, you must accept that the accused actually made the alleged confession in the terms described by NOW. That is, you must accept that NOA [*insert relevant details, e.g.* 'said to NOW "I killed NOV"'].

Secondly, you must accept that the accused's alleged confession was truthful. This requires you to accept that when NOA [*insert relevant details, e.g.* 'said "I killed NOV"'], s/he meant to confess to the crime of NOO,[253] and that that confession was honest.

In this case, the prosecution argued that NOA made the alleged confession, and that that confession was truthful. [*Describe relevant prosecution evidence and/or arguments.*]

The defence denied this, arguing [*describe relevant defence arguments, e.g.* "that NOA never made the confession" or "that while NOA did confess, his/her confession was not truthful because s/he was only boasting about having committed the offence"]. [*Summarise relevant defence evidence.*]

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[252] This charge is drafted for use in cases involving confessions. If the case involves admissions, the terminology used throughout the charge should be modified.

[253] Name of Offence.

It is for you to determine, based on all of the relevant evidence, whether NOA did confess in the way NOW said s/he did, and whether that confession was truthful.

[*If the evidence of the prison informer is the only evidence of one or more elements, add the following shaded section.*]

You will remember my directions that the prosecution must prove its case beyond reasonable doubt. In this case, the only evidence that [*identify relevant elements or facts in issue*] is the evidence that [*describe evidence of admission*]. It follows that you cannot be satisfied beyond reasonable doubt that [*identify relevant elements or relevant facts in issue*] unless you are satisfied, beyond reasonable doubt, of the two matters I have described; that NOA made this confession and that it was true.

Warning

In considering NOW's evidence of NOA's alleged confession you must take into account the warning I will now give you. I must give you this warning because NOW is what is called a "prison informer".

The experience of the courts is that the evidence of a prison informer may be unreliable for a number of reasons.

Reasons for Unreliability

[*Include any of the following matters that are significant in the circumstances of the case and which have been identified by the party when requesting the direction*]

Bad character

The first reason for this unreliability relates to the character of prison informers. Prison informers are convicted criminals who were serving a sentence of imprisonment when the alleged confession was made. This means that they may be regarded as being of bad character. As people who are of bad character are generally thought to be less trustworthy than other people, you are entitled to be more cautious about accepting their evidence than you otherwise would be.

Motive to lie

The second reason why the evidence of prison informers is often unreliable is because prison informers often have a motive to distort the truth or to fabricate evidence.

This motive can arise due to the pressures of the prison environment, or due to a belief that, in return for giving evidence, they will obtain some kind of benefit from the authorities.

There was evidence in this case that [*describe evidence of prison pressures, or of any actual or anticipated benefit to the informer in respect of sentencing, conditions of custody, or release on parole. If the witness stands to lose a particular benefit if s/he does not co-operate, explain this risk*].

In addition, counsel for the accused argued that [*refer to significant matters that should be taken into account despite the absence of evidence*].

Ease of fabrication

The third reason why the evidence of prison informers is often unreliable relates to the ease with which an oral confession can be fabricated. While it can be easy for a prison informer to fabricate evidence of an oral confession, it can be much more difficult for an accused person to produce evidence to challenge a fabricated confession. [*Describe evidence and arguments relating to the informer's capacity to fabricate evidence in the circumstances of this case.*]

Warning

The law says that every jury must take the potential unreliability of a prison informer's evidence into account when considering that evidence.

You must take this potential unreliability into account in determining whether you accept NOW's evidence at all, and if you do accept it, in whole or in part, in deciding what weight to give to that evidence.

Supporting evidence

[*If there is evidence capable of supporting the informer's evidence, add the following shaded section.*]

In considering whether it is safe to rely upon NOW's evidence, you should have regard to any supporting evidence led in this trial that you accept.

By supporting evidence I mean evidence from a source that is independent of NOW, and which tends to show either that NOA actually made the alleged confession, or that NOA's alleged confession was truthful.[254]

In this case the prosecution relied upon [*insert number*] items of evidence as providing independent support for NOW's evidence. These were [*identify evidence capable of supporting the evidence of the informer*].

[*If there is a risk that the jury might mistakenly believe certain evidence to be independent supporting evidence, add the following darker shaded section.*]

There was other evidence given in this case that you might have thought at first glance could provide independent support for NOW's evidence. This includes [*broadly identify non-supporting evidence*].

I direct you that this other evidence is not capable of independently supporting NOW's account, because [*explain why the evidence is not capable of supporting the witness, e.g.* "it does not come from an independent source"].

[*If the issue of mutual corroboration has arisen, and there is a possibility of joint fabrication, add the following darker shaded section.*]

You will see that the prosecution relies upon the evidence of [two/a number of] potentially unreliable witnesses to support each other. The law accepts that such witnesses can support each other in this way.

However, you may only accept their evidence as supporting if you accept that their accounts are truly independent of each other. That is, you must accept that they did not put their heads together and fabricate their evidence. Otherwise, you must not rely on their evidence as providing the necessary support for each other's accounts.

If you find that there was independent supporting evidence, it may assist you in concluding that NOW is telling the truth. If you find that there was no [acceptable] supporting evidence, you should be less ready to act on NOW's evidence of that confession.

I remind you that you must exercise great caution before relying on the evidence of a prison informer.

This does not mean that you cannot rely on NOW's evidence, and find that NOA confessed in the way NOW described. Instead, it means you should not do so unless you have subjected the evidence to close and careful scrutiny and, having regard to the dangers that I have described, you accept its truth, and accept that it is safe to convict upon it, despite its potentially unreliable source.

Last updated: 9 March 2017

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[254] If only one of these matters in issue (for example, if the content of a conversation is conceded, but its characterisation as a confession is contested) then this charge should be adapted to reflect only the matter in issue.

4.24 Word against Word Cases

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"Markuleski Direction" prohibited in Victoria

1. In NSW it has been held that the case law on inconsistent verdicts (e.g. *Jones v R* (1997) 191 CLR 439) makes it desirable to supplement the separate consideration direction in "word against word" cases[255] with a direction that the jury should take into account any unfavourable assessment they have made of the complainant's credibility in relation to one count when assessing his or her evidence in relation to any other counts (*R v Markuleski* (2001) 52 NSWLR 82; *R v RAT* (2000) 111 A Crim R 360; *R v Robinson* (2000) 111 A Crim R 388. See also *R v GAR* [2003] NSWCCA 224).
2. In Victoria, such a direction is not allowed. Any rule of common law under which such a direction could be given has been abolished (*Jury Directions Act 2015* ss 44F–44G, as amended in 2017).

Last updated: 2 October 2017

4.25 Alibi

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Introduction

1. An alibi is evidence that the accused was at another place at the time of the alleged offending. Such evidence is more particular than a bare denial of being at the place of the alleged offending (*DPP v Debs* [2002] VSC 79, [15]).
2. Victorian criminal practitioners have traditionally been cautious about running alibi defences (*Dun v The Queen* [2019] VSCA 43, [22]).
3. The admissibility of alibi evidence is regulated, in part, by the Criminal Procedure Act 2009. An accused must obtain leave of the court in order to give evidence of an alibi personally, or to call evidence in support of an alibi, if the accused has not given notice of alibi within 14 days of being committed for trial or, if that does not apply, within 14 days of receiving a copy of the indictment (*Criminal Procedure Act 2009* ss 190(1), (2). See also *DPP v Debs* [2002] VSC 79, [11]–[12]).
4. The court must grant leave if it appears that the accused was not informed of the requirement to give notice (*Criminal Procedure Act 2009* s 190(7)).
5. Ordinarily, the prosecution cannot lead evidence of a notice of alibi (*DPP v Debs* [2002] VSC 79, [18]).
6. Evidence rebutting an alibi is relevant and admissible as part of the prosecution case (*Killick v The Queen* (1981) 147 CR 565; *R v Rich (Ruling No 13)* [2008] VSC 520, [18]).
7. Where the prosecution had been informed of the alibi, the prosecution must generally call evidence rebutting the alibi before it closes its case. It is generally not appropriate to wait until after the accused has called evidence and seek to lead the evidence in rebuttal (*Killick v The Queen* (1981) 147 CR 565). While this rule does not apply if the prosecution learns of the alibi for the first time after it closes its case, Criminal Procedure Act 2009 s 190 means that this situation will rarely arise.

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[255] A "word against word" case is a case in which the only direct evidence of the commission of the offences is that of the complainant.

Directions about alibi evidence

8. Directions about alibi evidence are designed to deal with the risk that the jury will mistakenly think that:
    - the accused has the onus of proving the alibi; and
    - if the jury rejects the alibi, they will immediately conclude that the accused raised a false alibi to conceal his or her guilt (*R v J (No 2)* [1998] 3 VR 602; *R v Juric* (2002) 4 VR 411, [39]).
9. At common law, it was thought that these problems "will almost inevitably arise". However, there was no general rule the jury must be directed about these dangers. Instead, a direction was only required if there is an appreciable danger of the jury misunderstanding how the burden of proof operates (*R v J (No 2)* [1998] 3 VR 602; *Dun v The Queen* [2019] VSCA 43, [23]; *R v Merrett* [2007] VSCA 1, [17], [27]). Under the *Jury Directions Act 2015*, the need for a direction depends on whether a direction is sought and whether, despite the absence of any request, there are substantial and compelling reasons for giving the direction (*Jury Directions Act 2015* ss 12, 14, 16; *Chaouk v The Queen* [2022] VSCA 151). See 3.1 Directions Under Jury Directions Act 2015 for information on when directions are required.
10. In *Dun v The Queen* [2019] VSCA 43, [22], the Court of Appeal outlined that an alibi direction may tell the jury that:
    - The accused has adduced evidence which, if accepted, shows that at the time the relevant offence was committed, he or she was elsewhere.
    - When an accused person puts forward evidence of alibi, the burden of proving the accused's guilt remains with the prosecution.
    - This means that the prosecution assume a burden of disproving the alibi. If the prosecution fails to satisfy you beyond reasonable doubt that the alibi evidence should be rejected, then you must acquit the accused.
    - If the prosecution satisfies you beyond reasonable doubt that the alibi evidence should be rejected, it does not follow that you necessarily must convict the accused. The burden remains with the prosecution to prove beyond reasonable doubt each element of the offence (see also R v Liewes, Unreported, 10 April 1997, Victorian Court of Appeal; King v The Queen (1986) 15 FCR 427; R v J (No 2) [1998] 3 VR 602).
11. Another form of alibi direction was quoted with approval by Ferguson CJ and Maxwell P in *Pell v The Queen* [2019] VSCA 186:

    > The Crown must establish beyond reasonable doubt that the accused was at X at the relevant time. The Crown cannot do so if there is any reasonable possibility that he was at Y at that time, as asserted by the alibi evidence. The Crown must therefore remove or eliminate any reasonable possibility that the accused was at Y at the relevant time, and also persuade you, on the evidence on which the Crown relies, that beyond reasonable doubt he was at X at that time (quoting *R v Kanaan* (2005) 64 NSWLR 527, 559 [135])

12. In some cases, it will be appropriate to direct the jury that rejection of an alibi cannot be used to support other evidence of guilt. Whether such a direction is necessary will depend on how the case is conducted and whether there is any risk of the jury misusing the alibi evidence (*Sindoni v The Queen* (2011) 211 A Crim R 187, [86]–[89]). In deciding whether there is such a risk, the court may take into account whether the alibi evidence was introduced by the defence, or by the prosecution in its obligation to call all relevant evidence, along with whether there was any risk of the jury thinking that the accused had induced the witnesses to give false evidence (see *Chaouk v The Queen* [2022] VSCA 151).

13. In other cases, evidence rebutting an alibi may also be relevant to show the accused deliberately created a false alibi. In that situation, the judge will need to consider whether the jury can use the creation of a false alibi as incriminating conduct evidence. This may depend on whether there is evidence to support a conclusion that the alibi was deliberately fabricated, rather than being a product of mistake by witnesses. The jury can only use fabrication of alibi against the accused where they are satisfied that the only reason for the fabrication is to deceive the jury (*Killick v The Queen* (1981) 147 CR 565; *R v Juric* (2002) 4 VR 411, [39]–[41]; *R v Chan*, Unreported, 12 March 1998, Victorian Court of Appeal; *King v The Queen* (1986) 15 FCR 427). See also 4.6 Incriminating Conduct (Post Offence Lies and Conduct).

14. The risk of the jury misusing their rejection of alibi evidence is enhanced where the jury is directed to look for evidence to support the complainant's evidence, where there is a long delay between the alleged offending and the trial or where there is other evidence relied on as lies constituting incriminating conduct evidence (*R v J (No 2)* [1998] 3 VR 602).

15. The need for an alibi direction will depend, in part, on whether the alibi covers the whole of the period of offending. Where the alibi does not cover the complete period of offending, there is a greater risk that the direction will be unnecessary and confusing (*Dun v The Queen* [2019] VSCA 43, [25]; *R v Liewes*, Unreported, 10 April 1997, Victorian Court of Appeal).

Last updated: 28 October 2022

4.25.1 Charge: Alibi

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Note: This direction is designed for cases where the judge needs to direct the jury about both the risk of the jury reversing the onus of proof and the risk of treating the rejection of an alibi a basis for a conclusion of guilt. If the jury could use rejection of an alibi as evidence of incriminating conduct, this direction must be modified and further directions given in accordance with *Jury Directions Act 2015* Part 4, Division 1.

I am now going to turn to the evidence on NOA's movements.

You heard evidence from [*identify alibi witnesses*] that, at the time of the alleged offending, NOA was [*identify alibi*]. Lawyers refer to this evidence as an alibi.

There are two directions you must follow about this alibi evidence.

First, you must remember that the prosecution bears the burden of proving NOA's guilt and alibi evidence does not change this. The defence does not have to prove the accused was elsewhere at the time of the alleged offending. The prosecution must prove the accused committed the offence and that the alibi does not cause you to have a reasonable doubt. In other words, the prosecution must eliminate any reasonable possibility that the alibi is true.

Second, if you reject the alibi evidence, that does not mean the accused is guilty. Rejecting an alibi does not add to the prosecution's case. It merely removes one barrier to you being satisfied the prosecution has proved the accused's guilt beyond reasonable doubt.

The prosecution must still satisfy you beyond reasonable doubt of each and every element of the offence charged. Rejection of the alibi will not fill any gaps in the prosecution's case. If you are satisfied beyond reasonable doubt that the alibi evidence should be rejected, put it aside, then ask yourselves am I satisfied beyond reasonable doubt that the elements of the offence are proved. If the answer is no, you must acquit the accused.[256]

[256] If the jury can use rejection of an alibi as incriminating post offence conduct, this paragraph should be modified or omitted.

[*Refer to relevant evidence and arguments about the alibi evidence*.]

Last updated: 25 November 2019

5 Complicity

5.1 Overview

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Types of Complicity

1. A person may be liable for the criminal acts of another where they:
    - Agree to pursue a criminal enterprise with that person; or
    - Assist or encourage another person to commit an offence.
2. A person also commits an offence where they knowingly assist a person who has committed a serious indictable offence to avoid apprehension, prosecution, conviction or punishment.

Statutory Complicity (Victoria)

3. *Crimes Act 1958* section 324 provides that a person is guilty of an offence as a secondary party when he or she is "involved in the commission of the offence". That phrase is exhaustively defined in section 323 as applying where a person:

    (a) intentionally assists, encourages or directs the commission of the offence;

    (b) intentionally assists, encourages or directs the commission of another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence; or

    (c) enters into an agreement, arrangement or understanding with another person to commit the offence; or

    (d) enters into an agreement, arrangement or understanding with another person to commit another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence

4. Paragraph (a) corresponds to the principles of aiding, abetting, counselling and procuring at common law and paragraph (c) corresponds to the principles of joint criminal enterprise. Paragraph (b) and (d) create extended forms of those offences, based on the accused being aware of the probability that a different offence would be committed in the course of carrying out the primary offence.
5. These statutory forms of complicity only apply to offences committed on or after 1 November 2014.
6. For more information on these four forms of complicity, see 5.2 Statutory Complicity (From 1/11/14) (From 1/11/14).

Common Law Complicity

Agreement to Pursue a Criminal Enterprise

7. At common law, when two or more people agree to pursue a criminal enterprise, each person will be liable for the criminal acts of the others to the agreement (*Osland v R* (1998) 197 CLR 316; *R v Stewart; R v Schofield* [1995] 3 All ER 159; *R v Tangye* (1997) 92 A Crim R 545; *Johns v R* (1980) 143 CLR 108; *R v McAuliffe* (1995) 1883 CLR 108; *Hartwick, Clayton and Hartwick v R* (2006) 231 ALR 500).

8. Although many different terms were used to describe an agreement to pursue a criminal enterprise,[257] there were two distinct ways in which a person could be liable for taking part in such an enterprise:

    i) By taking part in a "joint criminal enterprise". This requires the accused to have agreed to pursue a criminal enterprise, to have participated in that enterprise in some way, and for a party other than the accused to have committed an offence within the scope of the agreement (see 5.3 Joint Criminal Enterprise (Pre-1/11/14)).

    ii) Where the offence committed was not planned by the accused, but was an "extension" of the common purpose of the parties. This required the accused to have agreed to pursue a criminal enterprise, for the accused to foresee the possibility that another party to the agreement would commit an offence other than those within the scope of the agreement, and for a party other than the accused to have committed the foreseen offence in the course of carrying out the agreement (see 5.4 Extended Common Purpose (Pre-1/11/14)).

Accessorial Liability

9. The common law also punished an accessory, who was a person who was linked in purpose with the person who committed the offence, and acted to bring about or render more likely the commission of the offence (*Giorgianni v R* (1985) 156 CLR 473; *R v Russell* [1933] VLR 59; *R v Wong* [2005] VSC 96; *R v Phan* (2001) 53 NSWLR 480). See 5.5 Aiding, Abetting, Counselling or Procuring (Pre-1/11/14).

10. An accessory may assist or encourage the person who commits the offence by:

    (a) Counselling or procuring the principal offender prior to that person committing the offence; or

    (b) Aiding or abetting the principal offender at the time that person commits the offence.

11. There is no need to prove the existence of an agreement between the accessory and the principal offender. The lack of an agreement is what distinguishes aiding, abetting, counselling or procuring from other forms of complicity (*R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448; *R v Lowery & King* (No 2) [1972] VR 560).

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[257] Some of the terms used in the cases are "common purpose", "common design", "common enterprise", "joint enterprise", "joint criminal enterprise", "concert", "acting in concert" and "a plan" (*R v McAuliffe* (1995) 1883 CLR 108; *R v PDJ* (2002) 7 VR 612; *R v Lao & Nguyen* (2002) 5 VR 129). In *Likiardopoulos v R* [2010] VSCA 344 and *Arafan v R* (2010) 31 VR 82, the Court of Appeal acknowledged the recurring problems of nomenclature in this area.

Assisting an Offender

12. A person commits an offence where they knowingly act to assist a person who has committed a serious indictable offence avoid apprehension, prosecution, conviction or punishment. This is the offence of being an "Accessory" (*Crimes Act 1958* s 325). See 5.6 Assist Offender.

13. Unlike other forms of complicity, this is a discrete substantive offence that is committed after the principal offence is complete. It will therefore not be relevant in the majority of cases concerning complicit liability. It is included here for historical reasons, as a person who commits this offence was previously called an "Accessory after the fact".

Commonwealth complicity

14. Sections 11.2 (complicity and common purpose) and 11.2A (joint commission) of the *Criminal Code* (Cth) provide forms of derivative liability for Commonwealth offences.

15. Before the *Criminal Code* commenced, section 5 of the *Crimes Act 1914* (Cth) deemed a person who aided, abetted, counselled, or procured the commission of the Commonwealth offence to have committed that offence. Section 5 also applied to any person who was knowingly concerned in or party to a Commonwealth offence being committed. Common law principles applied to establish liability under section 5.

16. Under section 11.2 of the *Criminal Code*, a person is taken to have committed an offence where their conduct aids, abets, counsels or procures the commission of an offence by another person.

17. The section codified the law of complicity for Commonwealth offences. It extends beyond the common law to cover circumstances where a person is reckless about a different offence being committed than the one they intended. For further information on the operation of s 11.2, see 5.7 Commonwealth Complicity (s 11.2).

18. Section 11.2A of the *Criminal Code* (Cth) provides for joint commission of Commonwealth offences and broadly corresponds to common law principles of joint criminal enterprise and extended joint criminal enterprise.

19. Section 11.2A applies to offences committed after 20 February 2010. Common law principles of joint criminal enterprise applied to offences committed before the *Code* was enacted; however, before section 11.2A was introduced, the *Code* lacked any provision extending criminal liability in circumstances involving an agreement to commit an offence. As such, this form of liability did not exist for Commonwealth offences between the *Code*'s enactment in 1995 and its amendment in 2010 (*Handlen v R; Paddison v R* (2011) 245 CLR 282, [1]; see also Explanatory Memorandum, Crimes Amendment (Serious and Organised Crime) Bill 2009, Item 4).

20. Under section 11.2A, a person is taken to have committed a joint offence where:

    (a) they enter into an agreement with other(s) intending to commit an offence, and the conduct of one or more parties in accordance with the agreement constitutes an offence of the same type as that agreed to; or

    (b) they enter into an agreement with other(s) intending to commit an offence, being aware of a substantial risk that another party to the agreement would commit the offence charged in the course of carrying out the agreement, and it is unjustifiable to take that risk in the circumstances known to them.

21. For further information on the operation of s 11.2A, see 5.8 Commonwealth Joint Commission (s 11.2A).

Only Introduce Necessary Categories

22. The different types of complicity can be confusing for juries. Each category should be treated separately, and should only be introduced into a trial if it is necessary (*R v Lao & Nguyen* (2002) 5 VR 129; *R v Stokes & Difford* (1990) 51 A Crim R 25).

23. If the prosecution has only sought to attribute responsibility to the accused in one particular way (e.g. as principals acting in concert), and the trial has proceeded entirely on that basis, the judge should not introduce the possibility of convicting the accused on a different basis (e.g. as aiders and abettors) in his or her summing up. This denies the accused the opportunity to meet the case against them, and will ordinarily result in a miscarriage of justice (*R v Abbouchi & Allouche* [2008] VSCA 171; *R v Falcone* [2008] VSCA 225; *Arafan v R* (2010) 31 VR 82).

24. The judge must clearly explain the differences between the different categories. The jury must be satisfied that the actions of the accused meet all the elements of one category. It is not permissible to run the types of complicit liability together (*R v Totivan & Dale* Vic CA 15/8/1996).

25. It will only be necessary to introduce the issue of complicity if the prosecution seeks to attribute the conduct of a principal offender to a co-offender, or if the identity of the principal offender is unknown (*R v Tangye* (1997) 92 A Crim R 545; *Clough v R* (1992) 28 NSWLR 396. See also *R v Coombe* Vic CCA 10/2/98).

26. Where the principal offender may be found guilty of a lesser charge, the jury may need to be directed about any viable bases of accessorial liability for those alternative verdicts (see, e.g. *R v Nguyen* [2010] VSCA 23).[258]

Order of Charge

27. The jury should consider whether an agreement to pursue a criminal enterprise has been established before they consider the issue of accessorial liability (*R v Franklin* (2001) 3 VR 9).

Last updated: 9 March 2018

5.2 Statutory Complicity (From 1/11/14)

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1. This topic applies to offences alleged to have been committed on or after 1 November 2014. For offences alleged to have been committed before that date, see:
    - 5.3 Joint Criminal Enterprise (Pre-1/11/14)
    - 5.4 Extended Common Purpose (Pre-1/11/14); or
    - 5.5 Aiding, Abetting, Counselling or Procuring (Pre-1/11/14).

"Involved in the Commission of an Offence"

2. Sections 323 to 324C of the *Crimes Act 1958* provide a statutory codification of the principles of complicity. It replaces and abolishes common law doctrines such as acting in concert, joint criminal enterprise, common purpose, extended common purpose and aiding, abetting, counselling and procuring (*Crimes Act 1958* s 324C).

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[258] The "viable" bases of accessorial liability may vary for each verdict. For example, while complicity on the bases of acting in concert or extended common purpose may be viable in relation to a verdict of murder, in some cases these forms of complicity may not be viable in relation to a verdict of manslaughter (see, e.g. *R v Nguyen* [2010] VSCA 23).

3. Instead, a person who is "involved in the commission of an offence is taken to have committed the offence and is liable to the maximum penalty for that offence" (*Crimes Act 1958* s 324(1)).
4. A person is "involved in the commission of an offence" if he or she:
   (a) intentionally assists, encourages or directs the commission of the offence; or
   (b) intentionally assists, encourages or directs the commission of another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence; or
   (c) enters into an agreement, arrangement or understanding with another person to commit the offence; or
   (d) enters into an agreement, arrangement or understanding with another person to commit another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence (Crimes Act 1958 s 323(1)).
5. Subsection (a) replaces the common law doctrine of aiding, abetting, counselling and procuring, while subsection (c) replaces the common law doctrine of joint criminal enterprise. Subsections (b) and (d) replace the principles of extended common purpose with a new form of liability based on recklessness for secondary offences, which extend liability under subsections (a) and (c) respectively.

Primary and Derivative Liability

6. Consistent with the common law, different forms of liability are involved depending on which limb of s 324 is invoked.
7. Liability under s 323(1)(a) and (b) is derivative, whereas s 323(1)(c) and (d) create a form of primary liability arising from a type of agency (*R v Rohan* [2024] HCA 3, [36]; *DPP v Gebregiorgis* (2023) 71 VR 361, [58]).
8. In the case of s 323(1)(c) and (d), "[t]he things done… which are necessary to constitute the crime are attributed to all parties to the agreement and they are all equally guilty of the crime regardless of the part played by each in its commission. … [Section] 323(1)(c) should not be understood as permitting or requiring the parties to an agreement to commit the crime to be treated differently according to who did what" (*R v Rohan* [2024] HCA 3, [36]).
9. As discussed under Mentally Impaired Parties below, it is likely that the defence of mental impairment operates to excuse the principal offender's liability but does not affect the operation of derivative liability.
10. In contrast, defences such as self-defence or duress are inconsistent with derivative liability. Where the jury finds, in the trial of the secondary party, that the principal offender acted under duress or in self-defence, then the jury must find the secondary party not guilty of committing the offence. This does not prevent other bases of liability, such as conspiracy or incitement to commit the offence, where those inchoate offences are appropriate.
11. Where liability is derivative, if the secondary party and the principal offender are tried together, and the evidence against them is the same, the secondary party generally cannot be found guilty unless the principal offender is also found guilty (*Osland v R* (1998) 197 CLR 316).
12. However, different verdicts between a principal offender and a secondary party will not always be inconsistent in a setting of derivative liability. For example, there may be sufficient evidence to prove that the secondary party assisted someone to commit the principal offence, but insufficient evidence to establish the identity of the principal offender (*Osland v R* (1998) 197 CLR 316; *R v King* (1986) 161 CLR 423).
13. Evidence that another person has been convicted is not admissible against the accused (*R v Kirkby* [2000] 2 Qd R 57; *Evidence Act 2008* s 91).

14. In some cases, the jury may be satisfied that the accused either committed the offence himself or herself or is liable as a secondary party, but cannot determine which. In that situation, the jury is entitled to convict the accused (*Crimes Act 1958* s 324B).

15. This principle extends to the scenario where there are several accused tried together and the jury cannot determine which was the principal offender and which secondary offenders (see *R v Lowery & King* (No 2) [1972] VR 560; *R v Phan* (2001) 53 NSWLR 480; *R v Clough* (1992) 28 NSWLR 396; *R v Mohan* [1967] 2 AC 187).

Intentionally assisting, encouraging or directing

16. Under subsection (a) of the definition of "involved in the commission of an offence", the prosecution must prove that the accused either:

    - Intentionally assisted;
    - Intentionally encouraged; or
    - Intentionally directed

    the commission of the offence.

Assistance, encouragement and direction

17. The words "assists" and "encourages" reflect the common law complicity liability of "aiding, abetting, counselling or procuring" an offence, which was defined as intentionally assisting or encouraging the principal offender to commit that offence (*Giorgianni v R* (1985) 156 CLR 473).

18. At common law, it was not necessary (or sufficient) to show that the accused exerted control over the principal offender. In cases of assisting or encouraging, the principal offender would have acted voluntarily, breaking the causal link between the accused's alleged control of the principal offender and the commission of the offence (*R v Franklin* (2001) 3 VR 9). It is likely that this is equally true for complicity under the *Crimes Act 1958*.

19. The accused also does not need to have reached an agreement with the principal offender about the commission of the crime, which is a separate pathway to complicity liability covered by *Crimes Act 1958* ss 323(1)(c) and (d). This was also true of aiding, abetting, counselling or procuring at common law, where the accused merely needed to have provided encouragement or assistance to the principal offender (*R v Oberbilig* [1989] 1 Qd R 342; *R v Nguyen* [2010] VSCA 23).

20. Subsection (a) of the definition of involvement removes the distinctions which existed at common law between liability as an accessory before the fact and as a principal in the second degree. The jury will instead look at all of the accused's conduct, leading up to and at the time of the alleged offence to determine whether the accused intentionally assisted, encouraged or directed the commission of the offence.

21. The definition also omits the third form of aiding and abetting at common law, which consisted of intentionally conveying assent to and concurrence in the commission of the crime. As explained by Ormiston JA in R v Makin (2004) 8 VR 262, this was likely a form of encouragement, and so it did not need to be separately described (see also *R v Phan* (2001) 53 NSWLR 480; *R v Al Qassim* [2009] VSCA 192).

22. Where it is alleged that the accused "assisted" the principal offender, it is not necessary to prove that the principal offender was aware of the accused's assistance (*R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448).

23. Similarly, where it is alleged that the accused "encouraged" the principal offender, it is not necessary to prove that the primary offence was in fact encouraged (*Crimes Act 1958* s 323(2)). See *Effect of encouragement need not be determined* below. While the Act does not contain a similar provision concerning the effectiveness of "assistance" or "direction", it may be assumed that it was because such a provision was not necessary (*R v Novakovic* [2019] VSC 339, [113]).

Presence at the commission of the crime

24. The *Crimes Act 1958* abolishes any common law requirement that a secondary party must be physically present at the time of the commission of the offence (*Crimes Act 1958* s 323(3)(a)). Physical presence is merely relevant as evidence to support a finding of assistance, encouragement or direction.

25. Mere presence at a crime is not sufficient by itself to found liability (*R v Al Qassim* [2009] VSCA 192; *R v Makin* (2004) 8 VR 262; *R v Lam* [2008] VSCA 109; *R v Nguyen* [2010] VSCA 23; *Al-Assadi v R* [2011] VSCA 111).

26. This is because, to be liable, a person must have assisted, encouraged or directed the principal offender in some way. A person who is simply present at the commission of a crime will usually not have offered such assistance or encouragement (see *R v Makin* (2004) 8 VR 262).

27. In some cases, however, the accused may assist or encourage the commission of a crime by being present. For example, by choosing to be present at the crime scene, the accused may provide moral support to the principal offender, or demonstrate a willingness to assist if required. Similarly, if the criminal offending was designed to be a public spectacle (such as an illegal prize fight), and drew support from the presence of observers, the accused's presence may be seen as having provided encouragement to the principal offender (*R v Lowery & King* (No 2) [1972] VR 560; *R v Conci* [2005] VSCA 173; *R v Panozzo* [2007] VSCA 245; *R v Coney* (1882) 8 QBD 534).

28. For the accused's presence to constitute assistance or encouragement, he or she must have done something more than simply be at the scene of the crime. The accused must, at some point, have said or done something which showed that he or she was linked in purpose with the principal offender, and thus contributed to the crime (*R v Al Qassim* [2009] VSCA 192; *R v Nguyen* [2010] VSCA 23).

29. The accused must have done something of a kind that can reasonably be seen as intentionally adopting and contributing to what was taking place in his or her presence (*Al-Assadi v R* [2011] VSCA 111).

30. Where it is alleged that the accused assisted or encouraged by being present at the scene of the crime, the judge should therefore tell the jury that mere presence is not sufficient. The judge should make clear that something more is required (*R v Al Qassim* [2009] VSCA 192; *Al-Assadi v R* [2011] VSCA 111).

31. The judge should clearly identify the additional matters beyond mere presence said to constitute assistance or encouragement (*R v Al Qassim* [2009] VSCA 192).

32. In determining whether the accused's presence assisted or encouraged the commission of the offence, the accused's conduct relating to the offence should be viewed as a whole. Things that the accused said or did prior to the commission of the offence may warrant the conclusion that the accused's presence made him or her complicit in the offence, by helping or encouraging the principal offender to commit the crime (*R v Al Qassim* [2009] VSCA 192).

Effect of encouragement need not be determined

33. *Crimes Act 1958* s 323(2) provides that:

> In determining whether a person has encouraged the commission of an offence, it is irrelevant whether or not the person who committed the offence in fact was encouraged to commit the offence.

34. This preserves the position which existed at common law that it was not necessary to prove that the principal offender was aware of the accused's encouragement, nor was it necessary to prove that the principal offender was actually encouraged by the accused's words or actions (see *R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448).

35. However, it is likely that in "encouragement" cases the prosecution must still prove that the encouragement was communicated to the principal offender in circumstances such that s/he could have been aware of that encouragement (See *R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448).

Failure to Act

36. Ordinarily, the fact that the accused failed to act in a particular way will not be sufficient to prove that s/he assisted or encouraged the principal offender to commit the crime (*R v Russell* [1933] VLR 59).

37. However, where the accused is under a legal or ethical duty to act, a failure to do so may be evidence of encouragement or assent to the offending (see, e.g. *R v Russell* [1933] VLR 59; *Ex parte Parker: Re Brotherson* (1957) SR(NSW) 326).

38. The *Crimes Act 1958* recognises, in section 323(3), that a person may be involved in the commission of an offence by "act or omission".

39. A duty to act may arise where the accused is in loco parentis to the victim (*R v Russell* [1933] VLR 59; *R v Clarke and Wilton* [1959] VR 645).

40. Where a person has a duty to act, s/he may be seen to have assisted or encouraged the principal offender if s/he fails to offer any protest to his/her conduct, or fails to offer any effective dissent (*R v Russell* [1933] VLR 59).

Intention

41. The prosecution must prove that D intentionally assisted, encouraged or directed the commission of the offence (*Crimes Act 1958* s 323(1)(a)).

42. The accused's state of mind must be assessed at the time s/he gave the relevant assistance, encouragement or direction rather than at the time of the offence (*White v Ridley* (1978) 140 CLR 342).

43. As at common law, proof of an intention to assist or encourage requires the prosecution to prove that the accused knew of, or believed in, the essential circumstances that establish the principal offence (*R v Rohan* [2024] HCA 3, [39], [68]; *Giorgianni v R* (1985) 156 CLR 473).

44. The "essential circumstances" of an offence are the facts that will go to satisfying the elements of the offence (*Giorgianni v R* (1985) 156 CLR 473; *Rohan v The King* [2022] VSCA 215, [82]).

45. For mens rea offences, the "essential circumstances" include the principal offender's state of mind (*R v Stokes & Difford* (1990) 51 A Crim R 25; *R v Lam & Ors(Ruling No 20)* (2005) 159 A Crim R 448; *R v Phan* (2001) 53 NSWLR 480).[259]

46. For an offence such as murder, the accused must intend and know or believe that the principal will engage in conduct that will kill or cause at least really serious injury to the deceased (*R v Novakovic* [2019] VSC 339, [289], [291]; *DPP v Gebregiorgis* (2023) 71 VR 361, [57]).

47. In the case of murder, this means the prosecution must prove:

    - The secondary party knew or believed the principal offender was going to perform an act directed at the deceased with the intent necessary for murder; that is, an intent to kill or cause really serious injury;
    - With that knowledge or belief, the secondary party intentionally encouraged the principal to perform that act with the intent necessary for murder;

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[259] For strict liability offences, while the accused must know the essential circumstances of the offence, s/he does not need to have any awareness of the principal offender's state of mind (*Giorgianni v R* (1985) 156 CLR 473).

- That act caused the death (*DPP v Gebregiorgis* (2023) 71 VR 361, [57]).

48. In a case where the accused assists the principal, believing the principal possesses an intention to cause really serious injury and also believing the principal will not cause that result, the accused will not be guilty of murder (*R v Novakovic* [2019] VSC 339, [296]).

49. The jury must consider what the accused knew at the time s/he assisted, encouraged or directed the principal offender, rather than at the time the principal offender committed the offence (*R v Stokes & Difford* (1990) 51 A Crim R 25).

50. The accused does not need to know that the principal offence is a criminal offence. It is sufficient if s/he intentionally assisted, encouraged or directed the conduct which constituted that offence (*Crimes Act 1958* s 323(3)(b). See also *Johnson v Youden* [1950] 1 KB 544; *Giorgianni v R* (1985) 156 CLR 473).

51. For the purpose of attributing criminal liability, an employee's knowledge cannot necessarily be imputed to an employer (*Ferguson v Weaving* [1951] 1 KB 814).

52. The accused must have actual knowledge or belief of the essential circumstances. It is not sufficient that he or she should have known of those circumstances, or failed to inquire about them (*Giorgianni v R* (1985) 156 CLR 473).

53. However, the failure of a person to make inquiries about the circumstances may be evidence that he or she was aware of the relevant facts (*Giorgianni v R* (1985) 156 CLR 473).

54. The accused must have intended to assist, encourage or direct the principal offender to commit the offence charged.[260] It is therefore not sufficient for the prosecution to prove that:

    - The accused had a general intention to assist crime (*R v Clarkson* [1971] 3 All ER 344; *Giorgianni v R* (1985) 156 CLR 473; *R v Tamme* [2004] VSCA 165); or
    - That the accused intended to assist or encourage a significantly different offence (*Giorgianni v R* (1985) 156 CLR 473; *Chai v R* (2002) 187 ALR 436; *R v Conci* [2005] VSCA 173).

55. Even if the principal offence is one that does not require the principal offender to have had a particular state of mind when it was committed (i.e., a strict liability offence), the accused must still be shown to have intended to assist, encourage or direct the principal offender to commit that offence (Giorgianni v R (1985) 156 CLR 473; *R v Tamme* [2004] VSCA 165; *R v Dardovski* 18/5/1995 Vic CCA).

56. This may mean the prosecution must prove a higher state of knowledge in relation to a party charged on the basis of complicity than a person charged as a principal offender. For example, certain offences require proof that the conduct was committed against a child, without requiring proof that the principal offender was aware that the person was a child (see, e.g. Crimes Act 1958 s 49A, sexual penetration of a child under 12). A person cannot be convicted of intentionally assisting the commission of such offences unless the prosecution proves that the secondary party knew or believed that the person was a child (*Rohan v The King* [2022] VSCA 215, [82]–[83]).

57. However, for an offence like murder, it is sufficient that the secondary party acted with knowledge or belief that the principal had any of the states of mind necessary for murder. Liability under complicity for murder is not limited to a case where the secondary knows or believes that the principal intends to kill; knowledge or believe that the principal intends to cause really serious injury is also sufficient (*DPP v Gebregiorgis* (2023) 71 VR 361, [57]).

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[260] However, see Divergence (below) for a discussion of liability on the basis of assisting, encouraging or directing a different offence from the one charged.

58. The operation of s 324B is complicated in cases where the prosecution relies on s 323(1)(a) and the prosecution must prove a higher state of knowledge of a secondary offender than the principal offender. As explained above, s 324B provides that the trier of fact may convict on the basis of being satisfied that the accused either committed the offence either as principal or as a secondary party, but cannot determine which. Where proof of commission as a secondary party requires a higher state of knowledge, s 324B is not available unless the prosecution proves that higher state of knowledge. As a practical matter, this means the prosecution must prove the higher state of knowledge if there is a possibility the jury might consider the accused to have been a secondary party under s 323(1)(a) rather than the principal. This should encourage the prosecution to clearly identify whether the accused is charged as principal or a secondary party under s 323(1)(a) (*Rohan v The King* [2022] VSCA 215, [61]–[64]). This issue does not arise, however, where the prosecution relies on complicity due to an agreement under s 323(1)(c) or (d), as there is no need to prove a higher state of mind than for the completed offence (see *R v Rohan* [2024] HCA 3).

Agreement, Arrangement or Understanding

59. Subsection (c) of the definition of "involved in the commission of an offence" covers the situation where the accused "enters into an agreement, arrangement or understanding with another person to commit the offence" (*Crimes Act 1958* s 323(1)(c)).

60. This replaces the common law principles such as acting in concert, common purpose and joint enterprise (*R v Rohan* [2024] HCA 3, [36], [66]).

61. Offending as part of a group requires proof of three elements:

    i) That two or more people reached an agreement to do certain acts or omissions necessary to commit an offence;

    ii) That, in accordance with the agreement, one or more parties to the agreement performed all of the acts necessary to commit the offence charged, in the circumstances necessary for the commission of that offence; and

    iii) That the accused had the state of mind required for the commission of the relevant offence at the time of entering into the agreement (*Crimes Act 1958* ss 323(1)(c), 324(1)–(2)); *R v Rohan* [2024] HCA 3, [34]; *DPP v Gebregiorgis* (2023) 71 VR 361, [61]).

62. For a time, it was thought that there was an additional element, that the accused performed an overt act as part of the agreement. This requirement existed at common law for joint criminal enterprise, but was not mentioned by the High Court in *R v Rohan* when identifying what needed to be proved under s 323(1)(c) (*R v Rohan* [2024] HCA 3, [31]. See also *DPP v Gebregiorgis* (2023) 71 VR 361, [61] and compare *R v Semaan & Ors (Ruling 7)* [2016] VSC 170).

Formation of agreement

63. For the first element to be met, the prosecution must prove:

    - That the accused reached an agreement, arrangement or understanding with others to do certain acts or omissions necessary to commit an offence; and
    - That the agreement, arrangement or understanding remained in existence at the time the offence was committed (*R v Clarke & Johnstone* [1986] VR 643; *R v Lao & Nguyen* (2002) 5 VR 129).

64. As at common law, the agreement need not be express but may also be an "arrangement or understanding". It may be inferred from the surrounding circumstances or the conduct of the parties (*R v Rohan* [2024] HCA 3, [29]; *R v Tangye* (1997) 92 A Crim R 545; *R v Clarke and Wilton* [1959] VR 645; *R v Jensen and Ward* [1980] VR 196; *Guthridge v R* (2010) 27 VR 452).

65. The agreement must be to commit the criminal offence charged. This element will not be satisfied if the accused agreed to pursue some form of wrongdoing that is not criminal, or to pursue a different offence (see *R v Taufahema* (2007) 228 CLR 232).[261]

66. The content of the agreement should be identified by reference to the specifically agreed future acts or omissions (see *R v Rohan* [2024] HCA 3, [33]).

67. The parties do not need to have precisely agreed on the scope of the agreement. This element will be satisfied if they shared an agreement, arrangement or understanding to commit a particular criminal act, even if they disagreed on the purpose of that act (*Gillard v R* (2003) 219 CLR 1; *R v Zappia* (2002) 84 SASR 206; c.f. *Collie, Kranz & Lovegrove v R* (1991) 56 SASR 302).[262]

68. Where the prosecution alleges an agreement, arrangement or understanding between more than two accused, it may not be necessary to prove that all of the accused were parties to the same agreement. It may be sufficient for the prosecution to prove that there are relationships between the various accused which form a chain of agreements over a common subject matter (see, e.g. *R v Lao & Nguyen* (2002) 5 VR 129).

Timing of agreement

69. The agreement need not have been formed far in advance of the offence. It may have been formed moments before the offence was committed (*R v Tangye* (1997) 92 A Crim R 545; *R v Jensen and Ward* [1980] VR 196; *Guthridge v R* (2010) 27 VR 452).

70. The fact that two people spontaneously decided to pursue the same course of action does not necessarily prove that they were acting pursuant to an agreement to commit a particular crime (*R v Taufahema* (2007) 228 CLR 232).

71. Two or more people may form an agreement that gives one of them the right to decide whether to commit a criminal act on any given occasion. Such an agreement will make all of the parties liable, even though they are not certain when the act will be committed (*Miller v R* (1980) 32 ALR 321).

Mentally Impaired Parties

72. At common law, a person who was mentally impaired because s/he did not realise that his/her acts were wrongful may still have been able to participate in an agreement to commit an offence. This allowed a court to find that such an agreement existed in determining the liability of secondary parties, as long the mentally impaired person was able to understand the nature and quality of the act to be performed (*Matusevich v R* (1977) 137 CLR 633; *Osland v R* (1998) 197 CLR 316).

73. Although it is not entirely clear, the better view appears to be that the same result follows under the *Crimes Act 1958*. The nature of the special verdict of not guilty because of mental impairment makes it consistent with a finding that the offence was committed.

74. The doctrine of innocent agent may also apply if the accused persuades a mentally impaired person to commit an offence (*Matusevich v R* (1977) 137 CLR 633).

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[261] However, see Divergence (below) for a discussion of liability on the basis of an agreement, arrangement or understanding to commit a different offence from the one charged.

[262] The courts have noted that this can produce an agreement that is narrower than the purpose of any given party (*Gillard v R* (2003) 219 CLR 1; *R v Zappia* (2002) 84 SASR 206; c.f. *Collie, Kranz & Lovegrove v R* (1991) 56 SASR 302).

Cancellation or Completion of Agreement

75. The prosecution must prove that the agreement had not been called off before the offence was completed (*R v Heaney & Ors* [1992] 2 VR 531).

76. In some cases, the acts agreed to by the parties may be completed without achieving the intended purpose of the agreement. In this situation, a party to the agreement will not be liable for the later completion of that purpose by any of the other parties to the agreement (unless s/he agreed to such a variation of the original agreement) (*R v Heaney & Ors* [1992] 2 VR 531).

Commission of the agreed offence

77. The prosecution must prove that the person who performed the relevant criminal act had the state of mind necessary for the agreed offence (*DPP v Gebregiorgis* (2023) 71 VR 361, [62]).

78. In the context of group offending, the prosecution must also prove that the commission of the offence occurred in accordance with, or within the scope of, the agreement, arrangement or understanding.

Conduct outside the scope of the agreement

79. At common law, an issue often arose whether the crime committed was within the scope of the agreement formed between the parties (see, e.g. *R v Jensen and Ward* [1980] VR 196; *R v PDJ* (2002) 7 VR 612; *R v Anderson* [1966] 2 QB 110; *R v Heaney & Ors* [1992] 2 VR 531).

80. The scope of the agreement must be determined by considering the subjective beliefs of the participants at the time the agreement was formed, or at the time the parties agreed to vary the original agreement (*R v Johns* (1980) 143 CLR 108; *R v McAuliffe* (1995) 183 CLR 108).

81. The scope of the agreement includes any contingencies that are planned as part of the agreed criminal enterprise (*R v Becerra* (1976) 62 Cr App R 212).

82. The liability of the accused is based on his/her authorisation (express or implied) of the criminal acts. Even if the accused did not believe that those acts were likely to be committed, s/he will be liable if they were within the scope of the agreement (*Johns v R* (1980) 143 CLR 108; *Chan Wing-Siu v R* [1985] AC 186; *Britten v R* (1988) 49 SASR 47).

83. In some cases, the parties will have differed in their understanding of how the agreed crime was to be carried out, leading to arguments that the accused had not agreed to participate in the particular offence that was committed. In such cases, the jury must consider whether the use of the means adopted placed the offence outside the scope of the agreement, or alternatively, whether the use of those means was no more than an incident of carrying out the common agreement (*Varley v R* (1976) 12 ALR 347; *R v Heaney & Ors* [1992] 2 VR 531).

84. Where the agreement involves the use of violence, the jury may need to consider whether the perpetrator acted outside the scope of the agreement by unexpectedly using a weapon. This will depend on the facts of the case, the understanding of the parties, and the difference between the weapon used and the manner of violence intended (see *Varley v R* (1976) 12 ALR 347; *R v Anderson* [1966] 2 QB 110; *Markby v R* (1978) 140 CLR 108; *Wooley v R* (1989) 42 A Crim R 418; *R v Heaney & Ors* [1992] 2 VR 531).

85. Under the *Crimes Act 1958*, the focus is on whether the accused agreed, arranged or had an understanding with another person to commit the offence charged. If the offence committed varies from the offence agreed, then the case may be one of divergence (see below) and dealt with under subsections (b) or (d) of the definition, as appropriate.

Accused's mental state

86. As at common law, the prosecution must prove that at the time of entering the agreement, the accused had the state of mind required for the commission of the offence (*Osland v R* (1998) 197 CLR 316; *Likiardopoulos v R* (2010) 30 VR 654).

87. This is different to the requirement that applies under s 323(1)(a) that the accused knew the essential circumstances of the offence, described above under the heading 'Intention'. This means the prosecution does not need to prove any greater level of knowledge or intention on the part of the person complicit by agreement than for the principal offender. In particular, for offences such as *Crimes Act 1958* s 49A and *Drugs, Poisons and Controlled Substances Act 1981* s 71B, there is no need to prove that the accused knew, intended or was aware that the intended victim was a child (see *R v Rohan* [2024] HCA 3, [33]).

88. The parties to the agreement do *not* need to have realised that their acts would be criminal. This element will be satisfied if they agreed to perform acts which, in fact, are criminal (*Crimes Act 1958* s323(3)(b); *Osland v R* (1998) 197 CLR 316; *R v Cox & Ors* [2005] VSC 255).

Divergence

89. Subsections (b) and (d) of the definition of "involved in the commission of an offence" address the situation where there is divergence between the offence originally assisted, encouraged, directed or agreed to, and the offence carried out.

90. In those situations, the accused will be liable for the new offence if he or she:

    - intentionally assisted, encouraged or directed a foundational offence; or
    - entered into an agreement arrangement or understanding to commit a foundational offence, and

    was aware that it was probable that the offence charged would be carried out in the course of committing the other offence (*Crimes Act 1958* ss 323(1)(b), (d)).

91. Subsection (d) is more limited than the common law doctrine of extended common purpose. Under that doctrine, it was sufficient for the prosecution to prove that the accused foresaw the *possibility* that the other offence would be carried out (*Johns v R* (1980) 143 CLR 108; *McAuliffe v R* (1995) 183 CLR 108; *Hartwick, Clayton and Hartwick v R* [2006] HCA 58; *R v Hartwick, Clayton and Hartwick* (2005) 14 VR 125).

92. On the other hand, subsection (b) extends liability compared to the common law of "aiding, abetting, counselling and procuring", which did not include liability for a different offence that the accused knew would probably occur during the course of the assisted or encouraged offence.

93. The nature of the foundational offence may affect how the jury should be directed about the requirement that the charged offence be committed in the course of carrying out the foundational offence. In *R v Novakovic*, Croucher J noted that in some cases it may be appropriate to require the jury to consider whether the foundational offence was committed. In others, it will be sufficient to direct the jury to consider whether the charged offence was committed in the course of carrying out the foundational offence (*R v Novakovic* [2019] VSC 339, [10], [341], footnote 19).

94. It is likely, as a matter of statutory interpretation, that the word "probable" is an ordinary English word and it is a matter for the jury to give the word meaning. If necessary, a judge may suggest that "likely" is an acceptable synonym (see, e.g. *Crabbe v R* (1985) 156 CLR 464). If the jury requires further guidance, it may be permissible to explain that the word "probable" is used in contrast to what is merely "possible". When directing the jury, the judge should not equate the word "probable" with a "balance of probabilities" test.

Withdrawal

95. A person is not involved in the commission of an offence if he or she withdraws from the offence (*Crimes Act 1958* s 324(2)). The Act does not codify the law of withdrawal, and the common law on this topic is preserved (*Crimes Act 1958* Notes to s 324(2) and s 324C).

96. At common law, a person is not responsible for the acts of other parties to an agreement if s/he withdrew from the agreement prior to its completion (*R v Lowery & King* (No 2) [1972] VR 560). Under the *Crimes Act 1958*, withdrawal may be relevant to both group offending and also to complicity on the basis of assisting, encouraging or directing an offence.

97. The withdrawal must ordinarily have been expressly communicated to the other members of the enterprise. However, in exceptional circumstances it may be possible for an accused to have implicitly withdrawn from the agreement (*White v Ridley* (1978) 140 CLR 342).[263]

98. The withdrawal must be accompanied by all action the accused can reasonably take to undo the effect of his/her previous encouragement or assistance. This may include informing the police (*White v Ridley* (1978) 140 CLR 342; *R v Tietie* (1988) 34 A Crim R 438; *R v Jensen and Ward* [1980] VR 196).

99. An accused who seeks to withdraw from an agreement must make a timely and effective withdrawal. An accused will not escape liability merely by leaving the scene shortly before the offence is completed, or by attempting to withdraw when it is too late to stop the offence (*White v Ridley* (1978) 140 CLR 342; *R v Whitehouse* [1941] 1 DLR 683; *R v Rook* [1993] 1 WLR 1005).

100. Similarly, a person is not taken to have withdrawn from an agreement merely because s/he has private feelings of regret, or wishes that s/he could stop the offence (*R v Lowery & King* (No 2) [1972] VR 560).

101. Where the accused has set in motion a chain of events leading to the commission of an offence, any attempts to withdraw from participation must be capable of effectively stopping the offending (*White v Ridley* (1978) 140 CLR 342).

102. In some cases, the accused may reasonably believe that once s/he withdraws from the agreement, the other members will not pursue the original criminal act. In those circumstances, the accused may not need to take any additional steps beyond countermanding his/her original instructions or agreement (*R v Truong* NSW CCA 22/06/1998).

103. It is usually more difficult to withdraw from an agreement at the time of the offending than beforehand. Withdrawal at the time of the offending will usually require greater conduct to undo the effect of the previous agreement (see *R v Becerra* (1976) 62 Cr App R 212).

104. It is not necessary to consider the issue of withdrawal using principles of causation. While a principal who continues to offend despite the timely withdrawal from the agreement by other parties may be treated as an intervening cause, it is not necessary to do so. Such an approach is likely to lead to confusion (*White v Ridley* (1978) 140 CLR 342; *R v Tietie* (1988) 34 A Crim R 438; *R v Menniti* [1985] 1 Qd R 250).

105. The issue of withdrawal only needs to be addressed if the defence has pointed to some evidence that shows that the accused unequivocally countermanded or revoked his/her previous agreement. The prosecution will then bear the onus of disproving this withdrawal (*White v Ridley* (1978) 140 CLR 342; *R v Croft* [1944] KB 295; *R v Rook* [1993] 1 WLR 1005).

Availability of statutory complicity

106. A person may be liable for being involved in the commission of an offence in relation to both indictable and summary offences (*Crimes Act 1958* s 324(1)).

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[263] For example, where there is a spontaneous agreement to assault another person, an accused may be able to withdraw by ceasing to fight and walking away without expressly communicating to others involved in the assault (*R v Mitchell and King* (1998) 163 JP 75; *R v O'Flaherty, Ryan and Toussaint* [2004] 2 Cr App R 20).

107. At common law, it was recognised that secondary liability could be impliedly excluded for some offences (*Mallan v Lee* (1949) 80 CLR 198; *Giorgianni v R* (1985) 156 CLR 473).

108. For offences committed on or after 1 November 2014, the question will be whether *Crimes Act 1958* s 324 is impliedly excluded.

109. The section only expressly excludes one class of offence. Under section 324(3), liability is not imposed "on a person for an offence that, as a matter of policy, is intended to benefit or protect that person" (*Crimes Act 1958* s 324(3)).

110. For example, a person under the age of 16 is not able to be involved with the commission of the offence of sexual penetration of him/herself (see, e.g. *R v Whitehouse* [1977] QB 868).

111. In addition, the beneficiary of a family violence restraining order cannot be prosecuted for assisting or encouraging the contravention of that order (see *Family Violence Protection Act 2008* s 125).

112. The law recognises that a person cannot attempt to conspire or attempt to be a secondary party to an offence (whether under the principles of statutory complicity or common law complicity) (*Franze v R* (2014) 46 VR 856).

113. Conversely, it is possible for a person to be a secondary party to an attempted offence. This occurs, for example, when the person enters into an agreement to complete an offence and that agreement only produces an attempt at the contemplated offence. The distinction lies between a joint attempt, which is legally possible, and an attempt to agree, which is not (*Franze v R* (2014) 46 VR 856).

Last updated: 4 March 2024

5.2.1 Charge: Statutory Complicity (Assisting, Encouraging or Directing)

Click here to download a Word version of this charge

This Charge has been designed for use in cases where the accused is charged with being involved in the commission of an offence under *Crimes Act 1958* section 323(1)(a).

This charge is written on the basis that the prosecution alleges assistance, encouragement and direction as cumulative or alternative bases of liability. If only one of these bases is relevant, the charge should be adjusted accordingly.

NOA has been charged with the offence of NOO.[264] However, it has not been alleged that s/he personally committed the acts that make up that offence. Instead, the prosecution has alleged that s/he committed NOO by assisting, encouraging or directing [*insert name of principal offender/s*] to commit that offence. I must therefore direct you about when a person will be held responsible for assisting, encouraging or directing someone else to commit an offence.

In order to find NOA guilty of committing NOO by assisting, encouraging or directing, the prosecution must prove the following [three/four] elements:[265]

One – that NOA knew or believed someone was going to commit the offence of NOO. Throughout these directions, I will call the person who committed that offence the "principal offender".

Two – that, with that knowledge or belief, NOA intentionally assisted, encouraged or directed the principal offender to commit NOO.

[264] Name of Offence.

[265] If withdrawal is relevant, there are four elements. Otherwise, there are three elements.

Three – that the principal offender [*identify acts necessary to commit NOO*].

[*If withdrawal is relevant, add the following shaded section.*]

Four – that the accused did not effectively withdraw his/her assistance or encouragement prior to the offence being committed.

Before you can find NOA guilty of NOO, you must be satisfied that all of these elements have been proven beyond reasonable doubt.

I will now explain each of these elements in more detail.

Knowledge or belief

The first element the prosecution must prove is NOA knew or believed the principal offender was going to commit the offence of NOO.

The prosecution says that the principal offender was NO3P.

A person commits NOO when s/he:

[*Describe all of the elements of the offence, explain those elements, and relate them to the facts*.]

This means the prosecution must prove that NOA knew or believed that NO3P was going to [*reiterate elements of the offence*].

[*If NOA may have committed the offence him/herself, add the following shaded section.*]

In this case, you may not be sure whether NOA either [*describe relevant offence*] himself/herself, or assisted, encouraged or directed NO3P to do so. You do not need to resolve this question to reach your verdict. The law says that if you are satisfied beyond reasonable doubt that NOA either committed the offence himself/herself, or assisted, encouraged or directed another person to commit the offence, you may find him/her guilty of NOO.

Assistance, Encouragement or Direction

The second element the prosecution must prove is that, with this knowledge or belief, NOA intentionally assisted, encouraged or directed the principal offender to commit NOO.

In this case, the prosecution argue that NOA assisted, encouraged or directed NO3P by [*identify relevant prosecution evidence and arguments*]. The defence deny this, and say [*identify relevant defence evidence and arguments*].

[*If the prosecution argued that the accused assisted or encouraged the offender by his/her presence alone, add the following shaded section*.]

You will note that in this case the prosecution did not allege that NOA said or did anything at the time of the offence to assist or encourage the principal offender. They alleged that s/he assisted or encouraged the principal offender simply by being present.

The law recognises that a person can intentionally assist or encourage the commission of an offence by being present at the commission of the offence. However, for this to be the case, you must find that NOA intended his/her presence at the crime scene to have encouraged or assisted the principle offender to commit NOO. It is not sufficient for him/her simply to have been there at the relevant time.

In determining whether NOA intended his/her presence at the commission of the offence to assist or encourage, you should view his/her conduct as a whole. You should look at his/her conduct before and at the time of the alleged offence, and consider whether s/he was linked in purpose with the principle offender in some way, and so contributed to the offence.

If you find that NOA was simply present when the offence was committed, then this element will not

be met. However, if you are satisfied that NOA's presence at the commission of the offence was intended to assist or encourage the principal offender to commit the crime, then this element will be met.

[*If not already done, identify the matters said to constitute assistance or encouragement.*]

You do not need to be satisfied that NOA's words or actions caused the principal offender to commit the crime. A person can assist, encourage or direct someone to commit an offence even if that other person already intended to commit that offence.

You also do not need to be satisfied that the principal offender was actually assisted, encouraged or directed by NOA's conduct. As long as NOA makes an effort to assist, encourage or direct him/her, in circumstances in which the principal offender could have been assisted, encouraged or directed, then this element will be met. In other words, this element looks at what NOA did. You do not need to consider what effect this had on NO3P.

I also emphasise that NOO consists of more than just [*identify physical elements of NOO*]. For this element, the prosecution must prove that NOA intentionally assisted, encouraged or directed NO3P to perform those acts with the intent necessary for NOO. That is, [*remind jury of fault elements of NOO*].

It is only if you are satisfied, beyond reasonable doubt, that NOA assisted, encouraged or directed the principal offender to commit NOO that this second element will be met.

Causation

The third element is that NO3P [*identify physical elements of NOO*].

[*Identify evidence and arguments that NO3P performed the physical elements of NOO.*]

Withdrawal

[*If withdrawal of the accused's assistance or encouragement is in issue, add the following shaded section.*]

The fourth element that the prosecution must prove is that the accused did not effectively withdraw his/her assistance, encouragement or direction prior to the offence being committed.

The law says that if a person is going to avoid liability by taking back his/her previous assistance, encouragement or direction, his/her withdrawal must be timely and effective. That is, s/he must do everything that s/he can reasonably do to undo the effect of his/her previous assistance, encouragement or direction, with enough time for his/her actions to be effective.

Whether the accused has taken all reasonable steps to undo the effect of his/her previous assistance, encouragement or direction is a question for you. You must apply your common sense and experience. For example, in some cases it will be enough for the accused to take back any tools he or she has provided for the commission of the crime, and to make it clear that if the principal offender commits the offence, s/he does so without the accused's approval or support. In some cases it may even be necessary for the accused to inform the police of the planned offence. It is important to emphasise that it is not for the defence to prove that the accused did everything reasonably possible to withdraw his/her previous assistance, encouragement or direction. It is the prosecution who must prove that the accused did not withdraw in a timely and effective manner.

In this case, the prosecution argued that the accused had not done everything s/he reasonably could to withdraw his/her previous assistance, encouragement or direction. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA's withdrawal was timely and effective. [*Insert defence evidence and/or arguments.*]

Application of Law to Evidence

[*If not already done, apply the law to the relevant evidence here.*]

Defences

[*If any* defences *are open on the evidence, insert relevant directions.*]

Summary

To summarise, before you can find NOA guilty of committing NOO by providing assistance, encouragement or direction, the prosecution must prove to you beyond reasonable doubt:

One – that NOA knew or believed that NO3P was going to commit NOO; and

Two – that, with that knowledge or belief, NOA intentionally assisted, encouraged or directed the principal offender to commit NOO; and

Three – that NO3P [*identify acts necessary to commit NOO*];

[*If withdrawal is relevant, add the following shaded section.*]

and Four – that NOA did not effectively withdraw his/her earlier assistance, encouragement or direction.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of NOO by providing assistance, encouragement or direction.

Last updated: 14 August 2023

5.2.2 Charge: Statutory Complicity (Assisting, Encouraging or Directing with Recklessness)

Click here to download a Word version of this charge

This Charge has been designed for use in cases where the accused is charged with being involved in the commission of an offence under *Crimes Act 1958* section 323(1)(b).

This charge is written on the basis that the prosecution alleges assistance, encouragement and direction as cumulative or alternative bases of liability. If only one of these bases is relevant, the charge should be adjusted accordingly.

The law says that if a person assists, encourages or directs another person to commit offence A, while aware that it is probable that offence B will be committed in the course of committing or attempting to commit offence A, then he or she may be responsible for offence B.[266]

[266] The judge may include the following example if it would assist: "For example, suppose a person, Mr Smith, wants to help another person, Mr Jones, rob a bank. Mr Smith is aware that Mr Jones has a vendetta against security guards and that, if any security guards are present, then he will probably shoot them. Mr Smith doesn't want any security guards shot, but he does want to help Mr Jones rob the bank. Mr Smith provides Jones with a car to use in his bank robbery. The bank robbery goes ahead, there is a security guard present and Mr Jones shoots him dead. In that situation, both Mr Smith and Mr Jones will be guilty of murder."

In this case, NOA has been charged with the offence of [*insert charged offence*]. However, it has not been alleged that s/he personally committed the acts that make up that offence. Instead, the prosecution has alleged that s/he committed [*insert charged offence*] by assisting, encouraging or directing [*insert name/s of principal offender/s*] to commit [*insert assisted offence*] while aware that it was probable that [*insert name/s of principal offender/s*] would commit [*insert charged offence*].

In order to find NOA guilty of committing [*insert charged offence*] by assisting, encouraging or directing, the prosecution must prove the following [four/five] elements:[267]

One – that NOA knew or believed someone was going to commit the offence of [*insert assisted offence*]. Throughout these directions, I will call the person who committed that offence the "principal offender".

Two – that with that knowledge or belief, NOA intentionally assisted, encouraged or directed the principal offender to commit [*insert assisted offence*].

Three – that the principal offender [*identify acts necessary to commit the charged offence*].

Four – that the accused was aware that it was probable that [*insert charged offence*] would be committed in the course of carrying out [*insert assisted offence*].

[*If* withdrawal *is relevant, add the following shaded section.*]

and Five – that the accused did not effectively withdraw his/her assistance or encouragement prior to the offence being committed.

Before you can find NOA guilty of [*insert charged offence*], you must be satisfied that all of these elements have been proven beyond reasonable doubt.

I will now explain each of these elements in more detail.

Knowledge or belief

The first element the prosecution must prove is that NOA knew or believed the principal offender was going to commit the offence of [*insert assisted offence*].

The prosecution says that the principal offender was NO3P.

A person commits [*name of assisted offence*] when s/he:

[*Describe all of the elements of the offence, explain those elements, and relate them to the facts*.]

This means the prosecution must prove that NOA knew or believed that NO3P was going to [*reiterate elements of the assisted offence*].

Assistance, Encouragement or Direction

The second element the prosecution must prove is that, with this knowledge or belief, the accused intentionally assisted, encouraged or directed the principal offender to commit [*insert assisted offence*].

The prosecution does not argue that NOA intentionally assisted, encouraged or directed NO3P to commit [*insert charged offence*]. Instead, the prosecution argues that s/he assisted, encouraged or directed NO3P to commit a different offence, [*insert assisted offence*].

In this case, the prosecution argue that NOA provided this assistance, encouragement or direction by [*identify relevant prosecution evidence and arguments*]. The defence deny this, and say [*identify relevant defence evidence and arguments*].

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[267] If withdrawal is relevant, there are five elements. Otherwise, there are four elements.

[*If the prosecution argued that the accused assisted or encouraged the offender by his/her presence alone, add the following shaded section*.]

You will note that in this case the prosecution did not allege that NOA said or did anything at the time of the offence to assist or encourage the principal offender. They alleged that s/he assisted or encouraged the principal offender simply by being present.

The law recognises that a person can intentionally assist or encourage the commission of an offence by being present at the commission of the offence. However, for this to be the case, you must find that NOA intended his/her presence at the crime scene to have encouraged or assisted the principal offender to commit [*insert assisted offence*]. It is not sufficient for him/her simply to have been there at the relevant time.

In determining whether NOA intended his/her presence at the commission of the offence to assist or encourage, you should view his/her conduct as a whole. You should look at his/her conduct before and at the time of the alleged offence, and consider whether s/he was linked in purpose with the principal offender in some way, and so contributed to the offence.

If you find that NOA was simply present when the offence was committed, then this element will not be met. However, if you are satisfied that NOA's presence at the commission of the offence intentionally assisted or encouraged the principal offender to commit the crime, then this element will be met.

[*If not already done, identify the matters said to constitute assistance or encouragement.*]

You do not need to be satisfied that NOA's words or actions caused the principal offender to commit the crime. A person can assist, encourage or direct someone to commit an offence even if that other person already intended to commit that offence.

You also do not need to be satisfied that the principal offender was actually assisted, encouraged or directed by NOA's conduct. As long as NOA makes an effort to assist, encourage or direct him/her, in circumstances in which the principal offender could have been assisted, encouraged or directed, then this element will be met. In other words, this element looks at what NOA did. You do not need to consider what effect this had on NO3P.

I also emphasise that [*insert assisted offence*] consists of more than just [*identify physical elements of assisted offence*]. For this element, the prosecution must prove that NOA intentionally assisted, encouraged or directed NO3P to perform those acts with the intent necessary for [*insert assisted offence*]. That is, [*remind jury of fault elements of assisted offence*].

It is only if you are satisfied, beyond reasonable doubt, that NOA assisted, encouraged or directed the principal offender to commit [*insert assisted offence*] that this second element will be met.

Causation

The third element is that NO3P [*identify physical elements of charged offence*].

[*Identify evidence and arguments that NO3P performed the physical elements of the charged offence*.]

Aware of probability

The fourth element the prosecution must prove is that, at the time s/he assisted, encouraged or directed NO3P to commit [*insert assisted offence*], s/he was aware that it was probable that [*insert charged offence*] would be committed in the course of carrying out [*insert assisted offence*].

In other words, the prosecution must prove that NOA realised, at the time s/he assisted, encouraged or directed NO3P to commit [*insert assisted offence*], that it was probable that NO3P would [*identify elements of charged offence*]. These are the [*insert number of elements*] matters which the prosecution needed to prove in relation to the third element, along with proof that NOA believed it was probable that the principal offender would [*reiterate fault elements of charged offence which are not mentioned in the third element*].

[*If further direction on the meaning of "probable" is required, add the following shaded section.*]

The word "probable" is an ordinary English word. It would not be enough for NOA to have been aware that [*insert charged offence*] was merely "possible" in the course of carrying out [*insert assisted offence*]. Rather s/he must have been aware that [*insert charged offence*] was "probable" or "likely".

There is an important difference between this element and the third element. The third element looks at what happened following NOA's assistance, encouragement or direction. Has the prosecution proved that a person [*identify physical elements of charged offence*]? In contrast, this element looks at what NOA realised at the time s/he provided the assistance, encouragement or direction. Has the prosecution proved that s/he was aware that it was probable that someone would commit [*insert charged offence*]?

There is also an important difference between this element and the second element. The second element looks at whether NOA assisted, encouraged or directed others to commit [*insert assisted offence*]. For this fourth element, you are looking at a different offence. Has the prosecution proved that s/he realised that it was probable that someone would commit [*insert charged offence*] in the course of carrying out [*insert assisted offence*]?

[*Identify relevant prosecution and defence evidence and arguments*.]

Withdrawal

[*If withdrawal of the accused's assistance or encouragement is in issue, add the following shaded section.*]

The fifth element that the prosecution must prove is that the accused did not effectively withdraw his/her assistance, encouragement or direction prior to the offence being committed.

The law says that if a person is going to avoid liability by taking back his/her previous assistance, encouragement or direction, his/her withdrawal must be timely and effective. That is, s/he must do everything that s/he can reasonably do to undo the effect of his/her previous assistance, encouragement or direction, with enough time for his/her actions to be effective.

Whether the accused has taken all reasonable steps to undo the effect of his/her previous assistance, encouragement or direction is a question for you. You must apply your common sense and experience. For example, in some cases it will be enough for the accused to take back any tools he or she has provided for the commission of the crime, and to make it clear that if the principal offender commits the offence, s/he does so without the accused's approval or support. In some cases it may even be necessary for the accused to inform the police of the planned offence.

It is important to emphasise that it is not for the defence to prove that the accused did everything reasonably possible to withdraw his/her previous assistance, encouragement or direction. It is the prosecution who must prove that the accused did not withdraw in a timely and effective manner.

In this case, the prosecution argued that the accused had not done everything s/he reasonably could to withdraw his/her previous assistance, encouragement or direction. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA's withdrawal was timely and effective. [*Insert defence evidence and/or arguments.*]

Application of Law to Evidence

[*If not already done, apply the law to the relevant evidence here.*]

Defences

[*If any defences are open on the evidence, insert relevant directions.*]

Summary

To summarise, before you can find NOA guilty of committing [*insert charged offence*] by providing assistance, encouragement or direction, the prosecution must prove to you beyond reasonable doubt:

One – that NOA knew or believed that NO3P was going to commit [*insert assisted offence*]; and

Two – that, with that knowledge or belief, NOA intentionally assisted, encouraged or directed the principal offender to commit [*insert assisted offence*]; and

Three – that NO3P [*identify acts necessary to commit charged offence*]; and

Four – that NOA was aware that it was probable that [*insert charged offence*] would be committed in the course of carrying out [*insert assisted offence*];

[*If withdrawal is relevant, add the following shaded section.*]

and Five – that NOA did not effectively withdraw his/her earlier assistance, encouragement or direction.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of [*insert charged offence*] by providing assistance, encouragement or direction.

Last updated: 14 August 2023

5.2.3 Charge: Statutory Complicity (Agreement, Arrangement or Understanding)

Click here to download a Word version of this charge

This Charge has been designed for use in cases where the accused is charged with being involved in the commission of an offence under *Crimes Act 1958* section 323(1)(c).

This charge refers to the accused entering into an "agreement". If the case is conducted on the basis of an "arrangement" or "understanding" then the charge should be modified accordingly.

NOA has been charged with the offence of NOO.[268] However, it has not been alleged that s/he committed that offence alone.[269] Instead, the prosecution has alleged that s/he committed it together with [*insert names of co-offenders*].

The law says that if a person agrees to commit an offence, then he or she may be responsible for that offence.

In order to find NOA guilty of committing NOO, the prosecution must prove the following 3 elements:

[268] Name of Offence.

[269] If complicity is alleged as an alternative to acting as a sole offender, this sentence will need to be modified accordingly.

One – the accused agreed with other people[270] to perform the acts necessary to commit NOO, and that the agreement remained in existence when the offence of NOO was committed.

Two – that a party to the agreement performed the acts necessary to commit NOO.

Three – that, when NOA agreed to commit NOO, s/he [*identify mens rea for NOO*].

Before you can find NOA guilty of NOO, you must be satisfied that the prosecution has proven all three of these elements beyond reasonable doubt.

I will now explain each of these elements in more detail.

Agree to Commit NOO

The first element that the prosecution must prove is that the accused agreed with other people to perform the acts necessary to commit NOO, and that this agreement remained in existence when the offence of NOO was committed.

There are two parts to this element. First, you must be satisfied that the accused agreed with at least one other person to perform the acts necessary to commit NOO.

The acts necessary to commit NOO are [*identify relevant acts, based on the substantive offence*].

People can make an agreement expressly. You can also infer that people made an agreement from the surrounding circumstances. You will recall what I have told you about inferences.[271]

[*If the* content *of the agreement, or the parties'* understanding of the content, *is in issue, add the following shaded section.*]

NOA must have agreed to perform the acts necessary to commit NOO. This element will not be satisfied if the accused agreed to pursue some other form of activity that is not criminal, or a different offence. However, you do not need to find that NOA and [*identify relevant co-offenders*] knew they were agreeing to commit a crime. This element will be satisfied as long as they agreed to do something which was, in fact, criminal.

Similarly, you do not need to find that all of the parties had the same purpose or intention when forming that agreement, or were all aware of the consequences of their actions. You do not even have to find that they all agreed on the precise terms of the agreement. For this element to be satisfied, you only need to find that they agreed to commit the particular criminal offence of NOO together.

An example is where two people agree to commit a bank robbery together, with one of them to buy the gun and give it to the other, who will use it at the bank to steal the money. If they carry out this plan, they would both be equally guilty of the crime of armed robbery.[272]

As part of this element, you must consider the scope of their agreement. What was within their plan, and what contingencies were part of the plan? The law recognises that people can agree to commit an offence, even if that was not their primary purpose. So, even if the parties were hoping to avoid committing NOO, and did not think it was likely, if they agreed to commit NOO if certain circumstances arose, then you should treat it as being within the scope of the agreement.

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[270] This charge is based on cases involving multiple co-offenders. If there is only one co-offender, some of the sentences throughout the charge will need to be modified.

[271] This charge is based on the assumption that the judge has already instructed the jury about inferences. It will need to be modified if that has not been done.

[272] If the offence charged is armed robbery, a different example should be used.

In this case, the prosecution alleged that [*specify parties*] agreed to commit NOO. They alleged that this agreement was made [*insert prosecution evidence about the formation of the agreement*].

[*If the defence denies that there was an agreement to commit an offence, add the following shaded section.*]

The defence denied this, arguing [*insert defence evidence and/or arguments*].

[*If the defence does not deny that there was an agreement, but is contesting liability on other grounds, add the following shaded section.*]

The defence does not deny that NOA agreed to perform the acts necessary to commit NOO, but argues [*outline defence arguments, e.g.* "that the accused had withdrawn from that agreement by the time the offence was committed"].

The second part of this element requires the prosecution to prove that the agreement remained in existence when the offence was committed. If there is a possibility that the agreement had been called off before the offence was committed, or that NOA had withdrawn from that agreement, then this first element will not be met.

[*If withdrawal from the agreement is in issue, add the following shaded section.*]

In this case, the defence argued that, [while/even if] NOA had agreed to commit NOO, s/he had withdrawn from that agreement by the time the offence was committed. It is for the prosecution to prove that s/he had not done so.

The law says that if a person is going to withdraw from an agreement to commit an offence, his/her withdrawal must be timely and effective. That is, s/he must do everything that s/he can reasonably do to undo the effect of the previous agreement with enough time for his/her actions to be effective.

Whether the accused has taken all reasonable steps to undo the effect of the previous agreement is a question for you. You must apply your common sense and experience. For example, in some cases it will be enough for the accused to take back any tools he or she has provided for the commission of the crime, and to make it clear to the other parties that if they continue with the offence, they do so without his or her approval or support. In some cases it may even be necessary for the accused to inform the police of the plan.

It is important to emphasise that it is not for the defence to prove that the accused did everything reasonably possible to withdraw from the agreement. It is the prosecution who must prove that the accused did not withdraw from the agreement in a timely and effective manner.

In this case, the prosecution argued that the accused had not done everything s/he reasonably could to withdraw from the agreement. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA's withdrawal was timely and effective. [*Insert defence evidence and/or arguments.*]

[*If it is alleged that the agreement, arrangement or understanding had been* cancelled or completed*, add the following shaded section.*]

In this case, the defence argued that, while NOA did agree to commit NOO, that agreement had been [completed/cancelled] by the time the offence of NOO was committed. [*Insert defence evidence and/or arguments*.] The prosecution disputed this, alleging that the agreement remained in existence at the relevant time. [*Insert prosecution evidence and/or arguments.*]

It is important to emphasise that it is not for the defence to prove that the agreement had been [completed/cancelled]. It is the prosecution who must prove that the agreement had not been [completed/cancelled] by the time the offence was committed.

[*If the continuing existence of the agreement, arrangement or understanding is not in issue, add the following shaded section.*]

In this case, it is not disputed that, if NOA had agreed to commit NOO, that agreement remained in

existence at the time the offence was committed. The main issue is [*outline main issue*[*s*]*, e.g.* "whether or not there was such an agreement"].

It is only if you are satisfied, beyond reasonable doubt, that the accused agreed to commit NOO, and that the agreement remained in existence when the offence of NOO was committed, that this first element will be met.

Commission of NOO

The second element that the prosecution must prove is that, in accordance with their agreement, one or more parties to the agreement performed the acts necessary to commit NOO.

These are the same acts I told you about as part of the first element. To be clear, the prosecution must prove that a party to the agreement [*identify relevant acts*].

In this case the prosecution alleged that [*describe relevant prosecution evidence and/or arguments*]. The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Accused's Mental State

The third element that the prosecution must prove is that the accused, when s/he agreed to commit NOO, [*identify mens rea for NOO*].

In this case, the prosecution alleged that [*describe relevant prosecution evidence and/or arguments*]. The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Uncertainty about whether accused committed offence as principal or secondary party

[*If NOA may have committed the offence him/herself, add the following shaded section.*]

In this case, you may not be sure whether NOA [*describe relevant acts*] himself/herself, or whether another party to the agreement did so. You do not need to resolve this question to reach your verdict. The law says that if you are satisfied beyond reasonable doubt that NOA either committed the offence himself/herself, or agreed with another person to commit the offence, you may find him/her guilty of NOO.

Application of Law to Evidence

[*If not already done, apply the law to the relevant evidence here.*]

Defences

[*If any* defences *are open on the evidence, insert relevant directions.*]

Summary

To summarise, before you can find NOA guilty of NOO, the prosecution must prove to you beyond reasonable doubt:

One – the accused agreed with other people to perform the acts necessary to commit NOO, and that the agreement remained in existence when the offence of NOO was committed.

Two – that the parties to the agreement, between them, performed the acts necessary to commit NOO.

Three – that, when s/he agreed to commit NOO, s/he [*identify mens rea for NOO*].

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of committing NOO.

Last updated: 4 March 2024

5.2.4 Charge: Statutory Complicity (Agreement, Arrangement or Understanding with Recklessness)

Click here to download a Word version of this charge

Note: This charge has not yet been updated in response to *R v Rohan* [2024] HCA 3. It must be used with caution and may need to be modified.

This Charge has been designed for use in cases where the accused is charged with being involved in the commission of an offence under *Crimes Act 1958* section 323(1)(d).

This charge refers to the accused entering into an "agreement". If the case is conducted on the basis of an "arrangement" or "understanding" then the charge should be modified accordingly.

In this case, NOA has been charged with the offence of [*insert charged offence*]. However, it has not been alleged that s/he committed that offence alone.[273] Instead, the prosecution has alleged that s/he committed it together with [*insert names of co-offenders*].

The prosecution case is that NOA and [*identify relevant co-offenders*] agreed to commit [*insert agreed offence*] and, in the course of [committing/attempting to commit] that offence, [*identify relevant co-offender(s)*] committed [*insert agreed offence*].

In order to find NOA guilty of committing [*insert charged offence*], the prosecution must prove the following 4 elements:

One – the accused agreed with other people[274] to perform the acts necessary to commit [*insert agreed offence*], and that the agreement remained in existence when the offence of [*insert charged offence*] was committed.

Two – that a party to the agreement committed [*insert charged offence*] in the course of carrying out the agreement to perform the acts necessary to commit [*insert agreed offence*].

Three – that, when NOA agreed to perform the acts necessary to commit [*insert agreed offence*], s/he [*identify mens rea for agreed offence*].

Four – that, when NOA agreed to perform the acts necessary to commit [*insert agreed offence*], s/he was aware that it was probable that [*insert charged offence*] would be committed in the course of attempting to carry out the agreement.

Before you can find NOA guilty of [*insert charged offence*], you must be satisfied that the prosecution has proven all four of these elements beyond reasonable doubt.

I will now explain each of these elements in more detail.

[273] If complicity is alleged as an alternative to acting as a sole offender, this sentence will need to be modified accordingly.

[274] This charge is based on cases involving multiple co-offenders. If there is only one co-offender, some of the sentences throughout the charge will need to be modified.

Agreement to Commit Offence

The first element that the prosecution must prove is that the accused agreed with other people to perform the acts necessary to commit [*insert agreed offence*], and that the agreement remained in existence when the offence of [*insert charged offence*] was committed.

There are two parts to this element. First, you must be satisfied that the accused agreed with at least one other person to perform the acts necessary to commit [*insert agreed offence*].

A person can agree to commit an offence expressly, or you may infer that s/he agreed to commit [*insert agreed offence*] from the surrounding circumstances. You will recall what I have told you about inferences.[275]

[*If the content of the agreement, or the parties' understanding of the content, is in issue, add the following shaded section.*]

NOA must have agreed to perform the acts necessary to commit [*insert agreed offence*]. This element will not be satisfied if the accused agreed to pursue some other form of activity that is not criminal. However, you do not need to find that NOA and [*identify relevant co-offenders*] knew they were agreeing to commit a crime. This element will be satisfied as long as they agreed to do something which was, in fact, criminal.

Similarly, you do not need to find that all of the parties had the same purpose or intention when forming that agreement, or were all aware of the consequences of their actions. You do not even have to find that they all agreed on the precise terms of the agreement. For this element to be satisfied, you only need to find that they agreed to commit the particular criminal offence of [*insert agreed offence*] together.

An example is where two people agree to commit a bank robbery together, with one of them to buy the gun and give it to the other, who will use it at the bank to steal the money. Each of the two people would have agreed to perform the acts necessary to commit armed robbery.[276]

It is not necessary that the parties agreed to commit [*insert charged offence*]. For the prosecution to establish liability on this basis, the prosecution must prove that NOA and others agreed to commit [*insert agreed offence*].

In this case, the prosecution alleged that [*specify parties*] agreed to perform the acts necessary to commit [*insert agreed offence*]. They alleged that this agreement was made [*insert prosecution evidence about the formation of the agreement*].

[*If the defence denies that there was an agreement to commit an offence, add the following shaded section.*]

The defence denied this, arguing [*insert defence evidence and/or arguments*].

[*If the defence does not deny that there was an agreement, but is contesting liability on other grounds, add the following shaded section.*]

The defence does not deny that NOA agreed to perform the acts necessary to commit [*insert agreed offence*], but argues [*outline defence arguments, e.g.* "that the accused had withdrawn from that agreement by the time the offence was committed"].

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[275] This charge is based on the assumption that the judge has already instructed the jury about inferences. It will need to be modified if that has not been done.

[276] If the agreed or charged offence is armed robbery, a different example should be used.

The second part of this element requires the prosecution to prove that the agreement remained in existence when the offence was committed. If there is a possibility that the agreement had been called off before the offence was committed, or that NOA had withdrawn from that agreement then this first element will not be met.

[*If withdrawal from the agreement is in issue, add the following shaded section.*]

In this case, the defence argued that, [while/even if] NOA had agreed to commit [*insert agreed offence*], s/he had withdrawn from that agreement by the time the offence was committed. It is for the prosecution to prove that s/he had not done so.

The law says that if a person is going to withdraw from an agreement to commit an offence, his/her withdrawal must be timely and effective. That is, s/he must do everything that s/he can reasonably do to undo the effect of the previous agreement with enough time for his/her actions to be effective.

Whether the accused has taken all reasonable steps to undo the effect of the previous agreement is a question for you. You must apply your common sense and experience. For example, in some cases it will be enough for the accused to take back any tools he or she has provided for the commission of the crime, and to make it clear to the other parties that if they continue with the offence, they do so without his or her approval or support. In some cases it may even be necessary for the accused to inform the police of the plan.

It is important to emphasise that it is not for the defence to prove that the accused did everything reasonably possible to withdraw from the agreement. It is the prosecution who must prove that the accused did not withdraw from the agreement in a timely and effective manner.

In this case, the prosecution argued that the accused had not done everything s/he reasonably could to withdraw from the agreement. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA's withdrawal was timely and effective. [*Insert defence evidence and/or arguments.*]

[*If it is alleged that the agreement had been cancelled or completed, add the following shaded section.*]

In this case, the defence argued that, while NOA did agree to commit [*insert agreed offence*], that agreement had been [completed/cancelled] by the time the offence of [*insert charged offence*] was committed. [*Insert defence evidence and/or arguments.*] The prosecution disputed this, alleging that the agreement remained in existence at the relevant time. [*Insert prosecution evidence and/or arguments*.]

It is important to emphasise that it is not for the defence to prove that the agreement had been [completed/cancelled]. It is the prosecution who must prove that the agreement had not had been [completed/cancelled] by the time the offence was committed.

[*If the continuing existence of the agreement is not in issue, add the following shaded section.*]

In this case, it is not disputed that, if there was an agreement to commit [*insert agreed offence*], that agreement remained in existence at the time [*insert charged offence*] was committed. The main issue is [*outline main issue*[*s*], *e.g.* "whether or not there was such an agreement"].

It is only if you are satisfied, beyond reasonable doubt, that the accused agreed to commit [*insert agreed offence*], and that the agreement remained in existence when the offence of [*insert charged offence*] was committed, that this first element will be met.

Commission of Charged Offence

The second element that the prosecution must prove is that, in the course of performing the acts necessary to commit [*insert agreed offence*], a party to the agreement committed [*insert charged offence*].

There are also two parts to this element. First, you must be satisfied that a party to the agreement committed [*insert charged offence*]. This means that you must find that all of the following matters have been proven beyond reasonable doubt:

[*Describe all of the elements of* [*insert charged offence*]*, explain those elements, and relate them to the facts.*]

The second part of this element requires the prosecution to prove that a party to the agreement committed [*insert charged offence*] in the course of carrying out the agreement to perform the acts necessary to commit [*insert agreed offence*].

In this case the prosecution alleged that [*describe relevant prosecution evidence and/or arguments*]. The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

It is only if you are satisfied that the parties committed [*insert charged offence*], and that they committed this offence in the course of carrying out the agreement to perform the acts necessary to commit [*insert agreed offence*], that this second element will be met.

Accused's Mental State

The third element that the prosecution must prove is that the accused had the state of mind necessary to commit [*insert agreed offence*] when s/he entered into the agreement.

That is, the prosecution must prove that NOA [*describe relevant mens rea element*] when s/he entered into the agreement.

In this case, the prosecution alleged that NOA had the necessary state of mind. [*Describe relevant prosecution evidence and/or arguments.*] The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Aware of probability

The fourth element the prosecution must prove is that, when NOA agreed to perform the acts necessary to commit [*insert agreed offence*], s/he was aware that it was probable that someone would commit [*insert charged offence*] in the course of carrying out that agreement.

This element therefore looks at NOA's state of mind when s/he agreed to perform the acts necessary to commit [*insert agreed offence*]. To prove this element, the prosecution must prove beyond reasonable doubt that s/he was aware that it was probable that, in the course of carrying out the agreement, someone would commit [*insert charged offence*].

In other words, the prosecution must prove that NOA realised, at the time s/he made the agreement, that it was probable that a person would [*identify elements of charged offence*]. These are the same [*insert number of elements*] matters which the prosecution needed to prove in relation to the third element.

[*If further direction on the meaning of "probable" is required, add the following shaded section.*]

The word "probable" is an ordinary English word. It would not be enough for NOA to have been aware that [*insert charged offence*] was merely "possible" in the course of carrying out [*insert agreed offence*]. Rather s/he must have been aware that [*insert charged offence*] was "probable" or "likely".

There is an important difference between this element and the second element. The second element looks at what happened in the course of carrying out the agreement. Has the prosecution proved that a party to the agreement committed [*insert charged offence*]? In contrast, this element looks at what NOA was aware of at the time s/he made the agreement. Has the prosecution proved that s/he was aware that it was probable that someone would commit [*insert charged offence*]?

There is also an important difference between this element and the first element. The first element looks at whether NOA, together with others, agreed to perform the acts necessary to commit [*insert agreed offence*]. What did NOA and the others agree? For that element, you are not looking at whether NOA agreed to commit [*insert charged offence*]. For this fourth element, you are looking only at what was in NOA's mind. Was s/he aware that it was probable that someone would commit [*insert charged offence*]?

[*Identify relevant prosecution and defence evidence and arguments.*]

Application of Law to Evidence

[*If not already done, apply the law to the relevant evidence here.*]

Defences

[*If any defences are open on the evidence, insert relevant directions.*]

Summary

To summarise, before you can find NOA guilty of [*insert charged offence*], the prosecution must prove to you beyond reasonable doubt:

One – That NOA agreed to perform the acts necessary to commit [*insert agreed offence*], and that the agreement remained in existence when the offence of [*insert charged offence*] was committed; and

Two – That a party to the agreement committed [*insert charged offence*] in the course of carrying out the agreement to perform the acts necessary to commit [*insert agreed offence*];[277] and

Three – That, when NOA agreed to perform the acts necessary to commit [*insert agreed offence*], s/he [*insert* mens rea *of agreed offence*]; and

Four – That, when NOA agreed to perform the acts necessary to commit [*insert agreed offence*], s/he was aware that it was probable that [*insert charged offence*] would be committed in the course of carrying out the agreement.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of committing [*insert charged offence*].

Last updated: 4 March 2024

5.3 Joint Criminal Enterprise (Pre-1/11/14)

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Overview

1. This topic examines the common law principle of joint criminal enterprise. On 1 November 2014, that principle was abolished by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*. For offences committed on or after 1 November 2014, see 5.2 Statutory Complicity (From 1/11/14).
2. When two or more people commit an offence by pursuing a joint criminal enterprise, each person will be liable for the criminal acts of the others (*R v Clarke & Johnstone* [1986] VR 643; *Gillard v R* (2003) 219 CLR 1; *R v Cox & Ors* [2005] VSC 255).
3. To establish liability by way of pursuing a joint criminal enterprise, the prosecution must prove:

    i) That two or more people reached an agreement to pursue a joint criminal enterprise that remained in existence at the time the offence was committed;

    ii) That the accused participated in that joint enterprise in some way;

    iii) That, in accordance with the agreement, one or more parties to the agreement performed all

[277] This summary will need to be modified to include the phrase "in the necessary circumstances" if one or more elements of the crime require the physical acts to be committed under certain conditions (e.g. for sexual penetration to be committed in the absence of the complainant's consent).

of the acts necessary to commit the offence charged, in the circumstances necessary for the commission of that offence; and

iv) That the accused had the state of mind required for the commission of the relevant offence at the time of entering into the agreement (*R v Clarke & Johnstone* [1986] VR 643; *Johns v R* (1980) 143 CLR 108; *McAuliffe v R* (1995) 183 CLR 108; *R v Taufahema* (2007) 228 CLR 232; *Likiardopoulos v R* (2010) 30 VR 654; *Arafan v R* (2010) 31 VR 82).

4. Liability under this basis is direct and is not affected by the prosecution accepting pleas to lesser offences from other parties to the enterprise (*Likiardopoulos v R* (2012) 247 CLR 265).

Difference Between Joint Criminal Enterprise and "Acting in Concert"

5. Previously, it was thought that "Joint Criminal Enterprise" and "Acting in Concert" were discrete forms of liability. The difference was said to be that "Concert" required proof of presence while "Joint Criminal Enterprise" required proof of participation. It is now recognised that the difference is only one of nomenclature and that there is no requirement to prove that an accused is present through the whole of the offending (*Likiardopoulos v R* (2012) 247 CLR 265; *McAuliffe v R* (1995) 183 CLR 108. See also *R v Morgan* [1994] 1 VR 567; *R v Franklin* (2001) 3 VR 9; *R v Lao & Nguyen* (2002) 5 VR 129; *R v Tangye* (1997) 92 A Crim R 545; *R v Cavkic* [2005] VSC 182; *Johns v R* (1980) 143 CLR 108. C.f *Likiardopoulos v R* (2010) 30 VR 654; *Smith, Garcia & Andreevski v R* [2012] VSCA 5).

Agreement to Pursue a Joint Enterprise to Commit a Crime

6. For the first element to be met, the prosecution must prove:
    - That the accused reached an agreement with others to pursue a joint criminal enterprise; and
    - That the agreement remained in existence at the time the offence was committed (*R v Clarke & Johnstone* [1986] VR 643; *R v Lao & Nguyen* (2002) 5 VR 129).
7. The agreement need not be express. It may be inferred from the surrounding circumstances (*R v Tangye* (1997) 92 A Crim R 545; *R v Clarke and Wilton* [1959] VR 645; *R v Jensen and Ward* [1980] VR 196; *Guthridge v R* (2010) 27 VR 452).
8. This element will also be met if there is an understanding or arrangement between the parties that amounts to an agreement (*R v Tangye* (1997) 92 A Crim R 545; *R v Clarke and Wilton* [1959] VR 645; *R v Jensen and Ward* [1980] VR 196; *R v Lowery & King (No 2)* [1972] VR 560; *R v Nguyen* [2010] VSCA 23).

Content of the Agreement

9. The agreement must be to commit a criminal offence. This element will not be satisfied if the accused agreed to pursue some form of wrongdoing that is not criminal (*R v Taufahema* (2007) 228 CLR 232).
10. The parties to the agreement do not need to have realised that their acts would be criminal. This element will be satisfied if they agreed to perform acts which, in fact, are criminal (*Osland v R* (1998) 197 CLR 316; *R v Cox & Ors* [2005] VSC 255).
11. The parties only need to have agreed to pursue a criminal enterprise. They do not need to have had the same intention, nor do they need to have had the same awareness of the consequences of those acts (*R v Matusevich & Thompson* [1976] VR 470).

12. The parties do not need to have precisely agreed on the scope of the agreement. This element will be satisfied if they shared an understanding of a criminal act, even if they disagreed on the purpose of that act (*Gillard v R* (2003) 219 CLR 1; *R v Zappia* (2002) 84 SASR 206; c.f. *Collie, Kranz & Lovegrove v R* (1991) 56 SASR 302).[278]

13. Where the prosecution alleges a criminal enterprise between more than two accused, it may not be necessary to prove that all of the accused were parties to the same agreement. It may be sufficient for the prosecution to prove that there are relationships between the various accused which form a chain of agreements over a common subject matter (see, e.g. *R v Lao & Nguyen* (2002) 5 VR 129).

14. The prosecution must precisely identify the offence to be pursued, as this may influence the course of the trial and the inferences that may be drawn about the scope of the agreement (*R v Taufahema* (2007) 228 CLR 232).

Timing of the Agreement

15. The agreement need not have been formed far in advance of the offence. It may have been formed moments before the offence was committed (*R v Tangye* (1997) 92 A Crim R 545; *R v Jensen and Ward* [1980] VR 196; *Guthridge v R* (2010) 27 VR 452).

16. The fact that two people spontaneously decided to pursue the same course of action does not necessarily prove that they were acting pursuant to an agreement to commit a particular crime (*R v Taufahema* (2007) 228 CLR 232).

17. Two or more people may form an agreement that gives one of them the right to decide whether to commit a criminal act on any given occasion. Such an agreement will make all of the parties liable, even though they are not certain when the act will be committed (*Miller v R* (1980) 32 ALR 321). See also 5.4 Extended Common Purpose (Pre-1/11/14).

Mentally Impaired Parties

18. A person who is mentally impaired because s/he does not realise that his/her acts are wrongful may still be able to participate in an agreement to commit a criminal act, as long as s/he is able to understand the nature and quality of the act to be performed (*Matusevich v R* (1977) 137 CLR 633; *Osland v R* (1998) 197 CLR 316).

19. The doctrine of innocent agent may also apply if the accused persuades a mentally impaired person to commit an offence (*Matusevich v R* (1977) 137 CLR 633).

Cancellation or Completion of Agreement

20. The prosecution must prove that the agreement had not been called off before the offence was completed (*R v Heaney & Ors* [1992] 2 VR 531).

21. In some cases, the acts agreed to by the parties may be completed without achieving the intended purpose of the agreement. In this situation, a party to the agreement will not be liable for the later completion of that purpose by any of the other parties to the agreement (unless s/he agreed to such a variation of the original agreement) (*R v Heaney & Ors* [1992] 2 VR 531).

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[278] The courts have noted that this can produce an agreement that is narrower than the purpose of any given party (*Gillard v R* (2003) 219 CLR 1; *R v Zappia* (2002) 84 SASR 206; c.f. *Collie, Kranz & Lovegrove v R* (1991) 56 SASR 302).

Withdrawing From an Agreement

22. A person is not responsible for the acts of other parties to an agreement if s/he withdrew from the agreement prior to its completion (*R v Lowery & King (No 2)* [1972] VR 560).

23. The withdrawal must ordinarily have been expressly communicated to the other members of the enterprise. However, in exceptional circumstances it may be possible for an accused to have implicitly withdrawn from the agreement (*White v Ridley* (1978) 140 CLR 342).[279]

24. The withdrawal must be accompanied by all action the accused can reasonably take to undo the effect of his/her previous encouragement or assistance. This may include informing the police (White v Ridley (1978) 140 CLR 342; *R v Tietie* (1988) 34 A Crim R 438; *R v Jensen and Ward* [1980] VR 196).

25. An accused who seeks to withdraw from an agreement must make a timely and effective withdrawal. An accused will not escape liability merely by leaving the scene shortly before the offence is completed, or by attempting to withdraw when it is too late to stop the offence (*White v Ridley* (1978) 140 CLR 342; *R v Whitehouse* [1941] 1 DLR 683; *R v Rook* [1993] 1 WLR 1005).

26. Similarly, a person is not taken to have withdrawn from an agreement merely because s/he has private feelings of regret, or wishes that s/he could stop the offence (*R v Lowery & King (No 2)* [1972] VR 560).

27. Where the accused has set in motion a chain of events leading to the commission of an offence, any attempts to withdraw from participation must be capable of effectively stopping the offending (*White v Ridley* (1978) 140 CLR 342).

28. In some cases, the accused may reasonably believe that once s/he withdraws from the agreement, the other members will not pursue the original criminal act. In those circumstances, the accused may not need to take any additional steps beyond countermanding his/her original instructions or agreement (R v Truong NSW CCA 22/06/1998).

29. It is usually more difficult to withdraw from an agreement at the time of the offending than beforehand. Withdrawal at the time of the offending will usually require greater conduct to undo the effect of the previous agreement (see *R v Becerra* (1976) 62 Cr App R 212).

30. It is not necessary to consider the issue of withdrawal using principles of causation. While a principal who continues to offend despite the timely withdrawal from the agreement by other parties may be treated as an intervening cause, it is not necessary to do so. Such an approach is likely to lead to confusion (*White v Ridley* (1978) 140 CLR 342; *R v Tietie* (1988) 34 A Crim R 438; *R v Menniti* [1985] 1 Qd R 250).

31. The issue of withdrawal only needs to be addressed if the defence has pointed to some evidence that shows that the accused unequivocally countermanded or revoked his/her previous agreement. The prosecution will then bear the onus of disproving this withdrawal (*White v Ridley* (1978) 140 CLR 342; *R v Croft* [1944] KB 295; *R v Rook* [1993] 1 WLR 1005).

Jury Directions

32. As this area of law is complex, the judge should usually give an example when explaining the first element to the jury (*R v Tangye* (1997) 92 A Crim R 545).

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[279] For example, where there is a spontaneous agreement to assault another person, an accused may be able to withdraw by ceasing to fight and walking away without expressly communicating to others involved in the assault (*R v Mitchell and King* (1998) 163 JP 75; *R v O'Flaherty, Ryan and Toussaint* [2004] 2 Cr App R 20).

Participation in the Joint Enterprise

33. For the second element to be met, the prosecution must prove that the accused participated in the joint enterprise in some way (*R v Clarke & Johnstone* [1986] VR 643; *R v Lao & Nguyen* (2002) 5 VR 129; *Likiardopoulos v R* (2010) 30 VR 654; *Arafan v R* (2010) 31 VR 82).

34. This requires the accused to take some steps to further the criminal enterprise (*R v Clarke & Johnstone* [1986] VR 643; *R v Lao & Nguyen* (2002) 5 VR 129; *Likiardopoulos v R* (2010) 30 VR 654; *Arafan v R* (2010) 31 VR 82).

35. It is thus not sufficient for the prosecution to simply prove that there was an agreement reflecting a common purpose. While proof of an agreement may be sufficient to prove *conspiracy* to commit an offence (see 6.1 Conspiracy to Commit an Offence (Victoria)), liability through joint criminal enterprise requires proof that the accused actually participated in the enterprise (*Arafan v R* (2010) 31 VR 82. See also *Likiardopoulos v R* (2010) 30 VR 654; *R v Clarke & Johnstone* [1986] VR 643).

36. It is not necessary that the accused acted illegally in furtherance of the criminal enterprise. A person may participate in a criminal enterprise by taking legal actions, such as purchasing property (see, e.g. *R v Clarke & Johnstone* [1986] VR 643; *Arafan v R* (2010) 31 VR 82).

Performance of the Necessary Acts

37. For the third element to be met, the prosecution must prove that:

    - In accordance with the agreement;
    - One or more of the parties to the agreement;
    - Performed all of the acts necessary to commit the offence charged;
    - In the circumstances necessary for the commission of that offence[280] (*R v Clarke & Johnstone* [1986] VR 643; *Johns v R* (1980) 143 CLR 108; *McAuliffe v R* (1995) 183 CLR 108; *R v Taufahema* (2007) 228 CLR 232).

38. The actions of all members of a joint criminal enterprise will be attributed to all other members of that enterprise (*R v Clarke & Johnstone* [1986] VR 643; *Gillard v R* (2003) 219 CLR 1).

39. The accused will only be liable for offences that were within the scope of the agreement. The jury must therefore determine whether the agreement extended to the commission of the offence charged (*McAuliffe v R* (1995) 183 CLR 108; *R v PDJ* (2002) 7 VR 612; *R v Johns* (1980) 143 CLR 108).

Acts Must have been Within the Scope of the Agreement

40. In some cases, in the course of pursuing the agreed crime a different offence will be committed. For the accused to be liable for that offence, the prosecution must prove that it was within the scope of the agreement (*R v Jensen and Ward* [1980] VR 196; *R v PDJ* (2002) 7 VR 612; *R v Anderson* [1966] 2 QB 110; *R v Heaney & Ors* [1992] 2 VR 531).

41. The scope of the agreement must be determined by considering the subjective beliefs of the participants at the time the agreement was formed, or at the time the parties agreed to vary the original agreement (*R v Johns* (1980) 143 CLR 108; *R v McAuliffe* (1995) 183 CLR 108).

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[280] For example, in a rape case, the prosecution must prove that the complainant was not consenting at the time of the penetration. This is a "necessary circumstance" of the offence (rather than an action to be performed by the offenders).

42. If the participants' beliefs about the scope of the agreement differed, its scope will be confined to those beliefs that all of the participants shared (see, e.g. *Gillard v R* (2003) 219 CLR 1; *R v Zappia* (2002) 84 SASR 206).[281]

43. The scope of the agreement includes any contingencies that are planned as part of the agreed criminal enterprise (*R v Becerra* (1976) 62 Cr App R 212).

44. The liability of the accused is based on his/her authorisation (express or implied) of the criminal acts. Even if the accused did not believe that those acts were likely to be committed, s/he will be liable if they were within the scope of the agreement (*Johns v R* (1980) 143 CLR 108; *Chan Wing-Siu v R* [1985] AC 186; *Britten v R* (1988) 49 SASR 47).

45. In some cases the parties will have differed in their understanding of how the agreed crime was to be carried out, leading to arguments that the accused had not agreed to participate in the particular offence that was committed. In such cases, the jury must consider whether the use of the means adopted placed the offence outside the scope of the agreement, or whether the use of those means was no more than an unexpected incident of carrying out the common agreement (*Varley v R* (1976) 12 ALR 347; *R v Heaney & Ors* [1992] 2 VR 531).

46. Where the agreement involves the use of violence, the jury may need to consider whether the perpetrator acted outside the scope of the agreement by unexpectedly using a weapon. This will depend on the facts of the case, the understanding of the parties, and the difference between the weapon used and the manner of violence intended (see *Varley v R* (1976) 12 ALR 347; *R v Anderson* [1966] 2 QB 110; *Markby v R* (1978) 140 CLR 108; *Wooley v R* (1989) 42 A Crim R 418; *R v Heaney & Ors* [1992] 2 VR 531).

Accused's Mental State

47. The fourth element requires the prosecution to prove that the accused had the state of mind required for the commission of the relevant offence (*Osland v R* (1998) 197 CLR 316; *Likiardopoulos v R* (2010) 30 VR 654).

48. The law is not entirely clear on when the accused must have this required state of mind. The better view appears to be that the accused must have the required state of mind at the time s/he entered into the agreement (*Osland v R* (1998) 197 CLR 316; *Hui Chi-Ming v R* [1992] 1 AC 34; *R v O'Flaherty, Ryan & Toussaint* [2004] 2 Cr App R 20).

49. This is because the joint criminal enterprise principles only attribute criminal *acts* to the parties to the agreement, not criminal *intentions*. The jury must therefore separately assess the state of mind of each accused (*R v Stewart; R v Schofield* [1995] 3 All ER 159; *Osland v R* (1998) 197 CLR 316; *R v Clarke & Johnstone* [1986] VR 643; but c.f. *R v Jensen & Ward* [1980] VR 194).

50. In homicide cases, this can allow the jury to convict one party of murder and another party of manslaughter (*Osland v R* (1998) 197 CLR 316; *R v Howe* [1987] AC 417; *R v Stewart; R v Schofield* [1995] 3 All ER 159).

51. Under this view of the law, the state of mind at the time of forming the agreement is deemed to continue unless the accused withdraws from the agreement. It is not enough that the accused has private feelings of regret or wishes that s/he could stop the offence (*R v Lowery & King (No 2)* [1972] VR 560; *R v Becerra* (1976) 62 Cr App R 212).

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[281] If certain offences were in the contemplation of individual parties, but not within the shared beliefs of all of the parties, then those individuals may be liable under the doctrine of Extended Common Purpose.

Defences

52. The prosecution must disprove any defences that are open on the evidence (*Osland v R* (1998) 197 CLR 316).

53. Defences must be separately disproved for each accused (*Osland v R* (1998) 197 CLR 316).

54. This may legitimately lead to a result whereby one party to the agreement is found not guilty of an offence (e.g. due to self defence), while another party is found guilty of the same offence (e.g. because s/he could not rely on self-defence) (see, e.g. *Osland v R* (1998) 197 CLR 316).

Joint Criminal Enterprise and Attempt

55. The law recognises that a person cannot attempt to conspire or attempt to be a secondary party to an offence (whether under the principles of statutory complicity or common law complicity) (*Franze v R* (2014) 46 VR 856).

56. Conversely, it is possible for a person to be a secondary party to an attempted offence. This occurs, for example, when the person enters into an agreement to complete an offence and that agreement only produces an attempt at the contemplated offence. The distinction lies between a joint attempt, which is legally possible, and an attempt to agree, which is not (*Franze v R* (2014) 46 VR 856).

Last updated: 2 March 2015

5.3.1 Charge: Joint Criminal Enterprise

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This charge only applies to offence committed before 1 November 2014.

NOA has been charged with the offence of NOO.[282] However, it has not been alleged that s/he committed that offence alone.[283] Instead, the prosecution has alleged that s/he committed it together with [*insert names of co-offenders*]. I must therefore direct you about what is called "joint criminal enterprise".

The law says that if two or more people are part of a "joint criminal enterprise" to commit an offence, then they will all be equally guilty of that offence, regardless of the role they played. This is one of the situations in which the law holds a person responsible for the actions of other people.

In order to find NOA guilty of committing NOO by a joint criminal enterprise, the prosecution must prove the following 4 elements:

One – the accused made an agreement with other people[284] to pursue a joint criminal enterprise, and that the agreement remained in existence when the offence of NOO was committed.

Two – that the accused participated in the joint criminal enterprise in some way.

Three – that, in accordance with that agreement, the parties to the agreement between them performed all of the acts necessary to commit NOO.

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[282] Name of Offence.

[283] If joint criminal enterprise is alleged as an alternative to acting as a sole offender, this sentence will need to be modified accordingly.

[284] This charge is based on cases involving multiple co-offenders. If there is only one co-offender, some of the sentences throughout the charge will need to be modified.

Four – that the accused had the state of mind necessary to commit NOO at the time of entering the agreement.

Before you can find NOA guilty of NOO by joint criminal enterprise, you must be satisfied that the prosecution has proven all four of these elements beyond reasonable doubt.

I will now explain each of these elements in more detail.

Agreement to Pursue a Joint Criminal Enterprise

The first element that the prosecution must prove is that the accused made an agreement with other people to pursue a joint criminal enterprise, and that the agreement remained in existence when the offence of NOO was committed.

There are two parts to this element. First, you must be satisfied that the accused came to an understanding or arrangement amounting to an agreement with at least one other person to pursue a joint criminal enterprise.

Such an agreement, understanding or arrangement may be expressly stated, or it may be inferred from the surrounding circumstances. You will recall what I have told you about inferences.[285]

[*If the content of the agreement, or the parties' understanding of the content, is in issue, add the following shaded section.*]

The agreement must have been to commit a criminal enterprise. This element will not be satisfied if the accused agreed to pursue some other form of wrongdoing that is not criminal. However, you do not need to find that the parties to the agreement knew that the relevant enterprise would be criminal. This element will be satisfied as long as they agreed to do something which was, in fact, criminal.

Similarly, you do not need to find that all of the parties had the same purpose or intention when forming that agreement, or were all aware of the consequences of their actions. You do not even have to find that they all agreed on the precise terms of the agreement. For this element to be satisfied, you only need to find that they agreed to commit a particular criminal act together.

An example of such an agreement would be where two people agree to commit a bank robbery together, with one of them to buy the gun and give it to the other, who will use it at the bank to steal the money. If they carry out this plan, they would both be equally guilty of the crime of armed robbery.[286]

In this case, the prosecution alleged that [*specify parties*] made an agreement to [*specify foundational crime*]. They alleged that this agreement was made [*insert prosecution evidence about the formation of the agreement*].

[*If the defence denies that there was an agreement to pursue a joint criminal enterprise, add the following shaded section.*]

The defence denied this, arguing [*insert defence evidence and/or arguments*].

[*If the defence does not deny that there was an agreement, contesting liability on other grounds, add the following shaded section.*]

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[285] This charge is based on the assumption that the judge has already instructed the jury about inferences. It will need to be modified if that has not been done.

[286] If the offence charged is armed robbery, a different example should be used.

The defence does not deny that such an agreement was made, but argues [*outline defence arguments*, e.*g.* "that the accused had withdrawn from that agreement by the time the offence was committed"].

The second part of this element requires the prosecution to prove that the agreement remained in existence when the offence was committed. If there is a possibility that the agreement had been called off prior to that time, or that NOA had withdrawn from that agreement, then this first element will not be met.

[*If withdrawal from the agreement is in issue, add the following shaded section.*]

In this case, the defence argued that, [while/even if] NOA had made an agreement to pursue a joint criminal enterprise, s/he had withdrawn from that agreement by the time the offence was committed. It is for the prosecution to prove that s/he had not done so.

The law says that if a person is going to withdraw from an agreement to pursue a joint criminal enterprise, his/her withdrawal must be timely and effective. That is, s/he must do everything that s/he can reasonably do to undo the effect of his/her previous agreement and participation, in sufficient time for his/her actions to be effective.

Whether the accused has taken all reasonable steps to undo the effect of his/her previous agreement is a question for you. You must apply your common sense and experience. For example, in some cases it will be sufficient for the accused to take back any tools he or she has provided for the commission of the crime, and to make it clear to the other parties that if they continue with the offence, they do so without his or her approval or support. In other cases it may be necessary for the accused to inform the police of the plan.

It is important to emphasise that it is not for the defence to prove that the accused did everything reasonably possible to withdraw from the agreement. It is the prosecution who must prove that the accused did not withdraw from the agreement in a timely and effective manner.

In this case, the prosecution argued that the accused had not done everything s/he reasonably could to withdraw from the agreement. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA's withdrawal was timely and effective. [*Insert defence evidence and/or arguments.*]

[*If it is alleged that the agreement had been cancelled or completed, add the following shaded section.*]

In this case, the defence argued that, while NOA did make an agreement to pursue a joint criminal enterprise, that agreement had been [completed/cancelled] by the time the offence of NOO was committed. [*Insert defence evidence and/or arguments.*] The prosecution disputed this, alleging that the agreement remained in existence at the relevant time. [*Insert prosecution evidence and/or arguments.*]

It is important to emphasise that it is not for the defence to prove that the agreement had been [completed/cancelled]. It is the prosecution who must prove that the agreement had not had been [completed/cancelled] by the time the offence was committed.

[*If the continuing existence of the agreement is not in issue, add the following shaded section.*]

In this case, it is not disputed that, if there was an agreement to pursue a joint criminal enterprise, that agreement remained in existence at the time the offence was committed. The main issue is [*outline main issue*[*s*], *e.g.* "whether or not there was such an agreement"].

It is only if you are satisfied, beyond reasonable doubt, that the accused made an agreement with other people to pursue a joint criminal enterprise, and that the agreement remained in existence when the offence of NOO was committed, that this first element will be met.

Participation

The second element that the prosecution must prove is that the accused participated in the joint criminal enterprise in some way.

That is, the accused must have done something to contribute to that enterprise. It is not enough that s/he merely agreed that it should be carried out.

For this element to be satisfied, you need to find that NOA performed some conduct, either legal or illegal, that in some way contributed to the commission of the crime. It does not matter how important or unimportant those acts were to the completion of the enterprise, as long as s/he did something to assist.

In this case, the prosecution alleged that NOA participated in the agreement by [*insert prosecution evidence about NOA's participation*]. The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Performance of the Necessary Acts

The third element that the prosecution must prove is that, in accordance with their agreement, understanding or arrangement, the parties between them performed all of the acts necessary to commit NOO.

There are also two parts to this element. First, you must be satisfied that all of the necessary acts were committed by parties to the agreement. This means that you must find that all of the following matters have been proven beyond reasonable doubt:

[*Describe all of the elements of the offence other than the accused's mental state, explain those elements, and relate them to the facts.*]

You do not need to find that each party to the agreement committed each of these acts. Even if they each only played a minor role, this part of the second element will be satisfied as long as all of the necessary acts were committed between the parties to the agreement.

The second part of this element requires the prosecution to prove that the commission of this offence was within the scope of the parties' agreement. That is, NOA and [*identify co-offenders*] must have agreed to commit the acts that constitute that offence. NOA will not be guilty of committing NOO by joint criminal enterprise if that offence was outside the bounds of what s/he had agreed to.

To determine what acts were within the scope of the agreement, you must consider the beliefs the parties held at the time they made that agreement. Whatever acts they all believed would or could be committed in the course of carrying out that agreement are to be treated as being within its scope.

[*If the offence committed may not have been the primary purpose of the criminal enterprise, add the following shaded section.*]

You will notice that I referred to acts that "would or could" be committed in the course of carrying out the agreement. This reflects the fact that the scope of an agreement includes any contingencies that are planned as part of that agreement. It is not limited to the acts the parties are definitely planning to carry out. So even if the parties were hoping to avoid committing a particular act, and did not think it was likely to be necessary, if there was a plan to perform that act if certain circumstances arose, then it should be treated as being within the scope of the agreement.

In this case the prosecution alleged that [*describe relevant prosecution evidence and/or arguments*]. The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

It is only if you are satisfied that the parties performed all of the acts necessary to commit NOO, and that the commission of this offence was within the scope of the parties' agreement, that this third element will be met.

Accused's Mental State

The fourth element that the prosecution must prove is that the accused had the state of mind necessary to commit NOO when s/he entered into the agreement.

In this case, that means that NOA must have [*describe and explain the relevant state of mind for the substantive offence*].

NOA him/herself must have had that state of mind. It will not be sufficient for the prosecution to prove that one of the other parties to the agreement had that state of mind at the time of entering into the agreement.

[*If withdrawal is in issue, add the following shaded section.*]

As I explained to you earlier, in order to withdraw from a criminal agreement, a person must do everything that s/he can reasonably do to undo the effect of his/her previous agreement. It is not enough that NOA may have privately regretted the agreement or hoped that the offence would not proceed. Even if you find that NOA did have private regrets, you will still find this fourth element established if NOA had the state of mind necessary to commit NOO when s/he entered into the agreement. It is only if s/he made an effective withdrawal from the agreement that this "change of heart" could be relevant to this fourth element.

In this case, the prosecution alleged that NOA had the necessary state of mind. [*Describe relevant prosecution evidence and/or arguments.*] The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Defences

[*If any* defences *are open on the evidence, insert relevant directions.*]

Summary

To summarise, before you can find NOA guilty of NOO by joint criminal enterprise, the prosecution must prove to you beyond reasonable doubt:

One – That NOA was a party to an agreement to pursue a joint criminal enterprise, and that the agreement remained in existence when the offence of NOO was committed; and

Two – That NOA participated in the joint criminal enterprise in some way; and

Three – That, in accordance with the agreement, the parties between them performed all of the acts necessary to commit NOO;[287] and

Four – That NOA had the state of mind necessary to commit NOO when s/he entered into the agreement.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of committing NOO by a joint criminal enterprise.

Last updated: 1 November 2014

5.3.2 Checklist: Joint Criminal Enterprise

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused made an agreement with other people to pursue a joint criminal enterprise, and that agreement remained in existence when the offence was committed; and

[287] This summary will need to be modified to include the phrase "in the necessary circumstances" if one or more elements of the crime require the physical acts to be committed under certain conditions (e.g. for sexual penetration to be committed in the absence of the complainant's consent).

2. The accused participated in the joint criminal enterprise; and

3. In accordance with the agreement, the parties to the agreement between them performed all the acts necessary to commit the offence; and

4. The accused had the state of mind necessary to commit the offence.

Criminal Agreement

1.1 Did the accused make an agreement with other people to pursue a joint criminal enterprise?

If Yes, then go to Question 1.2

If No, then the accused is not guilty of committing the offence charged by pursuing a joint enterprise

1.2 Did that agreement remain in existence at the time the offence was committed?

Consider – Have the prosecution proved that the accused did not withdraw from the agreement in a timely and effective manner? Have they established that the accused had not done everything reasonably possible to withdraw from the agreement?[288]

If Yes, then go to Question 2

If No, then the accused is not guilty of committing the offence charged by pursuing a joint enterprise

Participation

2. Did the accused participate in the joint criminal enterprise in some way?

Consider – Did the accused contribute to the commission of the offence?

If Yes, then go to Question 3.1

If No, then the accused is not guilty of committing the offence charged by pursuing a joint enterprise

Performance of Agreement

3.1 Did the parties to the agreement between them, or a party to the agreement, other than the accused, perform all of the acts needed to commit the offence?[289]

If Yes, then go to Question 3.2

If No, then the accused is not guilty of committing the offence charged by pursuing a joint

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[288] This paragraph should be deleted if withdrawal from the agreement is not in issue.

[289] If a separate checklist outlining the elements of the offence is provided to the jury, it may be desirable to include a cross-reference to that checklist here, noting which elements of the offence must be proven for this element to be met.

enterprise

3.2 Was the offence within the scope of the agreement?

Consider – What beliefs did the parties hold at the time they made the agreement? Did they believe that the offence would or could be committed in the course of carrying out the agreement?

If Yes, then go to Question 4

If No, then the accused is not guilty of committing the offence charged by pursuing a joint enterprise

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State of Mind

4. Did the accused have the state of mind necessary to commit the offence, at the time s/he entered into the agreement?[290]

If Yes, then the accused is guilty of the offence charged (as long as you have also answered Yes to questions 1.1, 1.2, 2, 3.1 and 3.2)

If No, then the accused is not guilty of committing the offence charged by pursuing a joint enterprise

Last updated: 1 November 2014

5.4 Extended Common Purpose (Pre-1/11/14)

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Overview

1. This topic examines the common law principle of extended common purpose. On 1 November 2014, that principle was abolished by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*. For offences committed on or after 1 November 2014, see Statutory Complicity.
2. The doctrine of "extended common purpose" applies to cases in which two or more parties reach an agreement to commit a crime (the "foundational crime"), and in the course of pursuing that agreement, one or more of the parties commit a different crime (the "charged offence"). The doctrine holds that any party to the agreement who foresaw the possibility that the charged offence would be committed when the agreement was carried out will be liable for that crime (*Johns v R* (1980) 143 CLR 108; *McAuliffe v R* (1995) 183 CLR 108; *Hartwick, Clayton & Hartwick v R* (2006) 231 ALR 500; *R v Hartwick, Clayton & Hartwick* (2005) 14 VR 125).
3. This is a form of liability for reckless participation in a criminal enterprise (*R v Powell; R v English* [1997] 3 WLR 959). The liability of the accused is based on his/her continued participation in the criminal enterprise, despite foreseeing the risk that other crimes would be committed as part of that enterprise (*Gillard v R* (2003) 219 CLR 1; *R v Panozzo* [2007] VSCA 245).
4. To establish liability by way of extended common purpose, the prosecution must prove:

   i) That two or more people reached an agreement to commit a crime (the foundational crime)

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[290] If a separate checklist outlining the elements of the offence is provided to the jury, it may be desirable to include a cross-reference to that checklist here, noting which elements of the offence must be proven for this element to be met.

that remained in existence at the time the charged offence was committed;

ii) That in the course of carrying out the agreement, one or more of the parties to the agreement, other than the accused, committed the charged offence; and

iii) That the accused foresaw the possibility that one or more parties to the agreement would commit the charged offence when the agreement was carried out (*McAuliffe v R* (1995) 183 CLR 108; *Hartwick, Clayton & Hartwick v R* (2006) 231 ALR 500; *R v Hartwick, Clayton & Hartwick* (2005) 14 VR 125; *R v Taufahema* (2007) 228 CLR 232; *R v Jones* (2006) 161 A Crim R 511).

Agreement to Commit a Crime

5. For the first element to be met, the prosecution must prove:
    - That the accused reached an agreement with others to commit a crime; and
    - That the agreement remained in existence at the time the charged offence was committed (*Hartwick, Clayton & Hartwick v R* (2006) 231 ALR 500; *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11).
6. For information concerning this element (which is identical to the first element of joint criminal enterprise), see 5.3 Joint Criminal Enterprise (Pre-1/11/14).

Performance of the Necessary Acts

7. For the second element to be met, the prosecution must prove that, in the course of carrying out the agreement, one or more of the parties to the agreement, other than the accused, committed the offence charged (*McAuliffe v R* (1995) 183 CLR 108; *Hartwick, Clayton & Hartwick v R* (2006) 231 ALR 500; *R v Hartwick, Clayton & Hartwick* (2005) 14 VR 125; *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11; *R v Jones* (2006) 161 A Crim R 511).
8. The principles of extended common purpose should generally not be used if the charged offence was also the foundational crime. In that situation, a different form of complicity should be used instead (*R v Stokes & Difford* (1990) 51 A Crim R 25. See 5.2 Statutory Complicity (From 1/11/14) (From 1/11/14) or 5.3 Joint Criminal Enterprise (Pre-1/11/14) to determine the most appropriate form of complicity to use in such a case).
9. In some cases, it is permissible to direct using extended common purpose principles, even if the charged offence was the foundational crime (*R v Mills, Sinfield & Sinfield* (1985) 17 A Crim R 411; *R v Mills* (1986) 68 ALR 455).

Foresight of Accused

10. The third element requires the accused to have foreseen the possibility that one or more of the parties to the agreement would commit the charged offence when the agreement was carried out (*McAuliffe v R* (1995) 183 CLR 108; *Hartwick, Clayton & Hartwick v R* (2006) 231 ALR 500; *R v Hartwick, Clayton & Hartwick* (2005) 14 VR 125; *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11; *R v Jones* (2006) 161 A Crim R 511).
11. The accused does not need to have intended that the charged offence be committed. The prosecution only needs to prove that s/he foresaw the commission of the charged offence as a possible result of carrying out the criminal enterprise (*Hartwick, Clayton & Hartwick v R* (2006) 231 ALR 500).
12. The accused will be liable for crimes that s/he foresaw as *possible*. S/he does not need to have considered the commission of the charged offence to have been *probable* (*Hartwick, Clayton & Hartwick v R* (2006) 231 ALR 500).

13. The judge may tell the jury that the accused must have foreseen that the charged offence *might* result. If it is necessary to explain this further, it is permissible to tell the jury that this means that there was a real or substantial possibility that it would result (*R v Hartwick, Clayton & Hartwick* (2005) 14 VR 125).

14. It is not necessary to elaborate on the meaning of "possible" in every case (*R v Hartwick, Clayton & Hartwick* (2005) 14 VR 125).

15. The accused must not only have foreseen the possibility that the perpetrator would commit the relevant acts, but also that s/he might act with the requisite state of mind[291] and in the absence of any defences (*Hartwick, Clayton & Hartwick v R* (2006) 231 ALR 500; *R v Hartwick, Clayton & Hartwick* (2005) 14 VR 125; *McAuliffe v R* (1995) 183 CLR 108).

16. This form of liability considers the foresight of an individual accused. It is not necessary to prove that the offence was within the joint contemplation of the parties or was an agreed contingency (*McAuliffe v R* (1995) 183 CLR 108).

Last updated: 1 November 2014

5.4.1 Charge: Extended Common Purpose

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This charge only applies to offences committed before 1 November 2014.

NOA has been charged with the offence of NOO.[292] However, it has not been alleged that s/he committed that offence him/herself.[293] Instead, the prosecution has alleged that NO3P[294] committed that offence, but that NOA should be held responsible for NO3P's actions. I must therefore give you some directions about when someone can be held responsible for the acts of another person.

The law says that if the accused makes an agreement with other people to pursue a criminal enterprise, and in the course of pursuing that enterprise one of the other people commits an offence which was not part of the agreement, the accused should be held responsible for that offence if s/he foresaw that it could happen. This is called the law of "extended common purpose". It makes the accused liable for continuing to participate in a criminal enterprise, despite foreseeing the risk that the offence would be committed.

In order to find NOA guilty of committing NOO by extended common purpose, there are 3 elements, all of which the prosecution must prove beyond reasonable doubt. I will list them for you and then explain each one in detail.

The first element that the prosecution must prove is that the accused made an agreement with other people[295] to commit a criminal act, and that the agreement remained in existence when the offence of NOO was committed.

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[291] If the charged offence has an objective fault element (e.g. manslaughter), the accused does not need to have foreseen any particular state of mind (Gillard v R (2003) 219 CLR 1; R v PDJ (2002) 7 VR 612).

[292] Name of Offence.

[293] If joint criminal enterprise is alleged as an alternative to acting as a sole offender, this sentence will need to be modified accordingly.

[294] Name of 3rd party (the alleged offender).

[295] This charge is based on cases involving multiple co-offenders. If there is only one co-offender, some of the sentences throughout the charge will need to be modified.

The second element that the prosecution must prove is that, in carrying out the agreement, a party to the agreement committed NOO.

The third element that the prosecution must prove is that the accused foresaw the possibility that another party to the agreement would commit NOO when the agreement was carried out.

Before you can find NOA guilty of committing NOO by extended common purpose, you must be satisfied that all three of these elements have been proven beyond reasonable doubt.

I will now explain each of these elements in more detail.

Agreement to Commit Criminal Acts

The first element that the prosecution must prove is that the accused made an agreement with other people to commit a criminal act, and that the agreement remained in existence when the offence of NOO was committed.

There are two parts to this element. First, you must be satisfied that the accused came to an understanding or arrangement amounting to an agreement with at least one other person to commit a criminal act together.

Such an agreement, understanding or arrangement may be expressly stated, or it may be inferred from the surrounding circumstances. You will recall what I have told you about inferences.[296]

[*If the content of the agreement, or the parties' understanding of the content, is in issue, add the following shaded section.*]

The agreement must have been to commit a criminal act. This element will not be satisfied if the accused agreed to pursue some other form of wrongdoing that is not criminal. However, you do not need to find that the parties to the agreement knew that the relevant act would be criminal. This element will be satisfied as long as they agreed to do something which was, in fact, criminal.

Similarly, you do not need to find that all of the parties had the same purpose or intention when forming that agreement, or were all aware of the consequences of their actions. You do not even have to find that they all agreed on the precise terms of the agreement. For this element to be satisfied, you only need to find that they agreed to commit a particular criminal act together.

In this case, the prosecution alleged that [*specify parties*] made an agreement to [*specify foundational crime*]. They alleged that this agreement was made [*insert prosecution evidence about the formation of the agreement*].

[*If the defence denies that there was an agreement to commit a criminal act, add the following shaded section.*]

The defence denied this, arguing [*insert defence evidence and/or arguments*].

[*If the defence does not deny that there was an agreement, contesting liability on other grounds, add the following shaded section.*]

The defence does not deny that such an agreement was made, but argues [*outline defence arguments, e.g.* "that the accused did not foresee that NO3P would commit NOO"].

[296] This charge is based on the assumption that the judge has already instructed the jury about inferences. It will need to be modified if that has not been done.

The second part of this element requires the prosecution to prove that the agreement remained in existence when the offence was committed. If there is a possibility that the agreement had been called off prior to that time, or that NOA had withdrawn from that agreement, then this first element will not be met.

[*If withdrawal from the agreement is in issue, add the following shaded section.*]

In this case, the defence argued that, [while/even if] NOA had made an agreement to commit a criminal act, s/he had withdrawn from that agreement by the time the offence was committed. It is for the prosecution to prove that s/he had not done so.

The law says that if a person is going to withdraw from an agreement to commit a criminal act, his/her withdrawal must be timely and effective. That is, s/he must do everything that s/he can reasonably do to undo the effect of his/her previous agreement, in sufficient time for his/her actions to be effective.

Whether the accused has taken all reasonable steps to undo the effect of his/her previous agreement is a question for you. You must apply your common sense and experience. For example, in some cases it will be sufficient for the accused to take back any tools he or she has provided for the commission of the crime, and to make it clear to the other parties that if they continue with the offence, they do so without his or her approval or support. In other cases it may be necessary for the accused to inform the police of the plan.

It is important to emphasise that it is not for the defence to prove that the accused did everything reasonably possible to withdraw from the agreement. It is the prosecution who must prove that the accused did not withdraw from the agreement in a timely and effective manner.

In this case, the prosecution argued that the accused had not done everything s/he reasonably could to withdraw from the agreement. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA's withdrawal was timely and effective. [*Insert defence evidence and/or arguments.*]

[*If it is alleged that the agreement had been cancelled or completed, add the following shaded section.*]

In this case, the defence argued that, while NOA did make an agreement to commit a criminal act, that agreement had been [completed/cancelled] by the time the offence of NOO was committed. [*Insert defence evidence and/or arguments.*] The prosecution disputed this, alleging that the agreement remained in existence at the relevant time. [*Insert prosecution evidence and/or arguments.*]

It is important to emphasise that it is not for the defence to prove that the agreement had been [completed/cancelled]. It is the prosecution who must prove that the agreement had not been [completed/cancelled] by the time the offence was committed.

[*If the continuing existence of the agreement is not in issue, add the following shaded section.*]

In this case, it is not disputed that, if there was an agreement to commit a criminal act, that agreement remained in existence at the time the offence was committed. The main issue is [*outline main issue*[*s*], *e.g.* "whether or not there was such an agreement"].

It is only if you are satisfied, beyond reasonable doubt, that the accused made an agreement with other people to commit a criminal act, and that the agreement remained in existence when the offence of NOO was committed, that this first element will be met.

Commission of the Offence

The second element that the prosecution must prove is that, when carrying out the agreement, understanding or arrangement, a party committed an offence.

In this case, the prosecution alleged that NO3P committed the offence of NOO in the course of carrying out the agreement. So for this element to be met, you must be satisfied that NO3P committed all of the acts necessary for the commission of NOO with the necessary mental state.

I must therefore [direct/remind] you about those matters. A person commits NOO if s/he:

[*Describe and explain all the elements of the offence charged, including any necessary state of mind and any relevant defences, and relate to the facts.*]

If you are satisfied, based on all of the evidence,[297] that NO3P committed the offence of NOO, then this second element will be met.

Foresight of Accused

The third element that the prosecution must prove is that NOA foresaw the possibility that a party to the agreement would commit NOO. That is, s/he realised that someone might commit that offence in the course of carrying out the agreement.

For this element to be met, NOA does not need to have intended that NOO be committed, nor does s/he have to have thought that it was likely or probable that someone would commit that offence. It is sufficient if s/he thought it was possible.

In particular, s/he must have foreseen the possibility that:

[*Again describe all the elements of the offence charged, including the relevant mental state and any defences.*]

In reaching your conclusion, you will need to draw an inference about NOA's state of mind. You will recall what I have told you about inferences.[298]

The prosecution argued that NOA did foresee the possibility that NOO would be committed when the agreement was carried out. [*Describe relevant prosecution evidence and/or arguments.*] The defence denied that, arguing [*describe relevant defence evidence and/or arguments*].

Summary

To summarise, before you can find NOA guilty of NOO by extended common purpose, the prosecution must prove to you beyond reasonable doubt:

One – That NOA was a party to an agreement to commit a criminal act, and that the agreement remained in existence when the offence of NOO was committed; and

Two – That, in the course of carrying out the agreement, a party to the agreement committed the offence; and

Three – That NOA foresaw the possibility that, in the course of carrying out the agreement, a party to the agreement would commit the offence of NOO.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of committing NOO by extended common purpose.

Last updated: 1 November 2014

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[297] If the accused is being tried with the primary offender, and the evidence admissible for each co-accused differs, the judge may need to remind the jury to only consider the evidence that is admissible against this accused.

[298] This charge is based on the assumption that the judge has already instructed the jury about inferences. It will need to be modified if that has not been done.

5.4.2 Checklist: Extended Common Purpose

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused made an agreement with other people to commit a criminal act, and that agreement remained in existence when the offence was committed; and
2. While carrying out the agreement, a party to the agreement committed the offence charged; and
3. The accused foresaw the possibility that one of the parties to the agreement would commit that offence.

Criminal Agreement

1.1 Did the accused make an agreement with other people to commit a criminal act?

If Yes, then go to Question 1.2

If No, then the accused is not guilty of committing the offence charged by extended common purpose

1.2 Did that agreement remain in existence at the time the offence was committed?

Consider – Have the prosecution proved that the accused did not withdraw from the agreement in a timely and effective manner? Have they established that the accused had not done everything reasonably possible to withdraw from the agreement?[299]

If Yes, then go to Question 2

If No, then the accused is not guilty of committing the offence charged by extended common purpose

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Commission of Offence

2. Did a party to the agreement commit the offence charged while carrying out the agreement?[300]

If Yes, then go to Question 2

If No, then the accused is not guilty of committing the offence charged by extended common purpose

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Foresight of Accused

3. Did the accused foresee the possibility that a party to the agreement would commit the offence

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[299] This paragraph should be deleted if withdrawal from the agreement is not in issue.

[300] If a separate checklist outlining the elements of the offence is provided to the jury, it may be desirable to include a cross-reference to that checklist here.

charged?[301]

Consider – The accused does not need to have thought it was likely or probable that the offence would be committed. He or she only needs to have thought that it was possible that a party to the agreement would commit that offence in the course of carrying out the agreement.

If Yes, then the accused is guilty of the offence charged (as long as you have also answered Yes to questions 1.1, 1.2, 2)

If No, then the accused is not guilty of committing the offence charged by extended common purpose

Last updated: 1 November 2014

5.5 Aiding, Abetting, Counselling or Procuring (Pre-1/11/14)

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1. This topic examines the principle of aiding, abetting, counselling and procuring prior to 1 November 2014. On 1 November 2014, those principles were replaced by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*. For offences committed on or after 1 November 2014, see 5.2 Statutory Complicity (From 1/11/14).

General Principles

Liability of a Person who Aids, Abets, Counsels or Procures

2. A person may be tried as a principal offender if s/he aids, abets, counsels or procures the commission of an indictable offence (*Crimes Act 1958* s 323).[302]

3. A person who aids, abets, counsels or procures the commission of an offence commits that substantive offence. S/he does not commit a distinct offence of being an accessory (*R v Wong* [2005] VSC 96).

Meaning of "Aid, Abet, Counsel or Procure"

4. In Australia, the words "aid, abet, counsel or procure" may be read collectively, to describe a person who assists or encourages someone to commit an offence (*Giorgianni v R* (1985) 156 CLR 473; *R v Wong* [2005] VSC 96; *Likiardopoulos v R* (2010) 30 VR 654; [2010] VSCA 344; *Arafan v R* (2010) 31 VR 82; [2010] VSCA 356; *R v Russell* [1933] VLR 59; but c.f. *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773).

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[301] If a separate checklist outlining the elements of the offence is provided to the jury, it may be desirable to include a cross-reference to that checklist here, noting the need for the accused to have foreseen each of those elements.

[302] The situation in relation to summary offences is slightly different. Unlike *Crimes Act 1958* s 323, which provides that a person who aids, abets, counsels or procures the commission of an indictable offence may be tried, indicted or presented and punished as a principal offender, *Crimes Act 1958* s 324 provides that such a person will be liable to the same punishment as a principal offender. Despite this difference, many of the principles outlined in this commentary will be relevant to summary offences.

5. This requires the accused to be linked in purpose with the person who commits the offence (the "principal offender"), and to act to bring about or render more likely the commission of the offence (*Giorgianni v R* (1985) 156 CLR 473; *R v Russell* [1933] VLR 59; *R v Wong* [2005] VSC 96; *R v Phan* (2001) 53 NSWLR 480).

6. The prosecution does not need to prove that there was any agreement between the accused and the principal offender. The lack of an agreement is what distinguishes aiding, abetting, counselling or procuring from other forms of complicity (e.g. Acting in Concert, Joint Criminal Enterprise, Extended Common Purpose) (*R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448; *R v Lowery & King (No 2)* [1972] VR 560; *R v Nguyen* [2010] VSCA 23; *Arafan v R* (2010) 31 VR 82; [2010] VSCA 356).

Not Available for All Offences

7. Liability for aiding, abetting, counselling or procuring will be available in relation to all offences, unless specifically excluded or excluded as a matter of necessary implication (*Mallan v Lee* (1949) 80 CLR 198; *Giorgianni v R* (1985) 156 CLR 473).

8. This type of liability will not necessarily be excluded by the fact that a particular offence may only be committed by a prescribed class of offenders. A person may aid, abet, counsel or procure an offence even s/he is incapable of committing that offence as the principal offender (*Mallan v Lee* (1949) 80 CLR 198; *R v Goldie; Ex parte Picklum* (1937) 59 CLR 254).

9. However, this type of liability may not be available where the accused is a member of a class the legislation is designed to protect (see, e.g. *R v Whitehouse* [1977] QB 868).[303]

10. This type of liability may also not be available where there is a separate and specific offence that deals with accessorial liability for a given offence (see, e.g. *Ellis v Guerin* [1925] SASR 282).

Elements

11. To establish liability by way of aiding, abetting, counselling or procuring, the prosecution must establish:

    i) That the principal offence was committed;

    ii) That the accused knew the essential circumstances that establish the principal offence; and

    iii) That the accused intentionally assisted or encouraged the principal offender to commit that offence (*Giorgianni v R* (1985) 156 CLR 473).

12. The second and third elements may overlap. A person generally cannot intentionally assist or encourage a person to commit an offence unless s/he is aware of the essential facts that constitute the offence (*Giorgianni v R* (1985) 156 CLR 473).

13. The judge must clearly explain all of the principles involved in proving this form of liability, and relate them to the evidence. It is not sufficient to simply direct the jury that the accused must have intentionally aided, abetted, counselled or procured the commission of the offence (*R v Abbouchi & Allouche* [2008] VSCA 171).

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[303] For example, a person under the age of 16 is not able to aid or abet the offence of sexual penetration of him/herself (see, e.g. *R v Whitehouse* [1977] QB 868). By contrast, in the absence of express provisions to the contrary, the beneficiary of a restraining order may be prosecuted for aiding and abetting the breach of that order (see, e.g. *Keane v Police* (1997) 69 SASR 481, but note Family Violence Protection Act 2008 s 125).

Commission of the Principal Offence

14. The first element requires the prosecution to prove, using evidence admissible against the accused, that the principal offence was committed (*Giorgianni v R* (1985) 156 CLR 473; *R v Hewitt* [1997] 1 VR 301; *R v Demirian* [1989] VR 97; *R v Jensen and Ward* [1980] VR 194; *R v Tamme* [2004] VSCA 165).

15. This requires the prosecution to prove that the principal offender committed the relevant criminal acts with the necessary criminal intention (*R v Jensen and Ward* [1980] VR 194).

16. If the accused and the principal offender are tried together, and the evidence against them is the same, the accused generally cannot be found guilty unless the principal offender is also found guilty (*Osland v R* (1998) 197 CLR 316).

17. However, different verdicts between a principal offender and an accessory will not always be inconsistent. For example, there may be sufficient evidence to prove that the accessory assisted someone to commit the principal offence, but insufficient evidence to establish the identity of the principal offender (*Osland v R* (1998) 197 CLR 316; *R v King* (1986) 161 CLR 423; *Likiardopoulos v R* (2010) 30 VR 654; [2010] VSCA 344).

18. If the accused and the principal offender are not tried together:

    - The prosecution does not need to prove that someone has been convicted as the principal offender (*Giorgianni v R* (1985) 156 CLR 473); and
    - Evidence that another person has been convicted is not admissible against the accused (*R v Kirkby* [2000] 2 Qd R 57; *Evidence Act 2008* s 91);
    - It is not an abuse of process for the prosecution to charge the accused with aiding, abetting, counselling or procuring an offence which is more serious than the one to which the principal offender pleaded guilty (or was convicted at trial) (*Likiardopoulos v R* (2010) 30 VR 654; [2010] VSCA 344; *Hui Chi-ming v R* [1992] 1 AC 34).

19. In some cases, the prosecution may not be able to prove which of several co-accused performed the relevant criminal acts. In such a case, the jury may convict all of the co-accused of the offence if satisfied, by evidence admissible against each co-accused, that one (or more) of them committed the offence and the others were accessories. The jury does not need to decide which of them was the principal offender and which were accessories (*R v Lowery & King (No 2)* [1972] VR 560).

Knowledge

20. The second element requires the prosecution to prove that the accused knew of, or believed in, the essential circumstances that establish the principal offence (*Giorgianni v R* (1985) 156 CLR 473).

21. The "essential circumstances" of an offence are the facts that will go to satisfying the elements of the offence (*Giorgianni v R* (1985) 156 CLR 473; *Likiardopoulos v R* (2010) 30 VR 654; [2010] VSCA 344).

22. For *mens rea* offences, this includes knowledge of, or belief in, the principal offender's state of mind (*R v Stokes & Difford* (1990) 51 A Crim R 25; *R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448; *Likiardopoulos v R* (2010) 30 VR 654; [2010] VSCA 344; *R v Phan* (2001) 53 NSWLR 480; c.f. *R v Le Broc* (2000) 2 VR 43).[304]

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[304] For strict liability offences, while the accused must know the essential circumstances of the offence, s/he does not need to have any awareness of the principal offender's state of mind (*Giorgianni v R* (1985) 156 CLR 473).

23. Where the offence requires a particular result to have been caused (e.g. death or serious injury), the accused does not need to know that this result will be achieved. It is sufficient if s/he knew that the principal offender was going to commit the acts which ultimately caused that result, and that s/he knew the principal offender would have the requisite state of mind when committing those acts (*Giorgianni v R* (1985) 156 CLR 473; *R v Stokes & Difford* (1990) 51 A Crim R 25; *Likiardopoulos v R* (2010) 30 VR 654; [2010] VSCA 344).

24. The jury must consider what the accused knew at the time s/he assisted or encouraged the principal offender, rather than at the time the principal offender committed the offence (*R v Stokes & Difford* (1990) 51 A Crim R 25).

25. The accused must have actual knowledge or belief of the essential circumstances. It is not sufficient that s/he should have known of those circumstances, or failed to inquire about them (*Giorgianni v R* (1985) 156 CLR 473).

26. However, the failure of a person to make inquiries about the circumstances may be evidence that s/he was aware of the relevant facts (*Giorgianni v R* (1985) 156 CLR 473).

27. The accused does not need to know that the principal offence is a criminal offence. It is sufficient if s/he is aware of all the facts that constitute the offence (*Johnson v Youden* [1950] 1 KB 544; *Giorgianni v R* (1985) 156 CLR 473).

28. An employee's knowledge cannot necessarily be imputed to an employer (*Ferguson v Weaving* [1951] 1 KB 814).

Assistance or Encouragement

29. The third element requires the accused to have intentionally assisted or encouraged the principal offender to commit the offence charged (*Giorgianni v R* (1985) 156 CLR 473).

30. For this to be the case, the accused must have been linked in purpose with the principal offender, and spoken words or performed acts designed to bring about the commission of the offence (*R v Tamme* [2004] VSCA 165; *R v Wong* [2005] VSC 96).

31. It is not necessary (or sufficient) to show that the accused exerted control over the principal offender. In cases of aiding, abetting, counselling or procuring, the principal offender will have acted voluntarily, breaking the causal link between the accused's alleged control of the principal offender and the commission of the offence (*R v Franklin* (2001) 3 VR 9).

32. The accused also does not need to have reached an agreement with the principal offender about the commission of the crime. S/he merely needs to have provided encouragement or assistance to the principal offender (*R v Oberbilig* [1989] 1 Qd R 342; *R v Nguyen* [2010] VSCA 23).

33. Where it is alleged that the accused "assisted" the principal offender, it is not necessary to prove that the principal offender was aware of the accused's assistance (*R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448).

34. Where it is alleged that the accused "encouraged" the principal offender, it is also not necessary to prove that the principal offender was aware of the accused's encouragement, nor is it necessary to prove that s/he was actually encouraged by the accused's words or actions (*R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448).

35. However, in "encouragement" cases the prosecution must prove that the encouragement was communicated to the principal offender in circumstances such that s/he *could* have been aware of that encouragement (*R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448).

36. When considering this element, a distinction is sometimes drawn between assistance or encouragement which is offered before the offending ("counselling or procuring"), and assistance or encouragement offered at the time of the offending ("aiding or abetting").[305] These are discussed in turn below.

37. The jury are not, however, required to unanimously agree on the exact form of assistance. The jury only need to be collectively satisfied that the accused aided, abetted, counselled or procured the offence (*R v Wong* [2005] VSC 96).

Counselling or Procuring (Assistance Before the Offence)

38. The accused may provide assistance or encouragement prior to the commission of the relevant offence by either:

    (a) Urging, advising or soliciting the principal offender to commit the offence ("procuring"); or

    (b) Encouraging or supporting the principal offender to commit the offence ("counselling") (Chai v R (2002) 187 ALR 436; Stuart v The Queen (1976) 134 CLR 426; R v Oberbilig [1989] 1 Qd R 342).

39. A person will not have "counselled" the principal offender by merely suggesting that the offence be committed. S/he must have done more than simply instigate its commission (*Hutton v R* (1991) 56 A Crim R 211).

40. An accessory may "counsel" the principal offender by supplying equipment used in the offending (*R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448; *National Coal Board v Gamble* [1959] 1 QB 11).

41. It is not necessary to show that the assistance or encouragement caused the offending. The accused may counsel the principal offender to commit an offence that s/he intended to commit even without the accused's assistance or encouragement (Howell v Doyle [1952] VLR 128).[306]

Aiding or Abetting (Assisting at the Time of the Offence)

42. There are three ways in which a person may aid or abet the principal offender at the time of the offending:

    i) By intentionally *helping* the principal offender to commit the offence;

    ii) By intentionally *encouraging* the principal offender to commit the offence; or

    iii) By intentionally *conveying* to the principal offender that s/he assents to and concurs in the commission of the offence (*R v Lowery & King (No 2)* [1972] VR 560; *R v Dardovski* Vic CCA 18/5/1995).

43. As with counselling or procuring, the focus here is on whether the accused assisted or encouraged the principal offender in some way. To this end, conveying assent (the third method of aiding or abetting) is seen as an indirect form of encouragement (*R v Makin* (2004) 8 VR 262).

44. For the accused to have aided or abetted the principal offender, s/he must have actually provided encouragement or assistance in some form. It is not sufficient that s/he secretly held an intention to assist, but did not actually provide any assistance or encouragement (*R v Allan* [1965] 1 QB 130).

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[305] If assistance was provided after the offence was committed, see 5.6 Assist Offender.

[306] In *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773 there is a suggestion that the word "procure" requires a causal connection. Given that Australia treats the four words of "aid, abet, counsel or procure" as descriptive of a single idea, it is not likely that this causal connection is required in Victoria.

45. However, the accused's conduct does not need to have caused the offending in any way. An aider or abettor generally does not physically participate in the offending (*Osland v R* (1998) 197 CLR 316; *R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448).

46. In cases where the prosecution cannot prove which of several possible co-accused was the principal offender, it will be sufficient to prove that the co-accused all assisted or encouraged each other in some way (*R v Phan* (2001) 53 NSWLR 480; *R v Clough* (1992) 28 NSWLR 396; *R v Mohan* [1967] 2 AC 187).

Conveying Assent

47. As noted above, a person can aid or abet the principal offender by conveying assent to, and concurrence in, the commission of the offence (*R v Lowery & King (No 2)* [1972] VR 560; *R v Dardovski* Vic CCA 18/5/1995).

48. This test will not be satisfied by simply proving that the accused was present at the commission of the crime, and assented to and concurred in its commission. The prosecution must prove that the accused's acquiescence or assent amounted to assistance or encouragement in some way (*R v Phan* (2001) 53 NSWLR 480; *R v Al Qassim* [2009] VSCA 192).

49. This requires the prosecution to prove that the accused, directly or indirectly, expressed a willingness to assist the principal offender if required (*R v Makin* (2004) 8 VR 262).

50. The accused does not need to have actually provided assistance for this test to be satisfied. The focus of this test is on the accused's *willingness* to assist the principal offender if required (*R v Makin* (2004) 8 VR 262).

51. The accused's willingness to assist may be inferred from the way in which s/he conveyed his/her assent to commission of the crime (*R v Makin* (2004) 8 VR 262; *R v Phan* (2001) 53 NSWLR 480).

52. It is not necessary to consider the principal offender's response to the accused's offer of assistance. The issue is simply whether the accused conveyed his or her support (*R v Makin* (2004) 8 VR 262).

Presence at the Commission of the Crime

53. While historically an aider or abettor had to be present at the commission of the crime, this is no longer the case. A person may aid and abet a crime even if s/he is not physically present at the time it is committed (*R v Morgan* [1994] 1 VR 567; *R v Wong* [2005] VSC 96. See also *Arafan v R* (2010) 31 VR 82; [2010] VSCA 356).

54. Conversely, a person may be present at the commission of the crime, and not be an aider and abettor. Mere presence at a crime is not sufficient by itself to found liability (*R v Al Qassim* [2009] VSCA 192; *R v Makin* (2004) 8 VR 262; *R v Lam* (2008) 185 A Crim R 453; *R v Nguyen* [2010] VSCA 23; *Arafan v R* (2010) 31 VR 82; [2010] VSCA 356; *Al-Assadi v R* [2011] VSCA 111).

55. This is because, to be liable, a person must have assisted or encouraged the principal offender in some way. A person who is simply present at the commission of a crime will usually not have offered such assistance or encouragement (*R v Makin* (2004) 8 VR 262).

56. In some cases, however, the accused may assist or encourage the commission of a crime by being present. For example, by choosing to be present at the crime scene, the accused may provide moral support to the principal offender, or demonstrate a willingness to assist if required (*R v Lowery & King (No 2)* [1972] VR 560; *R v Conci* [2005] VSCA 173; *R v Panozzo* [2007] VSCA 245).

57. For the accused's presence to constitute assistance or encouragement, he or she must have done something more than simply be at the scene of the crime. The accused must, at some point, have said or done something which showed that he or she was linked in purpose with the principal offender, and thus contributed to the crime (*R v Al Qassim* [2009] VSCA 192; *R v Nguyen* [2010] VSCA 23).

58. The accused must have done something of a kind that can reasonably be seen as intentionally adopting and contributing to what was taking place in his or her presence (*Al-Assadi v R* [2011] VSCA 111).

59. Where it is alleged that the accused aided or abetted by being present at the scene of the crime, the judge should therefore tell the jury that mere presence is not sufficient. It should be made clear that something more is required (*R v Al Qassim* [2009] VSCA 192; *Al-Assadi v R* [2011] VSCA 111).

60. The judge should clearly identify the additional matters said to constitute assistance or encouragement (*R v Al Qassim* [2009] VSCA 192).

61. In determining whether the accused's presence aided or abetted the principal offender, the accused's conduct relating to the offence should be viewed as a whole. Things that the accused said or did prior to the commission of the principle offence may warrant the conclusion that the accused's presence made him or her complicit in the offence, by helping or encouraging the principal offender to commit the crime, or conveying assent to and concurrence in the commission of that crime (*R v Al Qassim* [2009] VSCA 192).

62. It may be possible for the jury to infer from the accused's *intentional* presence at the crime that he or she aided or abetted the principal offender. For example, if the criminal offending was designed to be a public spectacle (such as an illegal prize fight), and drew support from the presence of observers, the accused's presence may be seen as having provided encouragement to the principal offender (See *R v Coney* (1882) 8 QBD 534).

Intention to Assist

63. The third element requires the prosecution to not only prove that the accused assisted or encouraged the commission of the crime in some way, but that s/he *intended* to do so (*R v Stokes & Difford* (1990) 51 A Crim R 25; *R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448).

64. The accused's state of mind must be assessed at the time s/he gave the relevant support or assistance, rather than at the time of the offence (*White v Ridley* (1978) 140 CLR 342).

65. The state of mind the prosecution must prove in relation to an accessory differs from the state of mind required for the principal offender:

    - For the principal offender, the prosecution must prove that, at the time of the offence, s/he acted with the state of mind necessary for that offence;
    - For the accessory, the prosecution must prove that, at the time s/he offered assistance or encouragement to the principal offender, s/he intended to assist or encourage him/her (*R v Stokes & Difford* (1990) 51 A Crim R 25; *R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448).

66. The accused must have intended to encourage or assist the principal offender to commit offence charged. It is therefore not sufficient for the prosecution to prove that:

    - The accused had a general intention to assist crime (*R v Clarkson* [1971] 3 All ER 344; *Giorgianni v R* (1985) 156 CLR 473; *R v Tamme* [2004] VSCA 165); or
    - That the accused intended to assist or encourage a significantly different offence (*Giorgianni v R* (1985) 156 CLR 473; *Chai v R* (2002) 187 ALR 436; *R v Conci* [2005] VSCA 173).[307]

[307] The accused may be liable if the offence committed only varied slightly from the offence the accused intended to assist or encourage (e.g. murder rather than manslaughter) (see e.g. *R v Stokes & Difford* (1990) 51 A Crim R 25).

67. Where criminal liability attaches to conduct that produces a particular result (e.g. death or serious injury), it is not necessary that the accused intended to produce that result. It is only necessary that s/he intended to assist or encourage the conduct that ultimately produced that result (*Giorgianni v R* (1985) 156 CLR 473).

68. Even if the principal offence is one that does not require the principal offender to have had a particular state of mind when it was committed (i.e., a strict liability offence), the accused must still be shown to have intended to encourage or assist the principal offender to commit that offence (*Giorgianni v R* (1985) 156 CLR 473; *R v Tamme* [2004] VSCA 165; *R v Dardovski* Vic CCA 18/5/1995).

69. In cases where it is alleged that the accused provided assistance or encouragement by conveying approval of the offending (see above), the prosecution must prove that, by conveying that approval, the accused intended to assist or encourage the principal offender (*R v Makin* (2004) 8 VR 262; *R v Phan* (2001) 53 NSWLR 480).

70. Where it is suggested that the accused's presence at the crime assisted or encouraged its commission, it is for the jury to assess whether his/her presence was intended to have this effect (*R v Beck* (1989) 43 A Crim R 135; *R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448).

71. The accused's conduct prior to the commission of the offence may be evidence of whether s/he intended to provide encouragement or assistance at the time of the offence (*R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448).

72. In some cases, the accused's conduct after the offending may also be evidence of his/her state of mind at an earlier time (*R v Ngo* [2002] VSCA 188; *R v Kitchin* [2001] VSCA 66).

Failure to Act

73. Ordinarily, the fact that the accused failed to act in a particular way will not be sufficient to prove that s/he assisted or encouraged the principal offender to commit the crime (*R v Russell* [1933] VLR 59).

74. However, where the accused is under a legal or ethical duty to act, a failure to do so may be evidence of encouragement or assent to the offending (see, e.g. *R v Russell* [1933] VLR 59; *Ex parte Parker: Re Brotherson* (1957) SR (NSW) 326).

75. A duty to act may arise where the accused is *in loco parentis* to the victim (*R v Russell* [1933] VLR 59; *R v Clarke and Wilton* [1959] VR 645).

76. Where a person has a duty to act, s/he may be seen to have assisted or encouraged the principal offender if s/he fails to offer any protest to his/her conduct, or fails to offer any effective dissent (*R v Russell* [1933] VLR 59).

Withdrawing Assistance or Encouragement

77. A person who aids, abets, counsels or procures the commission of an offence may avoid liability if s/he expressly withdraws his/her assistance or encouragement before the offence is committed (*White v Ridley* (1978) 140 CLR 342; *R v Croft* [1944] KB 295).

78. The withdrawal must be accompanied by all action the accused can reasonably take to undo the effect of his/her previous encouragement or assistance. This may include informing the police (*White v Ridley* (1978) 140 CLR 342; *R v Tietie* (1988) 34 A Crim R 438; *R v Jensen and Ward* [1980] VR 196).

79. It is usually more difficult for an accused to withdraw at the time of the offence, as this will usually require greater conduct on the accused's behalf to undo the effect of his/her previous assistance or encouragement (see *R v Becerra* (1976) 62 Cr App R 212).

80. For further information about withdrawal, see the section on Withdrawal of Agreement in 5.3 Joint Criminal Enterprise (Pre-1/11/14).

Terminology

81. A judge should not refer to aiding and abetting as a "less formal" method of proving involvement in a crime than acting in concert. Such an expression may suggest that the inference of guilt might be more easily drawn (*R v Abbouchi & Allouche* [2008] VSCA 171).

82. A judge should also not refer to the accused being "simply" an aider and abettor (rather than a principal acting in concert). The word "simply" in this context carries the connotation of a less significant involvement inherent in the role, and a diminished seriousness in the finding by the jury that the accused was implicated in this way (*R v Abbouchi & Allouche* [2008] VSCA 171).

Last updated: 1 November 2014

5.5.1 Charge: Counselling and Procuring

Click here to download a Word version of this charge

This charge only applies to offence committed before 1 November 2014.

This charge should be used where the accused is alleged to have assisted or encouraged the principal offender prior to the offending.

NOA has been charged with the offence of NOO.[308] However, it has not been alleged that s/he personally committed the acts that make up that offence. Instead, the prosecution has alleged that s/he committed NOO by assisting or encouraging [*insert names of co-offenders*] to commit that offence. I must therefore direct you about when a person will be held responsible for assisting or encouraging someone else to commit an offence.

The law says that if someone "counsels or procures" another person to commit an offence, then they will be equally guilty of that offence, regardless of the fact that they did not commit the crime themselves. This is one of the situations in which the law holds a person responsible for the actions of other people.

In order to find NOA guilty of committing NOO by counselling or procuring, the prosecution must prove the following [three/four] elements:[309]

One – that someone committed the offence of NOO. Throughout these directions, I will call the person who committed that offence the "principal offender".

Two – that the accused knew of, or believed in, the essential circumstances needed to establish NOO.

Three – that the accused intentionally assisted or encouraged the principal offender to commit NOO.

[*If withdrawal is relevant, add the following shaded section.*]

Four – that the accused did not effectively withdraw his/her assistance or encouragement prior to the offence being committed.

Before you can find NOA guilty of NOO by counselling or procuring, you must be satisfied that the prosecution has proven all of these elements beyond reasonable doubt.

I will now explain each of these elements in more detail.

---

[308] Name of Offence.

[309] If withdrawal is relevant, there are four elements. Otherwise, there are three elements.

Commission of Offence

The first element that the prosecution must prove is that someone committed the offence of NOO.

In this case, this requires you to be satisfied that all of the following matters have been proven beyond reasonable doubt:

[*Describe all of the elements of the offence, explain those elements, and relate them to the facts.*]

Knowledge

The second element that the prosecution must prove is that NOA knew all the essential circumstances needed to establish the offence of NOO, or believed that those essential circumstances existed.

The "essential circumstances" that are needed to establish NOO are the [*insert number*] matters that I just explained to you in relation to the first element. So for this second element to be met, NOA must have known or believed that:

[*Summarise all of the elements*[310] *of the principal offence.*]

For this element to be satisfied, you must find that NOA him/herself actually knew of, or believed in, all of these circumstances at the time s/he [*describe the alleged conduct constituting the counselling or procuring*]. It is not sufficient for you to find that s/he should have known those circumstances.

The prosecution alleged that NOA had the necessary knowledge or belief. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

Intentional Assistance or Encouragement

The third element that the prosecution must prove is that the accused intentionally assisted or encouraged the principal offender to commit NOO. In this case, it is alleged that NOA did this by what is called "counselling or procuring".

A person counsels or procures the commission of an offence if s/he urges, advises or solicits the principal offender to commit that offence, or encourages or supports him or her to commit it. This can be done by words, action or both.

For this element to be met, you do not need to be satisfied that NOA's words or actions caused the principal offender to commit the crime. A person can counsel or procure someone to commit an offence even if that other person already intended to commit that offence.

You also do not need to be satisfied that the principal offender was actually assisted or encouraged by NOA's behaviour. As long as NOA endeavoured to assist or encourage him/her, in circumstances in which the principal offender could potentially have been assisted or encouraged, then this element will be met.

However, you must be satisfied that NOA intentionally counselled or procured the commission of NOO. That is, you must be satisfied that, by saying or doing what s/he did, NOA intended to assist or encourage the principal offender to commit that offence.

[*If the relevant offence requires a particular result to have been caused add the following shaded section.*]

This does not mean that you have to find that NOA intended [*describe the relevant result, e.g.* "that NOV

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[310] If one of the elements of the relevant offence is a particular result (e.g. that the act cause death or serious injury), the judge should make it clear that the accused did not need to know that that result would be achieved. It is sufficient if s/he knew that the principal offender was going to commit the acts which ultimately caused that result, with the necessary state of mind.

die"]. This element will be satisfied if you find that the accused intended to assist or encourage the principal offender to commit the conduct that ultimately caused that result.

In this case, it was alleged that NOA counselled or procured the principal offender to commit NOO by [*insert prosecution evidence and/or arguments*]. The defence denied this, arguing [*insert defence evidence and/or arguments*].

It is only if you are satisfied, beyond reasonable doubt, that NOA intentionally assisted or encouraged the principal offender to commit NOO, by counselling or procuring the commission of that offence, that this third element will be met.

Withdrawal

[*If withdrawal of the accused's assistance or encouragement is in issue, add the following shaded section.*]

The fourth element that the prosecution must prove is that the accused did not effectively withdraw his/her assistance or encouragement prior to the offence being committed.

The law says that if a person is going to avoid liability by taking back his/her previous assistance or encouragement for a criminal act, his/her withdrawal must be timely and effective. That is, s/he must do everything that s/he can reasonably do to undo the effect of his/her previous assistance or encouragement, in sufficient time for his/her actions to be effective.

Whether the accused has taken all reasonable steps to undo the effect of his/her previous assistance or encouragement is a question for you. You must apply your common sense and experience. For example, in some cases it will be sufficient for the accused to take back any tools he or she has provided for the commission of the crime, and to make it clear that if the principal offender commits the offence, s/he does so without the accused's approval or support. In other cases it may be necessary for the accused to inform the police of the planned offence.

It is important to emphasise that it is not for the defence to prove that the accused did everything reasonably possible to withdraw his/her previous assistance or encouragement. It is the prosecution who must prove that the accused did not withdraw in a timely and effective manner.

In this case, the prosecution argued that the accused had not done everything s/he reasonably could to withdraw his/her previous assistance or encouragement. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA's withdrawal was timely and effective. [*Insert defence evidence and/or arguments.*]

Application of Law to Evidence

[*If not already done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of committing NOO by counselling or procuring, the prosecution must prove to you beyond reasonable doubt:

One – that someone committed NOO; and

Two – that NOA knew of, or believed in, the essential circumstances needed to establish NOO; and

Three – that NOA intentionally assisted or encouraged the principal offender to commit NOO, by counselling or procuring the commission of that crime.

[*If withdrawal is relevant, add the following shaded section.*]

and Four – that NOA did not effectively withdraw his/her earlier assistance or encouragement.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of NOO by way of counselling or procuring.

Last updated: 1 November 2014

5.5.2 Checklist: Counselling and Procuring

Click here to download a Word version of this charge

Three elements the prosecution must prove beyond reasonable doubt:

1. Someone committed the offence charged; and
2. The accused knew of, or believed in, the essential circumstances needed to establish that offence; and
3. The accused intentionally assisted or encouraged the principal offender to commit that offence.

Commission of the Offence

1. Did someone commit the offence charged?

Consider – Has the prosecution proven all of the elements of that offence?

If Yes, then go to Question 2

If No, then the accused is not guilty of counselling or procuring the offence charged

---

Knowledge of Essential Circumstances

2. Did the accused know of, or believe in, the essential circumstances needed to establish that offence?

Consider – When s/he assisted or encouraged the principal offender to commit the offence charged, did the accused know of, or believe in, all of the matters considered in question 1?[311]

If Yes, then go to Question 3

If No, then the accused is not guilty ofcounselling or procuring the offence charged

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Assistance or Encouragement

3. Did the accused intentionally assist or encourage the principal offender to commit that offence?

Consider – Did the accused counsel or procure the commission of that offence by urging, advising, soliciting, encouraging or supporting the principal offender to commit it?

Consider – By saying or doing what s/he did, did the accused intend to assist or encourage the principal offender to commit that offence?

If Yes, then the accused is guilty of the offence charged (as long as you have also answered Yes

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[311] If one of the elements of the relevant offence is a particular result (e.g. that the act cause death or serious injury), the judge should make it clear that the accused did not need to know that that result would be achieved. It is sufficient if s/he knew that the principal offender was going to commit the acts which ultimately caused that result, with the necessary state of mind.

to questions 1 and 2)

If No, then the accused is not guilty of counselling or procuring the offence charged

Last updated: 23 April 2008

5.5.3 Charge: Aiding and Abetting

Click here to download a Word version of this charge

This charge only applies to offences committed before 1 November 2014.

This charge should be used where the accused is alleged to have assisted or encouraged the principal offender at the time of the offending.

NOA has been charged with the offence of NOO.[312] However, it has not been alleged that s/he personally committed the acts that make up that offence. Instead, the prosecution has alleged that s/he committed NOO by assisting or encouraging [*insert names of co-offenders*] to commit that offence. I must therefore direct you about when a person will be held responsible for assisting or encouraging someone else to commit an offence.

The law says that if someone "aids or abets" another person to commit an offence, then they will be equally guilty of that offence, regardless of the fact that they did not commit the crime themselves. This is one of the situations in which the law holds a person responsible for the actions of other people.

In order to find NOA guilty of committing NOO by aiding or abetting, the prosecution must prove the following [three/four] elements:[313]

One – that someone committed the offence of NOO. Throughout these directions, I will call the person who committed that offence the "principal offender".

Two – that the accused knew of, or believed, in the essential circumstances needed to establish NOO.

Three – that the accused intentionally assisted or encouraged the principal offender to commit NOO.

[*If withdrawal is relevant, add the following shaded section.*]

Four – that the accused did not effectively withdraw his/her assistance or encouragement prior to the offence being committed.

Before you can find NOA guilty of NOO by aiding or abetting, you must be satisfied that the prosecution has proven all of these elements beyond reasonable doubt.

I will now explain each of these elements in more detail.

Commission of Offence

The first element that the prosecution must prove is that someone committed the offence of NOO.

In this case, this requires you to be satisfied that all of the following matters have been proven beyond reasonable doubt:

[*Describe all of the elements of the offence, explain those elements, and relate them to the facts.*]

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[312] Name of Offence.

[313] If withdrawal is relevant, there are four elements. Otherwise, there are three elements.

Knowledge

The second element that the prosecution must prove is that NOA knew all the essential circumstances needed to establish the offence of NOO, or believed that those essential circumstances existed.

The "essential circumstances" that are needed to establish NOO are the [*insert number*] matters that I just explained to you in relation to the first element. So for this second element to be met, NOA must have known or believed that:

[*Summarise all of the elements*[314] *of the principal offence.*]

For this element to be satisfied, you must find that NOA him/herself actually knew of, or believed in, all of these circumstances at the time s/he [*describe the alleged conduct constituting the aiding or abetting*]. It is not sufficient for you to find that s/he should have known those circumstances.

The prosecution alleged that NOA had the necessary knowledge or belief. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

Intentional Assistance or Encouragement

The third element that the prosecution must prove is that the accused intentionally assisted or encouraged the principal offender to commit NOO. In this case, it is alleged that NOA did this by what is called "aiding or abetting".

A person "aids or abets" the principal offender if s/he either:

- Intentionally helps him/her to commit the offence; or
- Intentionally encourages him/her, by words or presence, to commit the offence; or
- Intentionally conveys to him/her, by words or presence and behaviour, that s/he supports the commission of the offence.

A person can aid or abet an offence by words, action or both.

[*If conveying assent is relevant, add the following shaded section.*]

To have aided or abetted by conveying support for the commission of the offence, the accused must have done more than simply agreed with what the principal offender was doing. You must find that s/he attempted to communicate his/her support to the principal offender in a way that the principal offender could have been aware of, and that s/he indicated his/her willingness to assist the principal offender if required.

However, you do not have to find that the principal offender was aware of NOA's offer of assistance, or was actually encouraged by it. It is sufficient if NOA attempted to communicate his/her support and willingness to assist.

You do not need to be satisfied that NOA's words or actions caused the principal offender to commit the crime. A person can assist or encourage someone to commit an offence even if that other person already intended to commit that offence.

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[314] If one of the elements of the relevant offence is a particular result (e.g. that the act cause death or serious injury), the judge should make it clear that the accused did not need to know that that result would be achieved. It is sufficient if s/he knew that the principal offender was going to commit the acts which ultimately caused that result, with the necessary state of mind.

You also do not need to be satisfied that the principal offender was actually assisted or encouraged by NOA's behaviour. As long as NOA endeavoured to assist or encourage him/her, in circumstances in which the principal offender could potentially have been assisted or encouraged, then this element will be met.

However, you must be satisfied that NOA intentionally aided or abetted the commission of NOO. That is, you must be satisfied that, by saying or doing what s/he did, NOA intended to help, encourage or convey support to the principal offender to commit that offence.

[*If the relevant offence requires a particular result to have been caused, add the following shaded section.*]

This does not mean that you have to find that NOA intended [*describe the relevant result, e.g.* "that NOV die"]. It will be sufficient if you find that s/he intended to assist or encourage the principal offender to commit the conduct that ultimately caused that result.

In this case, it was alleged that NOA aided or abetted the principal offender to commit NOO by [*insert prosecution evidence and/or arguments*]. The defence denied this, arguing [*insert defence evidence and/or arguments*].

[*If the prosecution argued that the accused assisted or encouraged the offender by his/her presence, add the following shaded section.*]

You will note that in this case the prosecution did not allege that NOA said or did anything at the time of the offence to indicate his/her encouragement or support of the principle offender. They alleged that s/he assisted or encouraged the principle offender simply by being present.

This element can be satisfied by virtue of the accused having been present at the commission of the offence. However, for this to be the case, you must find that NOA intended his/her presence at the crime scene to have encouraged or assisted the principle offender to commit NOO. It is not sufficient for him/her simply to have been there at the relevant time.

In determining whether NOA intended to provide assistance or encouragement by his/her presence at the commission of the offence, you should view his/her conduct as a whole. You should look at his/her conduct before and at the time of the alleged offence, and consider whether s/he was linked in purpose with the principle offender in some way, and so contributed to the offence.

If you find that NOA was simply present when the offence was committed, then this element will not be met. However, if you are satisfied that NOA's presence at the commission of the offence made him/her complicit in that offence – because by being present s/he intentionally helped or encouraged the primary offender to commit the crime, or conveyed support for the commission of the offence – then this element will be met.

[*If not already done, identify the matters said to constitute assistance or encouragement*.]

It is only if you are satisfied, beyond reasonable doubt, that NOA intentionally assisted or encouraged the principal offender to commit NOO that this third element will be met.

Withdrawal

[*If withdrawal of the accused's assistance or encouragement is in issue, add the following shaded section.*]

The fourth element that the prosecution must prove is that the accused did not effectively withdraw his/her assistance or encouragement prior to the offence being committed.

The law says that if a person is going to avoid liability by taking back his/her previous assistance or encouragement for a criminal act, his/her withdrawal must be timely and effective. That is, s/he must do everything that s/he can reasonably do to undo the effect of his/her previous assistance or encouragement, in sufficient time for his/her actions to be effective.

Whether the accused has taken all reasonable steps to undo the effect of his/her previous assistance or encouragement is a question for you. You must apply your common sense and experience. For example, in some cases it will be sufficient for the accused to take back any tools he or she has provided for the commission of the crime, and to make it clear that if the principal offender commits the offence, s/he does so without the accused's approval or support. In other cases it may be necessary for the accused to inform the police of the planned offence.

It is important to emphasise that it is not for the defence to prove that the accused did everything reasonably possible to withdraw his/her previous assistance or encouragement. It is the prosecution who must prove that the accused did not withdraw in a timely and effective manner.

In this case, the prosecution argued that the accused had not done everything s/he reasonably could to withdraw his/her previous assistance or encouragement. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA's withdrawal was timely and effective. [*Insert defence evidence and/or arguments.*]

Application of Law to Evidence

[*If not already done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of committing NOO by aiding or abetting, the prosecution must prove to you beyond reasonable doubt:

One – that someone committed NOO; and

Two – that NOA knew of, or believed in, the essential circumstances needed to establish NOO; and

Three – that NOA intentionally assisted or encouraged the principal offender to commit NOO, by either helping him/her, encouraging him/her, or conveying his/her support.

[*If withdrawal is relevant, add the following shaded section.*]

and Four – that NOA did not effectively withdraw his/her earlier assistance or encouragement.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of NOO by way of aiding or abetting.

Last updated: 1 November 2014

5.5.4 Checklist: Aiding and Abetting

Click here to download a Word version of this charge

Three elements the prosecution must prove beyond reasonable doubt:

1. Someone committed the offence charged; and
2. The accused knew of, or believed in, the essential circumstances needed to establish that offence; and
3. The accused intentionally assisted or encouraged the principal offender to commit that offence.

Commission of the Offence

1. Did someone commit the offence charged?

Consider – Has the prosecution proven all of the elements of that offence?

If Yes, then go to Question 2

If No, then the accused is not guilty of aiding or abetting the offence charged

Knowledge of Essential Circumstances

2. Did the accused know of, or believe in, the essential circumstances needed to establish that offence?

Consider – When s/he assisted or encouraged the principal offender to commit the offence charged, did the accused know of, or believe in, all of the matters considered in question 1?[315]

If Yes, then go to Question 3

If No, then the accused is not guilty of aiding or abetting the offence charged

Assistance or Encouragement

3. Did the accused intentionally assist or encourage the principal offender to commit that offence?

3.1 Did the accused intentionally help the principal offender to commit that offence?

If Yes, then the accused is guilty of the offence charged (as long as you have also answered Yes to questions 1 and 2)

If No, then go to Question 3.2

3.2 Did the accused intentionally encourage the principal offender to commit that offence?

If Yes, then the accused is guilty of the offence charged (as long as you have also answered Yes to questions 1 and 2)

If No, then go to Question 3.3

3.3 Did the accused intentionally convey to the principal offender by words or presence and behaviour that s/he supported the commission of that offence?

Consider – Did the accused attempt to communicate his/her support to the principal offender, and indicate his/her willingness to assist if required?

If Yes, then the accused is guilty of the offence charged (as long as you have also answered Yes to questions 1 and 2)

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[315] If one of the elements of the relevant offence is a particular result (e.g. that the act cause death or serious injury), the judge should make it clear that the accused did not need to know that that result would be achieved. It is sufficient if s/he knew that the principal offender was going to commit the acts which ultimately caused that result, with the necessary state of mind.

If No, then the accused is not guilty of aiding or abetting the offence charged

Last updated: 23 April 2008

5.6 Assist Offender

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Overview

1. The offence of assisting an offender is created by *Crimes Act 1958* s 325.
2. The offence is available as an alternative to all serious indictable offences (*Crimes Act 1958* s 325(2)).
3. It is for the trial judge to determine whether or not to leave this offence to the jury. This determination does not need to be made until the close of the evidence (*Crimes Act 1958* s 325(2); *R v Taylor & Ors* 22/6/1989 Vic CCA).

Elements

4. The offence has the following five elements:

    i) A person (the "principal offender") committed a serious indictable offence (the "principal offence");

    ii) The accused performed a positive act after the completion of that offence;

    iii) When the accused performed that act, s/he knew or believed that the principal offender had committed the principal offence, or any other serious indictable offence;

    iv) The accused acted with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender; and

    v) The accused had no lawful authority or reasonable excuse for his/her actions (*Crimes Act 1958* s 325).

Serious Indictable Offence

5. The first element requires the prosecution to prove that the principal offender committed a "serious indictable offence" (*Crimes Act 1958* s 325; *R v Morton* [2001] VSC 16).
6. A "serious indictable offence" is defined as an indictable offence that "is punishable on first conviction with imprisonment for life or for a term of five years or more" (*Crimes Act 1958* s 325(6)).
7. The principal offender does not need to have committed the offence personally. His/her liability may be derivative, or the result of a legal doctrine, such as acting in concert (*R v Welsh* [1999] 2 VR 62).
8. A record of conviction of the principal offender is *prima facie* evidence that the principal offence was committed. It is not, however, necessary or sufficient. An accused may lead evidence to rebut the record of conviction (*R v Dawson* [1961] VR 773; *R v Welsh* [1999] 2 VR 62; *R v Kirkby* [2000] 2 Qd R 57).
9. If the principal offender and the accused are tried at the same time, the judge must give a separate consideration direction to the jury. S/he must make it clear that evidence that is admissible only against the principal offender (such as out of court admissions that were not made in the presence of the accused) cannot be used to establish, for the purpose of the offence of assisting an offender, that the principal offence has been committed (*R v Welsh* [1999] 2 VR 62) See 1.8 Separate Consideration for further information.

Accused's Actions

10. The second element requires the prosecution to prove that the accused performed a positive act (*Crimes Act 1958* s 325; *R v Taylor & Ors* 22/6/1989 Vic CCA; *R v Hurley & Murray* [1967] VR 526; *R v Ready & Manning* [1942] VLR 85).

11. The accused's act must have been performed after the principal offence was completed (*R v Taylor & Ors* 22/6/1989 Vic CCA).[316]

12. The accused simply needs to have performed a positive act. His/her act does not need to have actually assisted the principal offender (*R v Tevendale* [1955] VLR 95; *R v Levy* [1912] 1 KB 158).

13. Concealing evidence, or laying a false trail, may be a positive act (*R v Levy* [1912] 1 KB 158; *R v Taylor & Ors* 22/6/1989 Vic CCA).

14. However, the accused does not perform a positive act if s/he only instructs others not to give evidence, or refuses to give evidence him/herself (*R v Ready & Manning* [1942] VLR 85; *Ready & Manning v R* [1942] ALR 138).

15. Failing to inform the police of the principal offender's whereabouts is not a positive act. However, it can be relevant, in conjunction with other acts of assistance, to demonstrate that the accused intended to assist the principal offender (*R v Hurley & Murray* [1967] VR 526).

Knowledge or Belief

16. The third element requires the prosecution to prove that, when the accused performed the relevant act, s/he knew or believed that the principal offender had committed the principal offence, or any other serious indictable offence (*Crimes Act 1958* s 325).

17. The accused does not need to have known the precise offence that the principal offender committed. It is sufficient for him/her to have known, or believed, that the principal offender had committed some serious indictable offence (*Crimes Act 1958* s 325; *R v Taylor & Ors* 22/6/1989 Vic CCA; c.f. *R v Stone* [1981] VR 737; *R v Tevendale* [1955] VLR 95; *Middap v R* (1992) 63 A Crim R 434).

18. The accused must have had the requisite state of knowledge at the time s/he performed the relevant act. This element will not be satisfied if s/he acquired the necessary knowledge after completing the act (*R v Kawicki* (1995) 82 A Crim R 191).

Purpose

19. The fourth element requires the prosecution to prove that the accused performed the relevant act for the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender (*Crimes Act 1958* s 325; *R v Hurley & Murray* [1967] VR 526; *Middap v R* (1992) 63 A Crim R 434).

20. It is not sufficient for the accused to have performed that act *knowing that its probable result* would be to impede the apprehension, prosecution, conviction or punishment of the principal offender. S/he must have been motivated by a *subjective desire* to impede the principal offender's apprehension, prosecution, conviction or punishment (*R v Hurley & Murray* [1967] VR 526).

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[316] This means that this element will not be satisfied in cases where the accused acts between the time of the principal offender's causal acts and the time when the offence is finally committed (e.g. in a murder case, between the time the victim is stabbed and the time s/he dies). The accused's actions must be committed after the completion of the principal offence (i.e. after the victim's death).

21. It will usually only be necessary to explain the difference between desiring a result, and acting with the knowledge that that result will probably occur, if the defence argues that the accused did not subjectively desire the foreseen consequences of his/her action (*Middap v R* (1992) 63 A Crim R 434).

22. It is best to avoid directing the jury that the accused must "intend" to impede the apprehension, prosecution, conviction or punishment of the principal offender, as the word "intend" is ambiguous, covering both knowledge of probable consequences and a desire for those consequences (*R v Hurley & Murray* [1967] VR 526).

23. The accused's conduct does not need to have been solely motivated by a desire to protect the principal offender. This element may be satisfied even if s/he had other motivations for acting, such as seeking to conceal his/her own wrongdoing (*Middap v R* (1992) 63 A Crim R 434; *R v Tevendale* [1955] VLR 95).

24. While a desire to protect the principal offender does not need to have been the accused's sole purpose for acting, the jury must be satisfied beyond reasonable doubt that it was at least one his/her motivations. If the jury are unable to exclude the possibility that the accused was solely motivated by another desire (e.g. to conceal his/her own involvement in the crime), then this element will not be met (*R v Taylor & Ors* 22/6/1989 Vic CCA; *R v Jones* (1948) 33 Cr App R 230; *Middap v R* (1992) 63 A Crim R 434).[317]

25. The accused must have had this purpose at the time s/he performed the relevant act. This element will not be satisfied if this desire arose after s/he had completed the act (*R v Kawicki* (1995) 82 A Crim R 191).

26. It is not necessary to show that the accused was successful in impeding the apprehension, prosecution, conviction or punishment of the principal offender (*R v Dawson* [1961] VR 773).

Lawful Authority or Excuse

27. The prosecution must disprove any defences that are open on the evidence (*R v Hurley & Murray* [1967] VR 526; *Middap v R (1992) 63 A Crim R 434*).

28. A married person cannot be convicted of assisting his/her spouse (*Crimes Act 1958* s 338).

Last updated: 23 April 2008

5.6.1 Charge: Assist Offender

Click here to download a Word version of this charge

I must now direct you about the crime of assisting an offender. To prove this crime, the prosecution must prove five elements beyond reasonable doubt:

One – that someone committed a serious criminal offence. Throughout these directions, I will call the person who committed that offence the "principal offender".

Two – that, after that offence was committed, the accused performed some act.

Three – that, when the accused performed that act, s/he knew or believed that the principal offender had committed a serious criminal offence.

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[317] This means that, if the accused's purpose is to be inferred from the circumstances, the inference that the accused was at least partly motivated by a desire to protect the principal offender must be the only available inference (*R v Taylor & Ors* 22/6/1989 Vic CCA; R v Jones (1948) 33 Cr App R 230; *Middap v R* (1992) 63 A Crim R 434). See 3.6 Circumstantial Evidence and Inferences for further information.

Four – that the accused acted with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender.

Five – that the accused had no lawful authority or reasonable excuse for his/her actions.

Before you can find NOA guilty of assisting an offender you must be satisfied that the prosecution has proved all five of these elements beyond reasonable doubt.

I will now explain each of these elements in detail.

Serious Criminal Offence

The first element the prosecution must prove is that the principal offender committed a serious criminal offence.

[*If this element is not in issue, add the following shaded section.*]

In this case it is not disputed that NO3P committed NOO.[318] The law says that NOO is a serious criminal offence. You should therefore have no difficulty finding this element proven.

[*If this element is in issue, add the following shaded section.*]

In this case, it is alleged that NO3P committed the offence of NOO. The law says that NOO is a serious criminal offence. This element will therefore be met if you are satisfied that NO3P committed NOO.

This requires you to be satisfied that all of the following matters have been proven beyond reasonable doubt:

[*Describe all of the elements of the offence, explain those elements, and relate them to the facts*.]

[*If evidence of the principal offender's conviction has been led and contested, add the following darker shaded section.*]

In order to prove this element, the prosecution provided evidence that NO3P was convicted of NOO by another jury. While you may use this fact as evidence that NO3P did commit the offence of NOO, it is not conclusive. You must make your own assessment of the evidence in this case, and consider whether, based on all the evidence you have heard, you are satisfied that NO3P actually did commit the offence of NOO.

Accused's Action

The second element the prosecution must prove is that, after the offence of NOO was completed, the accused performed some act.

In this case it is alleged that NOA [*describe relevant act*]. This element will only be met if you are satisfied, beyond reasonable doubt, that s/he performed this act, and that this occurred after the offence of NOO was completed.

[*Describe relevant prosecution and defence evidence and/or arguments.*]

Knowledge or Belief

The third element the prosecution must prove is that, when the accused [*describe relevant act*], s/he knew or believed that the principal offender had committed a serious criminal offence.

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[318] Name of Offence.

[*If it is alleged that NOA believed that NO3P had committed a different offence from that which s/he had committed, add the following shaded section.*]

It does not matter if NOA believed that NO3P had committed a different offence from the one s/he actually committed. All that is required for this element is that NOA believed that NO3P had committed some serious criminal offence.

In this case, the prosecution alleged that, when NOA [*describe relevant act*], s/he knew or believed that NO3P had committed [*describe relevant offence*]. [*Describe relevant prosecution evidence and/or arguments.*] The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Purpose

The fourth element the prosecution must prove is that the accused acted with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender. That is, NOA [*describe relevant act*] because s/he wanted to prevent NO3P from being caught by the police and brought to trial.

[*If the defence argued that, the effect of impeding apprehension was not desired, add the following shaded section.*]

It is not sufficient for NOA to have known that his/her acts would probably impede NO3P's apprehension, prosecution, conviction or punishment. For this element to be met, s/he must have actively desired that result.

This does not need to have been NOA's only motivation for acting in that way. However, for this element to be met, you must be satisfied, beyond reasonable doubt, that it was at least one of his/her motivations. If you are unable to exclude the possibility that NOA was solely motivated by another desire, then this element will not be met.

In this case, the prosecution argued that the purpose of NOA's actions was to impede NO3P's apprehension, prosecution, conviction or punishment. [*Describe relevant prosecution evidence and/or arguments.*] The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Reasonable excuse

The fifth element the prosecution must prove is that the accused had no lawful authority or reasonable excuse for his/her actions.

[*If this element is not in issue, add the following shaded section.*]

This element is not in dispute in this case. You should therefore have no difficulty finding this element proven.

[*If this element is in issue, explain any relevant defences or justifications and relate to the facts.*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of assisting an offender, the prosecution must prove to you beyond reasonable doubt:

One – That NO3P committed NOO; and

Two – That after the completion of that offence, NOA performed some act; and

Three – That when NOA performed that act, s/he knew or believed that NO3P had committed a serious criminal offence; and

Four – That NOA acted with the purpose of impeding NO3P's apprehension, prosecution, conviction or punishment; and

Five – That NOA had no lawful authority or reasonable excuse for his/her actions.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of assisting an offender.

Last updated: 7 February 2013

5.6.2 Checklist: Assist Offender

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Five elements the prosecution must prove beyond reasonable doubt:

1. The principal offender committed a serious criminal offence; and
2. After that offence was committed, the accused performed some act; and
3. When the accused performed that act, s/he knew or believed that the principal offender had committed a serious criminal offence; and
4. The accused acted with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender; and
5. The accused acted without lawful authority or reasonable excuse.

Serious Criminal Offence

1. Did the principal offender commit a serious criminal offence?

Consider – Has the prosecution proven all of the elements of [*describe offence*]*?*

If Yes, then go to Question 2

If No, then the accused is not guilty of assisting an offender

---

Accused's Actions

2. After that offence was committed, did the accused perform some act?

Consider – Did the accused [*describe relevant act*]*?*

If Yes, then go to Question 3

If No, then the accused is not guilty of assisting an offender

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Accused's Knowledge or Belief

3. When the accused performed that act, did s/he know or believe that the principal offender had committed a serious criminal offence?

If Yes, then go to Question 4

If No, then the accused is not guilty of assisting an offender

---

Accused's Purpose

4. Did the accused act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender?

*Consider – **Was at least one of the accused's motivations for acting that s/he wanted to prevent the principal offender from being apprehended, prosecuted, convicted or punished?***

If Yes, then go to Question 5

If No, then the accused is not guilty of assisting an offender

---

Lawful Justification

5. Did the accused act without lawful justification or reasonable excuse?

If Yes, then the accused is guilty of assisting an offender (as long as you have also answered Yes to questions 1, 2, 3 and 4)

If No, then the accused is not guilty of assisting an offender

Last updated: 23 April 2008

5.7 Commonwealth Complicity (s 11.2)

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General Principles

1. *Criminal Code* s 11.2(1) provides that:

> (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

2. Section 11.2 does not create an offence, but extends criminal responsibility for an offence to a person who aids, abets, counsels or procures another person ('the principal offender') to commit the offence (*Australian Competition and Consumer Commission v Davies* [2015] FCA 1017 [28]).
3. The provisions of s 11.2 therefore do not specify elements of an offence. Rather, they specify statutory conditions which must be proved before a person can be found guilty of committing the principal offence. These conditions operate in a similar manner to Criminal Code s 11.5 (*Australian Competition and Consumer Commission v Davies* [2015] FCA 1017 [30]; *R v LK* (2010) 241 CLR 177 [131]–[133]). See 6.2 Conspiracy (Commonwealth) for further information.

Liability

4. To establish liability for an offence through s 11.2, the prosecution must prove beyond reasonable doubt that:

   i) The principal offender committed the offence (s 11.2(2)(b))

   ii) The conduct of the accused in fact aided, abetted, counselled or procured the commission of the offence by the principal offender (s 11.2(2)(a))

   iii) The accused intended that his or her conduct would aid, abet, counsel or procure the commission:

   - of any offence (including its fault elements) of the type committed by the principal offender (s 11.2(3)(a)); or

- of an offence, while being reckless about the principal offender committing the offence charged (including its fault elements) (s 11.2(3)(b))

Principal Offender Committed Offence

5. The first matter the prosecution must prove is that the principal offender committed the alleged offence (*Criminal Code* s 11.2(2)(b)).

6. This requires the prosecution to prove that the principal offender committed the relevant physical elements and had the relevant fault elements for the substantive offence (*Criminal Code* ss 3.1, 11.2(2)(b); *R v Nolan* (2012) 83 NSWLR 534 [46]; *Habib v Commonwealth* (2010) 183 FCR 62 [22]).

7. Under s 11.2(5), it is not necessary for the principal offender to have been prosecuted or found guilty before an accused may be found guilty of aiding, abetting, counselling or procuring the commission of an offence.

8. This is consistent with the common law approach. For further information, see 5.5 Aiding, Abetting, Counselling or Procuring (Pre-1/11/14).

9. The prosecution may have difficulty proving liability through s 11.2 where the principal offender could not be convicted of the substantive offence for some reason. This may occur where the principal offender is not criminally responsible for an offence by way of mental impairment (*Criminal Code* s 7.3). In such circumstances, where the prosecution seeks to rely on extended criminal responsibility, it may be more appropriate to rely on ss 11.2A (joint commission) or 11.3 (commission by proxy) (*Matusevich v The Queen* (1977) 137 CLR 633; *Osland v The Queen* (1998) 197 CLR 316; *R v Iliovski; R v Shnider* [2002] VSCA 172; *R v Gill* [2005] VSCA 321).

10. For further information on s 11.2A, see 5.8 Commonwealth Joint Commission (s 11.2A) and 5.10 Commission by Proxy (Commonwealth offences).

Conduct that Aids, Abets, Counsels or Procures

11. The second matter the prosecution must prove is that the accused's conduct in fact aided, abetted, counselled or procured the commission of the offence by the principal offender (*Criminal Code* s 11.2(2)(a)).

12. The words 'aids, abets, counsels or procures' are not defined in the Code. They are to be given their established legal meaning (*R v Campbell* (2008) 73 NSWLR 272 [155]; *Handlen v R* (2011) 245 CLR 282 [6]; *R v Jo* [2012] QCA 356 [35]; *Franze v R* [2014] VSCA 352 [124]).

13. Historically, the common law considered those who counsel or procure an offence to be accessories before the fact, while those who aid or abet an offence were considered principals in the second degree (*Franze v R* [2014] VR 856 [106]). This distinction has never applied under the Code (*Handlen v R* (2011) 245 CLR 282 [6]), and the language of accessories before or after the fact is no longer used at common law. It is now accepted that the words 'aid, abet, counsel or procure' may be read collectively to describe a person who assists or encourages someone to commit an offence (*Giorgianni v R* (1985) 156 CLR 473; *R v Wong* (2005) 202 FLR 1; *Likiardopoulos v R* [2010] VSCA 344; *Arafan v R* (2010) 31 VR 82; *R v Russell* [1933] VLR 59; but c.f. *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773).

14. This assistance or encouragement requires the accused to be linked in purpose with the principal offender, and to act to bring about or render more likely the commission of the offence (*Giorgianni v R* (1985) 156 CLR 473; *R v Russell* [1933] VLR 59; *R v Wong* (2005) 202 FLR 1; *R v Phan* (2001) 53 NSWLR 480; *Handlen v R* (2011) 245 CLR 282 [6]).

15. On that view, when considering liability under s 11.2, a jury is not required to specifically identify the accused as an aider, abettor, counsellor or procurer. They need only decide whether the accused's conduct demonstrates that s/he was linked in purpose with the principal, and their actions brought about or made more likely the offence (*Pong Su (Ruling No 21)* [2005] VSC 96 [35]). Where possible, however, if the alleged conduct could most simply be classified as one or two of the four terms and the parties are agreeable, it is suggested that the judge direct the jury using only the relevant terminology (i.e. referring only to one or a few of either aiding, abetting, counselling or procuring, rather than all four).

16. In *Pong Su (Ruling No 13)* [2005] VSC 96, Kellam J considered that the prosecution was not required to prove that a person accused of aiding and/or abetting under s 11.2 was actually present at the scene of a crime. Later in the same proceeding, he indicated that if he was incorrect on that point, 'constructive' presence would suffice (*Pong Su (Ruling No 21)* [2005] VSC 96 [62]; see also *R v Nolan* (2012) 83 NSWLR 534 [44])). This approach places more emphasis on the accused's conduct of providing assistance or encouragement to the principal offender at the time of the offending, acknowledging that the assistance could be provided from a distance.

17. This approach aligns with developments in the common law, in which actual presence is no longer required (*R v Morgan* [1994] 1 VR 567; *R v Wong* (2005) 202 FLR 1; see also *Arafan v R* [2010] VSCA 356). For details about the relevance of presence at common law, see 'Presence at the Commission of the Crime' in 5.5 Aiding, Abetting, Counselling or Procuring (Pre-1/11/14).

18. Section 4.1 of the Code defines conduct to include an act, an omission to perform an act, or a state of affairs.

19. For details about what conduct might constitute aiding, abetting, counselling or procuring, see 'Assistance or Encouragement' in 5.5 Aiding, Abetting, Counselling or Procuring (Pre-1/11/14).

20. It is not possible for an accused to be liable for aiding, abetting, counselling or procuring an offence they became involved in at a time when the offence had ended. For example, an accused who becomes involved in a drug importation scheme only after the drugs have been substituted for flour cannot be liable for aiding or abetting the offence, even though they could have been liable had the substitution not taken place. In such a situation, it would be appropriate for the accused to be charged with attempted importation or attempted possession (*R v Nolan* [2012] NSWCCA 126 [37], [51]).

21. The prosecution does not need to prove that there was any agreement between the accused and the principal offender. The lack of an agreement is what distinguishes liability under s 11.2 with the form of complicity established under s 11.2A (*R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448; *R v Lowery & King (No 2)* [1972] VR 560; *R v Nguyen* [2010] VSCA 23; *Arafan v R* [2010] VSCA 356).

Causation and Commonwealth Complicity

22. Section 11.2(2)(a) requires that the accused's conduct *in fact* aided, abetted, counselled or procured the commission of the offence. The meaning and effect of those words 'in fact' is a matter of debate.

23. At common law, the prosecution does not need to prove that the principal offender was actually assisted or encouraged by the accused. Requiring proof that the accused was actually assisted or encouraged would "impose an impossible burden upon the prosecution, who would rarely be in a position to place evidence before a jury as to the effect of the secondary participant's conduct on the principal offender's state of mind" (*R v Lam* (2008) 185 A Crim R 453, 464).

24. In Criminal Law Officers Committee, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 87, the committee noted that the requirement of causation was a "vexed question" and did not seek to enter into that debate. This may suggest that the inclusion of the words 'in fact' were not intended to change the common law (see also New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010), 40, 50).

25. It has been suggested that the use of 'in fact' relates to the common law requirement that an accused have demonstrated that they assented to the principal offender's actions in a way that encourages their performance (Commonwealth Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (March 2002) 251). Whether the principal offender knows of the accused's assent will depend on the alleged conduct. If the accused is alleged to have procured the principal offender to commit an offence, then the principal would be expected to have known of the accused's conduct. However, if the accused's conduct aided the principal by, for example, leaving a weapon out for them to find, then it may not be necessary to show that the principal knew it was the accused who left the weapon.

26. The approach adopted in this Charge Book is to require proof of a causal connection between the accused's conduct and the offence. This is adopted as a course of prudence, as it best accords with the words of the Act. In cases where causation is likely to be difficult to show, it will be for the parties to make submissions on why the court should adopt a different approach.

Intention

27. For a person to have committed an offence under s 11.2(1), they must have intended that their conduct would aid, abet, counsel or procure the commission of an offence by another person, and either:

    i) An offence of that type was committed by the other person (s 11.2(3)(a)); or

    ii) The accused was reckless about the commission of the offence actually committed by the other person (s 11.2(3)(b)).

28. The reference to 'reckless' in s 11.2(3)(b) does not indicate that recklessness is available as an alternative fault element to establish Commonwealth complicity. The relevant fault element is intention. This aligns with common law complicity (*Pong Su (Ruling No 12)* 159 A Crim R 300 [47]).

29. Section 5.2 of the *Code* defines intention and identifies that a person can have intention with respect to conduct, a circumstance or a result. The drafting of s 11.2 suggests that the relevant form of intention is intention with respect to result. That is, the prosecution must show that the accused meant for their conduct to assist in the commission of an offence, or that he or she was aware that the offending would occur in the ordinary course of events (*Criminal Code* s 5.2(3)). This is so regardless of whether the prosecution relies on s 11.2(3)(a) or s 11.2(3)(b) to establish an accused's complicity.

30. To establish that a person intended for their conduct to have assisted the commission of an offence, the prosecution must establish that the accused knew all of the facts that would make the activity he or she was assisting with a criminal offence; i.e. knew the facts that establish the elements of the offence (*Ansari v R* (2007) 70 NSWLR 89 [80]).

31. Establishing intention for s 11.2 is likely to involve drawing an inference and will draw on common law principles relating to intention to assist. For details, see under 'Intention to Assist' on 5.5 Aiding, Abetting, Counselling or Procuring (Pre-1/11/14).

32. Section 11.2(3) is subject to s 11.2(6), which states that any special liability provisions that apply to an offence also apply for the purposes of aiding, abetting, counselling or procuring an offence. This means that the prosecution will not need to establish intention in respect of any matter that is subject to a special liability provision (*R v Franze (Ruling No 1)* [2013] VSC 229 [17]). For further information, see below under 'Substantive offences and special liability provisions'.

33. Where an accused is charged with multiple counts of aiding and abetting, there must be evidence to establish the relevant intention with respect to each charge (*R v Poulakis (No 2)* [2015] ACTSC 190 [6]).

Type of Offence

34. Section 11.2(3)(a) explains that one way for a person to be guilty under s 11.2(1) is that the accused intended for his or her conduct to aid, abet, counsel or procure the commission of any offence of the type the other person committed.

35. This limb of s 11.2 also applies where the accused intended to assist in the commission of the offence committed (see *Australian Competition and Consumer Commission v Davies* [2015] FCA 1017 [35]).

36. The prosecution must prove that an accused intended their conduct would bring about or make more likely the commission of any offence 'of the type' that the other person committed. This suggests it is not necessary for the prosecution to prove the accused intended the *specific* offence would be committed.

37. There have not yet been any reported cases examining the meaning or limits of the words 'of the type' in the *Code*. Under English common law, someone could be found liable as an accessory if they intended that 'a crime of the type in question was intended'; they did not necessarily need to have known all details of the specific crime (*R v Bainbridge* (1960) 1 QB 129, 134). For example, while it would be necessary to prove that an accused who provided new vehicle registration plates to another person intended to assist the other person to steal a motor vehicle, it would not be necessary to prove that the accused intended to assist in the theft of a *specific* vehicle (*Ancuta v R* (1990) 49 A Crim R 307). It is not clear whether this is also the Australian common law position, though *Bainbridge* has not been disapproved (*Giorgianni v R* (1985) 156 CLR 473, 481, 505; *Ancuta v R* (1990) 49 A Crim R 307, 313).

38. This approach may provide some guidance as to the meaning of 'type' in s 11.2. It is also supported by the Explanatory Memorandum which accompanied the introduction of s 11.2A of the *Code*. Section 11.2A(2)(a) provides that an offence will be committed in accordance with an agreement 'if the conduct of one or more parties ... makes up the physical elements consisting of conduct of an offence ... *of the same type* as the offence agreed to.' The Explanatory Memorandum states that 'of the same type' was included to ensure the requirement was broad enough to cover situations where the *exact* offence agreed to was not actually committed. The example provided was a group who agree to commit a specific drug offence, but the quantity or type of drug actually involved differs from the agreement (Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, 134). Although s 11.2A was enacted after s 11.2, principles of statutory construction include the presumption that words and phrases are to be interpreted consistently within a piece of legislation.

39. Where the prosecution relies on this basis of complicity, the judge will first need to determine whether the matter of type is a pure question of law, or whether the judge's role is to determine whether it is open to the jury to find that the two offences are of the same 'type'. As a matter of prudence, this Charge Book takes the latter approach, and leaves it to the jury to determine whether two offences are of the same 'type'. Parties will, however, need to provide submissions to both the judge and the jury that identify why the two offences are said to be of the same 'type'.

Recklessness as to the offence committed

40. Section 11.2(3)(b) provides another way for a person to be guilty under s 11.2(1), where the accused intended that his or her conduct would aid, abet, counsel or procure the commission of any offence and was reckless about the commission of the offence actually committed.

41. It will always be necessary for the prosecution to prove that the accused intended that his or her conduct would assist in the commission of an offence (*Pong Su (Ruling No 12)* 159 A Crim R 300).

42. A person is reckless when they are aware of a substantial risk that a result or circumstance will occur, and it is unjustifiable for them to take that risk given the circumstances known to them (*Criminal Code* s 5.4).

43. In the context of s 11.2(3)(b), when the offence charged is not the one which the accused intended to assist with, the prosecution needs to demonstrate that the accused was aware of a substantial risk that their conduct would lead to the principal committing the offence charged, and it was unjustifiable for the accused to take that risk. This requires that the prosecution prove, in relation to each element of the completed offence, that the accused was aware of a substantial risk that this element would occur and it was unjustifiable to take that risk.

44. The jury must determine whether it is unjustifiable to take a risk on the facts known to the accused (*Criminal Code* ss 5.4(1)(b), 5.4(2)(b)). However, the accused does not need to have believed that it was unjustifiable to take the risk. The test is objective not subjective.

45. The question of whether a risk is unjustifiable requires the jury to make a moral or value judgment relating to the accused's advertent disregard of risk (*R v Saengsai-Or* (2004) 61 NSWLR 135).

46. The jury must assess the likelihood of the risk eventuating, and determine whether the risk is one that should not have been taken (*Lustig v R* (2009) 195 A Crim R 310).

47. This aspect of s 11.2 extends liability compared to the common law of aiding, abetting, counselling or procuring, which required proof of specific intent. It was not sufficient at common law that an accused *should* have known the essential circumstances which made up an offence that they are alleged to have aided, abetted, counselled or procured (*Giorgianni v R* (1985) 156 CLR 473). Common law aiding, abetting, counselling or procuring did not include liability for a different offence that the accused was reckless about occurring when they were aiding, abetting, counselling or procuring the commission of another offence.

Withdrawal

48. A person cannot be found guilty under s 11.2 if, before the offence was committed:

    - they terminated their involvement; and
    - took all reasonable steps to prevent the offence being committed (*Criminal Code* s 11.2(4)).

49. The accused bears the evidential burden of providing evidence suggesting a reasonable possibility that they terminated their involvement in the agreement and took all reasonable steps to prevent the commission of the offence (*Criminal Code* s 13.4).

50. If the accused meets the evidential burden, the prosecution will then have to prove that the accused did not effectively terminate their involvement.

51. At common law, withdrawal requires the accused to take all action he or she can reasonably take to undo the effect of his or her previous encouragement or assistance, which can include informing the police (see *White v Ridley* (1978) 140 CLR 342; *R v Tietie* (1988) 34 A Crim R 438; *R v Jensen and Ward* [1980] VR 196).

52. In contrast, the second limb of withdrawal under the Code is to take 'all reasonable steps to prevent the commission of the offence' (*Criminal Code* s 11.2(4)(b)).

53. There do not appear to be any reported cases on the scope and operation of this requirement. The New South Wales Law Reform Commission suggests that the following matters are relevant to the requirement of 'reasonable steps':

    - The significance of the assistance or encouragement previously given;
    - The seriousness of the offence in question and its likely consequences;
    - Whether or not the accused can be satisfied, on reasonable grounds, by the principal offender's response that the offence will not occur;
    - Any element of risk or duress posed by the principal offender;

- The accused's age and maturity (New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) 56).

54. While these considerations have not been endorsed by a court, they are provided as guidance for trial judges on the operation of s 11.2(4).

55. For further details on principles of withdrawal at common law, see under 'Withdrawing From an Agreement' in 5.5 Aiding, Abetting, Counselling or Procuring (Pre-1/11/14) and 5.3 Joint Criminal Enterprise (Pre-1/11/14).

Substantive offences and special liability provisions

56. Any special liability provisions that apply to an offence also apply for the purposes of determining whether a person is guilty of committing the offence by s 11.2 of the *Code* (*Criminal Code* s 11.2(6)).

57. The same principle applies for the purpose of attempt, incitement and conspiracy (*Criminal Code* ss 11.1(6A), 11.4(4A), 11.5(7A))

58. 'Special liability provision' is defined as:

    (a) A provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew a particular thing; or

    (b) A provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew or believed a particular thing (Criminal Code Dictionary).

    (c) Fault elements such as knowledge, recklessness and negligence are not 'special liability provisions'.

59. In addition, strict liability, as defined in *Criminal Code* s 6.1, does not fit within the definition of special liability provision. Therefore, where strict liability applies, the common law rule that an accused must know the essential facts for a joint offence will continue to apply, and the prosecution must prove awareness of those facts (*R v Ansari* (2007) 70 NSWLR 89, [84]).

60. An example of how a special liability provision operates can be seen in the offence of importing a commercial quantity of a border controlled drug. Section 307.5(2) of the Code establishes absolute liability for possessing commercial quantities of an unlawfully imported border controlled drug or plant. When a person is charged with joint commission an offence against s 307.5(1), s 11.2A(6) means that there will be no need for the prosecution to prove the accused agreed or intended that the importation involve a specific quantity of drug (*Franze v R* [2014] VSCA 352 [150]–[153]).

Complicity and Attempt

61. It is not an offence to attempt to commit an offence against s 11.2 (*Criminal Code* s 11.1(7)). However, liability under s 11.2 extends to attempted offences. For example, where a person aids, abets, counsel or procures the principal offender to import a border controlled drug, but the importation is interrupted before the offence can be completed, s 11.2 will extend liability for the attempted importation to the person who provided assistance (*Franze v R* [2014] VSCA 352 [3]).

Uncertainty about role of accused: Principal offender or accessory

62. Section 11.2(7) states that if the jury is satisfied beyond reasonable doubt that an accused is guilty of a particular offence whether because they were complicit in its commission or are otherwise guilty, but the jury cannot determine which, they may nevertheless find the accused guilty of that offence.

63. This picks up the common law principle that, where the prosecution is not able to prove which of several co-accused performed the relevant criminal acts, the jury may convict all of the co-accused of the offence if satisfied, by evidence admissible against each co-accused, that one (or more) of them committed the offence and the others were accessories. The jury does not need to decide which of them was the principal offender and which were accessories (*R v Lowery & King (No 2)* [1972] VR 560).

Last updated: 9 March 2018

5.7.1 Charge: Commonwealth Complicity Type of Offence Not in Issue

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This Charge has been designed for use in cases where the accused is charged with being involved in the commission of an offence via Criminal Code (Cth) s 11.2(1), where it is accepted that the offence committed was of the same type as the offence the accused intended to aid, abet, counsel or procure. This will occur either:

i) where the offence committed was the intended offence or

ii) where the offence committed was somehow different to the offence intended, but the parties agree that it was of the same 'type'.

This Charge is not intended for use when there is a question about whether the offence committed is the same 'type' as the offence the accused intended to aid, abet, counsel or procure, or when the prosecution relies on an accused having been reckless about the offence committed.

This charge refers only to aiding or abetting. If the accused's alleged conduct is properly classified as counselling or procuring, the charge should be adapted accordingly.

NOA has been charged with the offence of NOO. However, it has not been alleged that s/he personally committed the acts that make up that offence. Instead, the prosecution has alleged that s/he committed NOO by aiding or abetting NO3P to commit that offence. I must therefore direct you about when a person will be held responsible for aiding or abetting someone else to commit an offence.

In order to find NOA guilty of NOO by aiding or abetting its commission, the prosecution must prove the following [three/four] elements:[319]

One – that someone committed the offence of NOO. Throughout these directions, I will call the person who committed that offence the "principal offender".

Two – that NOA actually aided or abetted the principal offender to commit NOO.

Three – that NOA intended that his/her conduct would aid or abet the principal offender to commit NOO.[320]

[*If withdrawal is relevant, add the following shaded section.*]

Four – that NOA did not effectively terminate his/her involvement prior to the offence being committed.

[319] If termination is relevant, there are four elements. Otherwise, there are three elements.

[320] If there is a question about whether the offence committed is of the same type as the offence NOO intended to aid or abet, refer to 5.7.3 Charge: Commonwealth Complicity – type of offence in issue.

Before you can find NOA guilty of NOO, you must be satisfied that all of these elements have been proven beyond reasonable doubt.

I will now explain each of these elements in more detail.

Offence committed

The first element that the prosecution must prove is that someone committed the offence of NOO.

In this case, this requires you to be satisfied that all of the following matters have been proven beyond reasonable doubt:

[*Describe all of the elements of the offence, explain those elements, and relate them to the facts.*]

[*If NOA may have committed the offence him/herself, add the following shaded section.*]

Now, you may not be sure whether NOA either committed NOO himself/herself, or assisted NO3P to do so. You do not need to resolve this question to reach your verdict. The law says that if you are satisfied beyond reasonable doubt that NOA either committed the offence himself/herself, or aided or abetted another person to commit the offence, you may find him/her guilty of NOO.

Aid, Abet, Counsel or Procure

Caution! Part of this direction concerns the meaning of the words 'in fact'. The law on this issue is unclear. See 5.7 Commonwealth Complicity (s 11.2) for guidance.

The second element that the prosecution must prove is that the accused in fact aided or abetted the principal offender to commit an offence like NOO.

A person aids or abets the principal offender if s/he:

[*insert the following bullet points as appropriate*]

- helps him/her to commit the offence; or
- encourages him/her to commit the offence; or
- conveys to him/her that s/he supports the commission of the offence.

A person can aid or abet an offence by words, action or both.

[*If counselling/procuring is being alleged, insert the following bullet points as appropriate*]

A person counsels or procures an offence if s/he:

- urges, advises or solicits the principal offender to commit the offence; or
- encourages or supports the principal offender to commit the offence; or

A person can counsel or procure an offence by words, action or both.

In this case, the prosecution argue that NOA aided or abetted the offending by [*identify relevant prosecution evidence and arguments*]. The defence deny this, and argue [*identify relevant evidence and arguments*].

As part of this element, you also need to consider whether NOA's actions actually aided or abetted NO3P's offending. This means you must consider what effect NOA's actions had on whether NOO was committed.

[*Insert relevant prosecution and defence evidence and arguments.*]

It is only if you are satisfied, beyond reasonable doubt, that NOA actually aided or abetted NO3P to commit NOO that this second element will be met.

Intention

The third element that the prosecution must prove is that NOA intentionally aided or abetted the principal offender to commit NOO.

To prove this, the prosecution must first show that at the time s/he [*identify the conduct of NOA that is alleged as having aided or abetted the offending*], s/he meant for that conduct to assist or encourage NO3P to commit NOO, or s/he was aware that NOO would occur in the ordinary course of events.

The prosecution must show that NOA knew all the essential facts needed to establish NOO, or believed that those essential facts existed. This is because a person cannot intentionally aid or abet an offence unless s/he knows the essential facts giving rise to that offence.

The "essential facts" that are needed to establish NOO are the [*insert number*] matters that I just explained to you in relation to the first element. So for this first step to be met, NOA must have known or believed that:

[*Summarise all of the elements of the principal offence as they relate to NO3P's conduct, subject to any special liability provisions that apply.*]

Another way this element could be satisfied is if you find that NOA was aware that their conduct would bring about the commission of NOO in the ordinary course of events.

The prosecution alleged that NOA had this intention. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert relevant evidence and/or arguments*].

[*If the prosecution argue that the accused aided or abetted the offender by his/her presence alone, add the following shaded section.*]

You will note that in this case the prosecution did not allege that NOA said or did anything at the time of the offence to assist or encourage NO3P. They alleged that it was NOA's presence at the time that NO3P committed NOO that aided or abetted NO3P.

The law recognises that a person can intentionally aid or abet the commission of an offence by being present when the offence is committed. However, for this to be the case, you must find that NOA intended his/her presence at the crime scene to have aided or abetted NO3P to commit NOO. It is not sufficient for him/her simply to have been there at the relevant time, or to have simply been passing by.

In determining whether NOA intended his/her presence at the commission of the offence to aid or abet NOO, you should view his/her conduct as a whole, before and at the time of the alleged offence, and consider whether s/he was linked in purpose with NO3P in some way, such that his/her presence assisted or encouraged NO3P.

If you find that NOA's presence was not intended to have aided or abetted NO3P, then this element will not be met. However, if you are satisfied that NOA had that intention, then this element will be met.

[*If not already done, identify the matters said to constitute aiding or abetting NOO.*]

Withdrawal

[*If termination of the accused's involvement is in issue, add the following shaded section.*[321]]

The fourth element that the prosecution must prove is that the accused did not effectively terminate his/her involvement prior to the offence being committed.

The law says that, for a person not to be taken to have committed the offence, s/he must terminate his/her involvement and take all reasonable steps to prevent the offence being committed. His/her termination must be timely and effective.

Whether the accused has taken all reasonable steps to prevent the commission of the offence is a question for you. You must apply your common sense and experience. For example, in some cases it will be enough for the accused to take back any tools he or she has provided for the commission of the crime, and to make it clear that if the principal offender commits the offence, s/he does so without the accused's approval or support. In some cases it may be necessary for the accused to inform the police of the planned offence.

It is not for the defence to prove that NOA terminated his/her involvement in NOO in a timely and effective manner. It is the prosecution who must prove that NOA did not take all reasonable steps to prevent NOO being committed.

The prosecution argued that NOA had not taken all reasonable steps to prevent NOO. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA terminated his/her involvement in a timely and effective manner. [*Insert relevant evidence and/or arguments.*]

Application of Law to Evidence

[*If not already done, apply the law to the relevant evidence here.*]

Defences

[*If any* defences *are open on the evidence, insert relevant directions.*]

Summary

To summarise, before you can find NOA guilty of committing NOO by aiding, abetting, counselling or procuring the principal offender to commit NOO, the prosecution must prove to you beyond reasonable doubt:

One – that someone committed NOO; and

Two – that the accused in fact aided or abetted NO3P to commit NOO; and

Three – that the accused intended for their conduct to aid or abet the principal offender to commit NOO;

[*If termination is relevant, add the following shaded section.*]

and Four – that NOA did not effectively terminate his/her earlier involvement.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of NOO by aiding or abetting its commission.

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[321] To reflect the different statutory language, this element of the charge is different to the termination element for a charge under s 11.2A (joint commission).

Last updated: 9 March 2018.

5.7.2 Checklist: Commonwealth Complicity Type of Offence Not in Issue

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Four elements the prosecution must prove beyond reasonable doubt:

1. Someone committed the offence charged; and

2. The accused actually assisted or encouraged the principal offender to commit the offence;[322] and

3. The accused intended to assist or encourage the principal offender to commit the offence; and

4. The accused did not effectively terminate his/her involvement before the offence was committed.[323]

Offence committed

1. Did someone commit the offence charged?[324]

Consider – Has the prosecution proven all elements of that offence?

If Yes, then go to Question 2.1

If No, then the accused is not guilty of aiding or abetting the offence charged

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Actual assistance or encouragement

2.1 Did the accused do something that helped the principal offender to commit the offence?

If Yes, then go to Question 3.1

If No, then go to Question 2.2

2.2. Did the accused do something that encouraged the principal offender to commit the offence?

If Yes, then go to Question 3.1

If No, then go to Question 2.3

2.3. Did the accused do something that conveyed to the principal offender, by words or presence or behaviour, that s/he supported the commission of the offence?

If Yes, then go to Question 3.1

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[322] If counselling/procuring is being alleged, adjust the language in this checklist accordingly.

[323] This should be deleted if termination is not in issue.

[324] If the jury has received a separate checklist outlining the elements of the offence, it may be desirable to include a cross-reference to that checklist here, noting which elements of the offence must be proven for this element to be met.

If No, then the accused is not guilty of aiding or abetting the offence charged

*Consider – **What effect did the accused's words, presence or behaviour have on the principal offender?***

Intention

3.1 At the time the accused assisted or encouraged the principal offender, did s/he know, or believe in, the essential circumstances that make up the offence?

If Yes, then go to Question 4.1

If No, then go to Question 3.2

3.2 At the time the accused assisted or encouraged the principal offender, was s/he aware that their conduct would bring about the commission of the offence in the ordinary course of events?

If Yes, then go to Question 4.1[325]

If No, then the accused is not guilty of aiding or abetting the offence charged

Termination

4.1 Did the accused terminate his or her involvement in a timely manner, before the offence was committed?

Consider – How long before the offence was committed did the accused withdraw his/her assistance/encouragement?

If Yes, then go to Question 4.2

If No, then the accused is guilty of aiding or abetting the offence charged (as long as you have also answered Yes to questions 1, 2, and 3)

4.2 Did the accused take all reasonable steps to prevent the offence being committed?

Consider – What steps did the accused take? In the circumstances, were those all the steps s/he could reasonably take?

If Yes, then the accused is not guilty of committing the offence charged by pursuing a joint enterprise

If No, then the accused is guilty of aiding or abetting the offence charged (as long as you have also answered Yes to questions 1, 2, and 3)

Last updated: 9 March 2018

5.7.3 Charge: Commonwealth Complicity Type of Offence in Issue

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[325] If termination is not in issue, the checklist ends here, and this should be adjusted to note that a Yes means that the accused is guilty of the offence charged.

This Charge has been designed for use in cases where the accused is charged with being involved in the commission of an offence via Criminal Code (Cth) s 11.2(1), where there is an issue about whether the offence committed was of the same type as the offence the accused intended to aid, abet, counsel or procure, or the charge is based on the accused having been reckless about the offence actually committed.

For other forms of complicity for Commonwealth offences, see:

i) Charge: Commonwealth Complicity – Type of offence not in issue

ii) Charge: Commonwealth Joint Commission – Accordance with Agreement

iii) Charge: Commonwealth Joint Commission – Course of Agreement

This charge refers to two different offences. The charged offence is the offence which is charged on the indictment. The intended offence is the offence the prosecution identifies as the one which the accused intended to aid, abet, counsel or procure. This will be identified by the prosecution during the course of the trial.

This charge refers only to aiding or abetting. If the accused's alleged conduct is properly classified as counselling or procuring, the charge should be adapted accordingly.

NOA has been charged with the offence of [*insert charged offence*]. However, it has not been alleged that s/he personally committed the acts that make up that offence. Instead, the prosecution has alleged that s/he committed [*insert charged offence*] by aiding or abetting NO3P to commit that offence. I must therefore direct you about when a person will be held responsible for aiding or abetting someone else to commit an offence.

In order to find NOA guilty of NOO by aiding or abetting its commission, the prosecution must prove the following [three/four] elements:[326]

One – that someone committed the offence of NOO. Throughout these directions, I will call the person who committed that offence the "principal offender".

Two – that NOA actually aided or abetted the principal offender to commit NOO.

Three – that NOA had the necessary state of mind when aiding or abetting the principal offender to commit [*insert intended offence*].

[*If termination is relevant, add the following shaded section.*]

and Four – that NOA did not effectively terminate his/her involvement prior to the offence being committed.

Before you can find NOA guilty of [*insert charged offence*], you must be satisfied that all of these elements have been proven beyond reasonable doubt.

I will now explain each of these elements in more detail.

Commission of Offence

The first element that the prosecution must prove is that someone *committed* [*insert charged offence*].

In this case, this requires you to be satisfied that all of the following matters have been proven beyond reasonable doubt:

[*Describe all of the elements of the charged offence, explain those elements, and relate them to the facts.*]

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[326] If termination is relevant, there are four elements. Otherwise, there are three elements.

[*If NOA may have committed the offence him/herself, add the following shaded section.*]

Now, you may not be sure whether NOA either committed [*insert charged offence*] himself/herself, or assisted NO3P to do so. You do not need to resolve this question to reach your verdict. The law says that if you are satisfied beyond reasonable doubt that NOA either committed the offence himself/herself, or aided or abetted another person to commit the offence, you may find him/her guilty of [*insert charged offence*].

Aid, Abet, Counsel or Procure

Caution! Part of this direction concerns the meaning of the words 'in fact'. The law on this issue is unclear. See 5.7 Commonwealth Complicity (s 11.2) for guidance.

The second element that the prosecution must prove is that the accused in fact aided or abetted NO3P to commit [*insert charged offence*].

A person aids or abets the principal offender if s/he:

[*insert the following bullet points as appropriate*]

- helps him/her to commit the offence; or
- encourages him/her to commit the offence; or
- conveys to him/her that s/he supports the commission of the offence.

A person can aid or abet an offence by words, action or both.

[*If counselling/procuring is being alleged, insert the following bullet points as appropriate*]

A person counsels the principal offender or procures an offence if s/he:

- urges, advises or solicits him/her to commit the offence; or
- encourages or supports him/her to commit the offence; or

A person can counsel or procure an offence by words, action or both.

In this case, the prosecution argue that NOA aided or abetted the offending by [*identify relevant prosecution evidence and arguments*]. The defence deny this, and say [*identify relevant evidence and arguments*].

As part of this element, you also need to consider whether NOA's actions actually aided or abetted NO3P's offending. This means you must consider what effect NOA's actions had on whether NOO was committed. [*Insert relevant prosecution and defence evidence and arguments.*]

It is only if you are satisfied, beyond reasonable doubt, that NOA actually aided or abetted NO3P to commit [*insert charged offence*] that this second element will be met.

State of mind

Caution! Part of this direction concerns the meaning of the words 'of the type'. The law on this issue is unclear. See 5.7 Commonwealth Complicity (s 11.2) for guidance.

The third element looks at NOA's state of mind. There are three parts to this element.[327]

The prosecution does not argue that NOA intended to aid or abet [*insert charged offence*]. Instead, the prosecution argues that s/he intended to aid or abet NO3P to commit a different offence, [*insert intended offence*].

To prove this, the prosecution must first show that at the time NOA [*identify the conduct of NOA that is alleged as having aided or abetted the offending*], s/he meant to aid or abet NO3P to commit [*insert intended offence*]. They must show that NOA knew all the essential facts needed to establish [*insert intended offence*], or believed that those essential facts existed. This is because a person cannot intentionally aid or abet an offence unless s/he knows the essential facts of that offence.

[*Summarise all of the elements of the intended offence, subject to any special liability provisions that apply, relating those to the facts alleged.*]

You must find that NOA him/herself actually knew of, or believed in, all of these circumstances at the time s/he [*describe the conduct alleged to have aided or abetted*]. It is not enough for you to find that s/he should have known those circumstances.

The prosecution alleged that NOA had the necessary knowledge or belief. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert relevant evidence and/or arguments*].

If you are satisfied that NOA knew of these essential circumstances, you must then consider whether s/he intended to aid or abet the commission of [*insert intended offence*].

[*If the prosecution argued that the accused aided or abetted the offender by his/her presence alone, add the following shaded section.*]

You will note that in this case the prosecution did not allege that NOA said or did anything at the time of the offence to assist or encourage NO3P. They alleged that it was NOA's presence at the time that NO3P committed [*intended offence*] that aided or abetted NO3P.

The law recognises that a person can intentionally aid or abet the commission of an offence by being present when the offence is committed. However, for this to be the case, you must find that NOA intended his/her presence at the crime scene to have aided or abetted NO3P to commit [*insert intended offence*]. It is not sufficient for him/her simply to have been there at the relevant time, or to have simply been passing by.

In determining whether NOA intended his/her presence to aid or abet [*insert intended offence*], you should view his/her conduct as a whole, before and at the time of the alleged offence, and consider whether s/he was linked in purpose with NO3P in some way, such that his/her presence assisted or encourage NO3P.

If you find that NOA's presence was not intended to have aided or abetted NO3P, then this element will not be met. However, if you are satisfied that NOA had that intention, then this element will be met.

[*If not already done, identify the matters said to constitute aiding or abetting NOO.*]

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[327] If it is not open to the jury to find that the intended offence and the charged offence are of the same type, this direction must be modified. In such a case, there will only be two parts to the third element: intention to aid or abet the intended offence and recklessness about the commission of the charged offence.

Second, you must consider the relationship between [*insert intended offence*] and [*insert charged offence*]. The law says that if you find that [*insert intended offence*] is of the same type as [*insert charged offence*], then this third element only requires proof that NOA intended that his/her conduct would aid or abet NO3P to commit [*insert intended offence*]. Otherwise, there is an additional requirement which I will explain in a moment.

It is a question for you to decide whether [*insert intended offence*] is of the same type as [*insert charged offence*]. The law does not specify what you must consider to decide this question. The prosecution says that these two offences are of the same type because [*identify relevant prosecution evidence and arguments*]. Defence say you should reject this, arguing [*identify relevant evidence and arguments*].[328]

Remember, the prosecution must satisfy you beyond reasonable doubt that [*insert intended offence*] and [*insert charged offence*] are of the same type. If you are satisfied, then you do not need to consider the third part of this element, which I explain shortly. If you are not satisfied – that is, if you find that the two offences are not of the same type – then you must go on to consider the third part of this element.[329]

The third part of this element is that NOA was reckless about the commission of [*insert charged offence*].

To prove this, the prosecution must show that NOA was aware of a substantial risk that NO3P would [*identify elements of charged offence*]. These are the same [*insert number of elements*] matters which the prosecution needed to prove in relation to the first element.[330]

The prosecution must also show that it was unjustifiable for NOA to take that risk in the circumstances known to him/her.

There is an important difference between this element and the first element. The first element looks at what happened following NOA's conduct to aid or abet an offence. Has the prosecution proved that a person committed [*insert charged offence*]? In contrast, this element looks at what NOA knew or was aware of at the time the prosecution contends that s/he aided or abetted NO3P. Has the prosecution proved that s/he was aware of a substantial risk that NO3P would commit [*insert charged offence*] and that it was unjustified to take that risk?

[*Identify relevant prosecution and defence evidence and arguments.*]

Withdrawal

[*If termination of the accused's involvement is in issue, add the following shaded section.*][331]

The fourth element that the prosecution must prove is that the accused did not effectively terminate his/her involvement prior to the offence being committed.

The law says that, for a person not to be taken to have committed the offence, s/he must terminate his/her involvement and take all reasonable steps to prevent the offence being committed. His/her

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[328] The jury may ask for examples of offences that may be 'same type'. 5.7 Commonwealth Complicity includes two examples, but these may not be appropriate in all cases. Consider providing a case-specific example.

[329] If the jury asks what to do if they disagree, internally, about whether an offence is the same type, instruct them to consider the third part of the state of mind element (recklessness).

[330] This statement must be modified if any of the physical elements of the completed offence are subject to a special liability provision.

[331] To reflect the different statutory language, this element of the charge is different to the termination element for a charge under s 11.2A (joint commission).

termination must be timely and effective.

Whether the accused has taken all reasonable steps to prevent the commission of [*insert charged offence*] is a question for you. You must apply your common sense and experience. For example, in some cases it will be enough for the accused to take back any tools he or she has provided for the commission of the crime, and to make it clear that if the principal offender commits the offence, s/he does so without the accused's approval or support. In some cases it may be necessary for the accused to inform the police of the planned offence.

It is not for the defence to prove that NOA terminated his/her involvement in NOO in a timely and effective manner. It is the prosecution who must prove that NOA did not take all reasonable steps to prevent NOO being committed.

The prosecution argued that NOA had not taken all reasonable steps to prevent NOO. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA terminated his/her involvement in a timely and effective manner. [*Insert relevant evidence and/or arguments.*]

Application of Law to Evidence

[*If not already done, apply the law to the relevant evidence here.*]

Defences

[*If any defences are open on the evidence, insert relevant directions.*]

Summary

To summarise, before you can find NOA guilty of committing NOO by aiding, abetting, counselling or procuring the principal offender to commit NOO, the prosecution must prove to you beyond reasonable doubt:

One – that someone committed [*insert charged offence*]; and

Two – that the accused actually aided or abetted NO3P to commit [*insert charged offence*]; and

Three – that NOA had the necessary *state of mind* when aiding or abetting the principal offender to commit [*insert intended offence*].

[*If termination is relevant, add the following shaded section.*]

and Four – that NOA did not effectively terminate his/her earlier involvement.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of [*insert charged offence*].

Last updated: 9 March 2018

5.7.4 Checklist: Commonwealth Complicity Type of Offence in Issue

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Four elements the prosecution must prove beyond reasonable doubt:

1. Someone committed the offence charged; and

2. The accused actually assisted or encouraged the principal offender to commit the offence;[332] and

3. When the accused assisted or encouraged the principal offender to commit the offence, s/he had the necessary state of mind; and

4. The accused did not effectively terminate his/her involvement before the offence was committed.[333]

Offence committed

1. Did someone commit the offence charged?[334]

Consider – Has the prosecution proven all elements of that offence?

If Yes, then go to Question 2

If No, then the accused is not guilty of aiding or abetting the offence charged

Actual assistance or encouragement

2.1 Did the accused do something that helped the principal offender to commit the offence?

If Yes, then go to Question 3.1

If No, then go to Question 2.2

2.2. Did the accused do something that encouraged the principal offender to commit the offence?

If Yes, then go to Question 3.1

If No, then go to Question 2.3

2.3. Did the accused do something that conveyed to the principal offender, by words or presence or behaviour, that s/he supported the commission of the offence?

If Yes, then go to Question 3.1

If No, then the accused is not guilty of aiding or abetting the offence charged

*Consider – **What effect did the accused's words, presence or behaviour have on the principal offender?***

State of mind

3.1 At the time the accused assisted or encouraged the principal offender, did s/he know, or believe in,

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[332] If counselling/procuring is being alleged, adjust the language in this checklist accordingly.

[333] This should be deleted if termination is not in issue.

[334] If the jury has received a separate checklist outlining the elements of the offence, it may be desirable to include a cross-reference to that checklist here, noting which elements of the offence must be proven for this element to be met.

the essential circumstances that make up [*intended offence*]?[335]

If Yes, then go to Question 3.2

If No, then the accused is not guilty of aiding or abetting the offence charged

3.2 Did the accused intend to assist or encourage the principal offender to commit an offence of the same type as the offence that s/he has been charged with aiding or abetting?

If Yes, then go to Question 4[336]

If No, then go to Question 3.3

3.3 Was the accused aware that there was a substantial risk that the principal offender would commit the offence charged?

If Yes, then go to Question 3.4

If No, then the accused is not guilty of aiding or abetting the offence charged

3.4 Was it unjustifiable for the accused to take that risk, in the circumstance known to him/her?

If Yes, then go to Question 4[337]

If No, then the accused is not guilty of aiding or abetting the offence charged

Termination

4.1 Did the accused terminate his or her involvement in a timely manner, before the offence was committed?

Consider – How long before the offence was committed did the accused withdraw his/her assistance/encouragement?

If Yes, then go to Question 4.2

If No, then the accused is guilty of aiding or abetting the offence charged (as long as you have also answered Yes to questions 1, 2, and 3)

4.2 Did the accused take all reasonable steps to prevent the offence being committed?

Consider – What steps did the accused take? In the circumstances, were those all the steps s/he could

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[335] If there is an issue about whether the intended offence and the charged offence are 'of the same type', it may be desirable to provide a document showing the elements of the intended offence, so that the jury can clearly see what it is that that the accused allegedly intended.

[336] If termination is not in issue, the checklist ends here, and this should be adjusted to note that a Yes means that the accused is guilty of the offence charged.

[337] If termination is not in issue, the checklist ends here, and this should be adjusted to note that a Yes means that the accused is guilty of the offence charged.

reasonably take?

If Yes, then the accused is not guilty of committing the offence charged by pursuing a joint enterprise

If No, then the accused is guilty of aiding or abetting the offence charged (as long as you have also answered Yes to questions 1, 2, and 3)

Last updated: 9 March 2018

5.8 Commonwealth Joint Commission (s 11.2A)

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General Principles

1. Criminal Code s 11.2A(1) provides that:

> (1) If:
>
> (a) a person and at least one other party enter into an agreement to commit an offence; and
>
> (b) either:
>
> (i) an offence is committed in accordance with the agreement ...; or
>
> (ii) an offence is committed in the course of carrying out the agreement ...;
>
> the person is taken to have committed the joint offence ... and is punishable accordingly.

2. Section 11.2A does not create an offence, but extends criminal responsibility to all those who enter into an agreement to commit an offence (*Franze v R* [2014] VSCA 352 [97]). It codifies the law of joint criminal enterprise (s 11.2A(1)(b)(i)) and extended common purpose (s 11.2A(1)(b)(ii)) (see *R v Franze (Ruling No 2)* (2013) 37 VR 101 [20]; *Masri v R* [2015] NSWCCA 243 [1]).
3. Section 11.2A applies to offences committed after 20 February 2010. It was introduced with the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) after it was recognised that, prior to the amendment, the Code lacked any provision extending criminal liability in circumstances involving an agreement to commit an offence (*Handlen v R; Paddison v R* (2011) 245 CLR 282 [1]).

Liability

4. Section 11.2A of the *Code* provides two forms of liability for joint commission. The first form of liability is an analogue to joint criminal enterprise. The prosecution must prove, beyond reasonable doubt, that:

   i) The accused entered into an agreement with at least one other person to commit an offence (the joint offence)

   ii) The accused and at least one other party to the agreement intended that the joint offence would be committed under the agreement

   iii) The joint offence was committed in accordance with the agreement (ss 11.2A(1), (2), (4); *Tartaglia v The Queen* (2022) 367 FLR 149).

5. This form of liability is referred to in this topic as joint commission of an offence in accordance with an agreement.
6. The second form of liability is a statutory analogue to extended common purpose and covers the situation where there is divergence between the agreement and the committed offence. Proof of this form of liability requires the prosecution to show, beyond reasonable doubt, that:

    i) The accused entered into an agreement with at least one other person to commit an offence (the foundational offence)

    ii) The accused and at least one other party to the agreement intended that an offence would be committed under the agreement

    iii) The accused was reckless about the commission of a different offence (the charged offence) that another party in fact committed in the course of carrying out the agreement (ss 11.2A(1), (3), (4)).

7. This form of liability is referred to in this topic as joint commission of an offence in the course of carrying out an agreement.
8. An accused may be found guilty of jointly committing an offence even if they were not present while any of the conduct constituting the offence charged was engaged in (*Criminal Code* s 11.2A(7)(b)).

Joint Commission of an offence in accordance with an agreement

Agreement to Commit an Offence

9. The first matter the prosecution must prove is that the accused and at least one other party entered into an agreement to commit an offence (*Criminal Code* s 11.2A(1)(a)).
10. The agreement must be entered into before or at the same time as the acts or omissions constituting the charged offence (*Criminal Code* s 11.2A(5)(b)).
11. Other than specifying that the agreement may be a non-verbal understanding (Criminal Code s 11.2A(5)(a)), the Code does not define 'agreement'. The scope of the term is likely to be informed by common law principles in relation to joint criminal enterprise. For details, see 'Agreement to Pursue a Joint Enterprise to Commit a Crime' in 5.3 Joint Criminal Enterprise (Pre-1/11/14).
12. This is consistent with the common law position (see *McAuliffe v The Queen* (1995) 183 CLR 108).
13. The agreed criminal conduct must be capable of definition with some degree of certainty (*R v Franze (Ruling No 1)* (2013) 37 VR 101; Weng v R [2013] VSCA 221, [71]).

Parties with a mental impairment

14. At common law, it was possible for a person who could not understand that his or her actions were wrong to still be part of an agreement to commit an offence. That person's actions could be attributed to other parties to the agreement, even though the person with the impairment may not be criminally liable for the offence because he or she was suffering from a mental impairment (*Matusevich v The Queen* (1977) 137 CLR 633; *Osland v The Queen* (1998) 197 CLR 316).
15. In *Matusevich*, Aicken J (Stephen, Mason, Murphy JJ agreeing) noted that careful directions would be required in such a situation. The jury would need to consider whether the party alleging a mental impairment understood the nature and quality of what he or she did to contribute to the agreement. If he or she did not have that understanding, there could be no joint commission, because there could be no agreement. However, if he or she could understand the nature of their activity but could not understand that it was *wrong*, he or she could nevertheless form an agreement.

16. In some cases, it may be more appropriate for the prosecution to place a charge under s 11.3 of the *Code*, commission by proxy.

Intention

17. The second matter the prosecution must prove is that the accused and at least one other party to the agreement intended that an offence would be committed under the agreement.

18. Section 5.2 of the Code defines intention and identifies that a person can have intention with respect to conduct, a circumstance or a result. The drafting of s 11.2A(4) suggests that the relevant form of intention is intention with respect to result. That is, the prosecution must show that the accused meant to bring about the commission of an offence when they entered into the agreement, or were aware that this would occur in the ordinary course of events (*Criminal Code* s 5.2(3)).

19. Section 11.2A(4) speaks of intention to commit an offence, and is not expressly limited to the offence charged or agreed on. The broad language used is likely due to the fact that the same sub-section applies to intention for offences committed both in accordance with and in the course of carrying out the agreement.

20. At common law, the accused was required to have the state of mind relevant to the agreed offence (*R v Clarke & Johnstone* [1986] VR 643; *Johns v R* (1980) 143 CLR 108; *McAuliffe v R* (1995) 183 CLR 108; *R v Taufahema* [2007] HCA 11; *Likiardopoulos v R* [2010] VSCA 344; *Arafan v R* [2010] VSCA 356). By including a separate element of intention in s 11.2A, it appears that this aspect of the common law does not apply.

21. The most likely interpretation in the context of offences committed in accordance with the agreement is that the accused (and another party to the agreement) must have intended to commit an offence of the same type as the joint offence. This accords with the language of s 11.2A(2)(a).

22. Section 11.2A(4) is subject to s 11.2A(8), which states that any special liability provisions that apply to an offence also apply for the purposes of joint commission. This means that the prosecution will not need to establish intention in relation to any physical elements of the offence that are subject to a special liability provision (*R v Franze (Ruling No 1)* [2013] VSC 229 [17]). For further information, see 'Substantive offences and special liability provisions' below.

Offence Committed in Accordance with Agreement

23. The third matter the prosecution must prove is that the offence was committed in accordance with the agreement (Criminal Code s 11.2A(1)(b)(i)).

24. Section 11.2A(2) explains that an offence is committed in accordance with the agreement if:

    (a) the conduct of one or more of the parties in accordance with the agreement makes up the physical elements of an offence (the joint offence) of the same type as the offence agreed to; and

    (b) to the extent that a physical element of the joint offence consists of a result of conduct, that result arises from the conduct engaged in; and

    (c) to the extent that a physical element of the joint offence consists of a circumstance, the conduct engaged in, or a result of the conduct engaged in, occurs in that circumstance.

25. In the context of s 11.2A(2), conduct can either be an act or an omission to perform an act (*Criminal Code* s 4.1).

26. The prosecution will need to prove all physical elements of the offence charged. It will not be sufficient for the prosecution to demonstrate that only some of the physical elements have been completed. If some of the physical elements are incomplete, the prosecution should rely on attempting to commit the relevant offence.

27. The prosecution must also prove that the offence was committed in accordance with the agreement. It must have come within the scope of the parties' agreement (*R v Jensen and Ward* [1980] VR 196; *R v PDJ* (2002) 7 VR 612; *R v Anderson* [1966] 2 QB 110; *R v Heaney & Ors* [1992] 2 VR 531). Determining whether the offence was within the scope of the agreement will likely rely on common law principles. For further information, see 'Acts Must have been Within the Scope of the Agreement' in 5.3 Joint Criminal Enterprise (Pre-1/11/14).

Type of Offence

28. An offence is committed in accordance with the agreement if the offence committed is of the 'same type' as that which was agreed to (*Criminal Code* s 11.2A(2)(a)).

29. There have not yet been any reported cases examining the meaning of 'same type' in s 11.2A. For guidance on what it may include, see 5.7 Commonwealth Complicity (s 11.2).

Accused's Participation

30. At common law, offending as part of a group required proof of an additional element that the accused participated in the joint enterprise in some way. The prosecution was required to prove that the accused took a step or steps toward committing the agreed offence (*R v Clarke & Johnstone* [1986] VR 643; *R v Lao & Nguyen* (2002) 5 VR 129; *Likiardopoulos v R* [2010] VSCA 344; *Arafan v R* [2010] VSCA 356).

31. Several judgments have assumed that this is also a requirement under the Code, though such statements have been obiter (see, e.g. *Romolo v The Queen* [2018] NSWCCA 3, [52]; *R v Franze (No 2)* (2013) 37 VR 101, [20]; *Inegbedion v The Queen* [2013] NSWCCA 291, [52]).

32. Most recently, the South Australian Court of Appeal considered the issue as part of a ground of appeal and held that there is no separate requirement of proving participation as part of offending under s 11.2A. The Court considered there was no textual basis for importing such a requirement, and the principles of statutory interpretation applicable to codes do not support approaching s 11.2A as though it was simply a restatement of the common law. The Court also observed that the conspiracy provisions in s 11.5 do require proof of an overt act as part of a conspiracy, and if Parliament had wanted to include a similar requirement for s 11.2A, it could have done so (*Tartaglia v The Queen* (2022) 367 FLR 149, [51]–[61])..

Joint Commission of an offence in the course of carrying out an agreement

33. Section 11.2A(3) provides for the situation where, in the course of carrying out an agreement to commit one offence, a different offence is committed. In this situation, the accused is guilty of the charged offence if:

    i) He or she entered into an agreement with at least one other person to commit an offence (the foundational offence)

    ii) He or she and at least one other party to the agreement intended that an offence would be committed under the agreement

    iii) He or she was reckless about the commission of a different offence (the charged offence) that another party in fact committed in the course of carrying out the agreement (ss 11.2A(1), (3), (4)).

Agreement to Commit an Offence

34. As with joint commission in accordance with an agreement, the first matter the prosecution must prove is that the accused and at least one other party entered into an agreement to commit an offence (the foundational offence) (*Criminal Code* s 11.2A(1)(a)).

35. The same principles as those discussed above in relation to joint commission in accordance with an agreement apply here.

Intention

36. The second matter the prosecution must prove is that the accused and at least one other party to the agreement must have intended that an offence would be committed under the agreement.

37. Section 5.2 of the Code defines intention and identifies that a person can have intention with respect to conduct, a circumstance or a result. The drafting of s 11.2A(4) suggests that the relevant form of intention is intention with respect to result. That is, the prosecution must show that the accused meant to bring about the commission of an offence when they entered into the agreement, or be aware that this would occur in the ordinary course of events (*Criminal Code* s 5.2(3)).

38. Section 11.2A(4) speaks of intention to commit an offence, and is not expressly limited to the offence charged or agreed on. This could mean that the intention relates to either the foundational or charged offence. The broad language used is likely due to the fact that the same sub-section applies to intention for offences committed both in accordance with and in the course of carrying out the agreement.

39. In the absence of case authority, this Charge Book adopts the view that, to establish intention in relation to joint commission of an offence committed in the course of an agreement, the accused (and another party to the agreement) must have intended to commit an offence of the same type as the foundational offence, which accords with the language of s 11.2A(2)(a). This is because recklessness is the relevant form of fault with respect to the charged offence.

40. Section 11.2A(4) is subject to s 11.2A(8), which states that any special liability provisions that apply to an offence also apply for the purposes of joint commission. This means that the prosecution will not need to establish intention in relation to any physical elements of the foundational offence that are subject to a special liability provision (see *R v Franze (Ruling No 1)* [2013] VSC 229 [17]). For further information, see below under 'Substantive offences and special liability provisions'.

Offence Committed in the Course of Carrying out Agreement

41. The third matter the prosecution must prove is that the accused was reckless about the commission of a different offence (the charged offence) that another party in fact committed in the course of carrying out the agreement (*Criminal Code* s 11.2A(1)(b)(i)).

42. There are two aspects of this. First, the prosecution must prove that the charged offence was committed; and second, they must prove that the accused was reckless about the commission of the charged offence.

Offence committed

43. At common law, proving an offence was committed via extended common purpose required the prosecution to demonstrate that one or more parties to the agreement performed the acts necessary to commit the offence charged, and had the necessary mental state. Nothing in the text of s 11.2A suggests that Commonwealth joint commission intends to depart from that position.

44. This Charge Book adopts the view that, consistently with common law, to establish that an offence was committed in accordance with an agreement under s 11.2A(3) the prosecution must demonstrate that all of the physical elements of the offence charged were committed, and that the principal offender(s) had the necessary fault elements for that offence.

45. It is not necessary for the principal offender(s) to have been prosecuted or found guilty before an accused may be found guilty of the joint offence (*Criminal Code* s 11.2A(7)(a)).

Recklessness as to the offence committed

46. The prosecution must also prove that the accused was reckless about the commission of the charged offence; the offence that was actually committed.

47. A person is reckless when they are aware of a substantial risk that a result or circumstance will occur, and it is unjustifiable for them to take that risk given the circumstances known to them (*Criminal Code* s 5.4).

48. At common law, the accused must have foreseen the possibility of the offence charged occurring (*Miller v R* [2016] HCA 30 [4]). This differs from the recklessness provision in s 11.2A(3), which requires awareness of a substantial risk. In this respect the Code departs from the common law.

49. In the context of s 11.2A(3), the prosecution needs to demonstrate that the accused was aware of a substantial risk that the principal offender would commit the offence charged while carrying out the agreement, and it was unjustifiable for the accused to take that risk.

50. The jury must determine whether it is unjustifiable to take a risk on the facts known to the accused (s 5.4(1)(b)). However, the accused does not need to have believed that it was unjustifiable to take the risk. The test is objective not subjective.

51. The question of whether a risk is unjustifiable requires the jury to make a moral or value judgment relating to the accused's advertent disregard of risk (*R v Saengsai-Or* (2004) 61 NSWLR 135).

52. The jury must assess the likelihood of the risk eventuating, and determine whether the risk is one that should not have been taken (*Lustig v R* (2009) 195 A Crim R 310).

Withdrawal

53. A person cannot be found guilty under s 11.2A if, before any conduct constituting part of the charged offence was committed:

    - they terminated their involvement; and
    - took all reasonable steps to prevent the conduct from being engaged in (*Criminal Code* s 11.2A(6)).

54. The accused bears the evidential burden of pointing to evidence that suggests a reasonable possibility that they terminated their involvement in the agreement and took all reasonable steps to prevent the conduct constituting an offence to be engaged in (s 13.4).

55. If the accused meets the evidential burden, the prosecution will then have to prove that the accused did not effectively terminate their involvement.

56. At common law, withdrawal requires the accused to take all action the accused can reasonably take to undo the effect of his or her previous encouragement or assistance, and this can include informing the police (see *White v Ridley* (1978) 140 CLR 342; *R v Tietie* (1988) 34 A Crim R 438; *R v Jensen and Ward* [1980] VR 196).

57. In contrast, withdrawal under the Code must occur before any aspect of the offending has taken place, and the second limb is to take 'all reasonable steps to prevent the conduct from being engaged in' (s 11.2A(6)(b)).

58. There do not appear to be any reported cases on the scope and operation of this requirement. The Explanatory Memorandum suggests that what will constitute 'reasonable steps' will differ depending on the case, but could include:

    - Discouraging other parties to the agreement;
    - Alerting the proposed victim;
    - Withdrawing goods necessary for committing the crime; and
    - Giving a timely warning to law enforcement before the offence is committed (Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, 138).

59. While these considerations have not been endorsed by a court, they are provided as guidance for trial judges on the operation of s 11.2A(6).

60. Establishing whether the accused has effectively terminated their involvement may draw on common law principles about withdrawing from a joint criminal enterprise. For details, see 'Withdrawing From an Agreement' in 5.3 Joint Criminal Enterprise (Pre-1/11/14).

Substantive offences and special liability provisions

61. Any special liability provisions that apply to the offence charged also apply for the purposes of determining whether a person is guilty of committing the offence through s 11.2A (s 11.2A(8)).

62. The same principle applies for the purpose of attempt, incitement and conspiracy (*Criminal Code* ss 11.1(6A), 11.4(4A), 11.5(7A)).

63. 'Special liability provision' is defined as:

    (a) A provision that provides that absolute liability applies to one or more (but not all) of the physical elements of an offence; or

    (b) A provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew a particular thing; or

    (c) A provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew or believed a particular thing (Criminal Code Dictionary).

64. Fault elements such as knowledge, recklessness and negligence are not 'special liability provisions'.

65. In addition, strict liability, as defined in Criminal Code s 6.1, does not fit within the definition of special liability provision. Therefore, where strict liability applies, the common law rule that an accused must know the essential facts for a joint offence will continue to apply, and the prosecution must prove awareness of those facts (*R v Ansari* (2007) 70 NSWLR 89, [84]).

66. An example of how a special liability provision operates can be seen in the offence of importing a commercial quantity of a border controlled drug. Section 307.5(2) of the *Code* establishes absolute liability for possessing commercial quantities of an unlawfully imported border controlled drug or plant. When a person is charged with joint commission an offence against ss 307.5(1), 11.2A(6) means that there will be no need for the prosecution to prove the accused agreed or intended that the importation involve a specific quantity of drug (*Franze v R* [2014] VSCA 352 [150]–[153]).

Complicity and Attempt

67. It is not an offence to attempt to commit an offence against s 11.2A (*Criminal Code* s 11.1(7)). However, liability under s 11.2A extends to attempted offences. For example, where a person enters into an agreement with another person to import a border controlled drug but the importation is interrupted, s 11.2A enables the person to be charged with attempted importation (*Franze v R* [2014] VSCA 352 [3]).

Last updated: 17 November 2022

5.8.1 Charge: Commonwealth Joint Commission Accordance with Agreement

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This Charge has been designed for use in cases where the accused is charged with being involved in the commission of an offence via Criminal Code (Cth) section 11.2A(1)(b)(i)).

For other forms of complicity for Commonwealth offences, see:

i) Charge: Commonwealth Complicity – Type of offence in issue

ii) Charge: Commonwealth Complicity – Type of offence not in issue

iii) Charge: Commonwealth Joint Commission – Course of Agreement

NOA has been charged with the offence of NOO. However, it has not been alleged that s/he committed that offence alone. Instead, the prosecution has alleged that s/he committed it by agreement with [*insert names of co-offenders*].

The law says that if a person agrees to commit an offence, then he or she may be responsible for committing that offence.

In order to find NOA guilty of NOO, the prosecution must prove the following [three/four] elements:[338]

One – the accused agreed with other people to commit NOO.

Two – that NOA and NO3P intended that an offence would be committed under the agreement.

Three – that, in accordance with that agreement, the parties to the agreement between them performed all of the acts necessary to commit NOO.

[*If termination is relevant, add the following shaded section.*]

Four – that NOA did not effectively terminate his/her involvement prior to the offence being committed.

Before you can find NOA guilty of NOO, you must be satisfied that the prosecution has proven all [three/four] of these elements beyond reasonable doubt.

I will now explain each of these elements in more detail.

Agree to Commit NOO

Caution! Part of this direction concerns the meaning of the words 'of the same type'. The law on this issue is unclear. See 5.8 Commonwealth Joint Commission (s 11.2A) for guidance.

The first element that the prosecution must prove is that the accused agreed with other people to commit NOO.

A person can agree to commit an offence expressly, or you may infer that s/he agreed to commit an offence from the surrounding circumstances. You will recall what I have told you about inferences.[339]

[*If the content of the agreement, or the parties' understanding of the content, is in issue, add the following shaded section.*]

NOA must have agreed to commit an offence [*if relevant, add:* of the same type as] NOO. This element will not be satisfied if the accused agreed to pursue some other form of activity that is not criminal. However, you do not need to find that NOA and [*identify relevant co-offenders*] knew they were agreeing to commit a crime. This element will be satisfied as long as they agreed to do something which was actually criminal.

Similarly, you do not need to find that all of the parties had the same purpose when forming that agreement, or were all aware of the consequences of their actions. You do not even have to find that

[338] If termination is relevant, there are four elements. Otherwise, there are three elements.

[339] This charge is based on the assumption that the judge has already instructed the jury about inferences. It will need to be modified if that has not been done.

they all agreed on the precise terms of the agreement. For this element to be satisfied, you only need to find that they agreed to do something which was actually criminal together.

An example is where two people agree to commit a bank robbery together, with one of them to buy the gun and give it to the other, who will use it at the bank to steal the money. If they carry out this plan, they would both be equally guilty of the crime of armed robbery.

[*If the prosecution relies on NOO being of the same type as the offence agreed to, add the following shaded section.*]

In this case, the prosecution has argued that the acts performed under the agreement together make up NOO, and that this is an offence *of the same type* as the offence agreed to. What does it mean to be *an offence of the same type* as the agreed offence? The prosecution say that if NOA did not agree to NOO, then s/he agreed to [*identify other offences said to be of the same type*]. The prosecution says that these offences are of the *same type* as NOO because [*identify relevant prosecution evidence and arguments*]. Defence say you should reject this, arguing [*identify relevant evidence and arguments*]. It is a matter for you, using logic and common sense, whether [*identify offences said to be of the same type*] are offences of the same type as NOO. If you are satisfied that they are, then you may find this element proved if you are satisfied, beyond reasonable doubt, that NOA agreed to commit [*identify offences said to be of the same type*].

[*If the timing of the agreement is in issue, add the following shaded section.*]

The law says that it does not matter whether the agreement was made before, or at the same time, as NOA and [*identify co-offenders*] started committing NOO. For example, if a person were in the process of robbing a bank when he/she called on someone to help him/her unlock a safe, the person he/she called knew that the caller was robbing a bank, that person could be liable for the robbery even though he/she agreed to help after some of the work had already been done.

In this case, the prosecution alleged that [*specify parties*] agreed to commit NOO. They alleged that this agreement was made [*insert prosecution evidence about the formation of the agreement*].

[*If the defence denies that there was an agreement to commit an offence, add the following shaded section.*]

The defence denied this, arguing [*insert relevant evidence and/or arguments*].

This first element will only be met if you are satisfied, beyond reasonable doubt, that the accused agreed to commit [*if relevant, add:* an offence of the same type as] NOO.

Mental State

The second element that the prosecution must prove is that the accused and NO3P intended that [*insert if relevant:* an offence like] NOO would be committed under the agreement. S/he must have intended the agreement to bring about NOO, or have been aware that NOO would occur in the ordinary course of events.

[*Identify physical elements of NOO, subject to any special liability provisions that apply.*]

It is only if you are satisfied that NOA intended that these elements would be committed under the agreement that this second element will be met.

Joint Offence Committed

The third element that the prosecution must prove is that, in accordance with their agreement, the parties between them performed all of the acts necessary to commit NOO.

There are two parts to this element. First, you must be satisfied that all of the necessary acts were committed by parties to the agreement. This means that you must find that all of the following matters have been proven beyond reasonable doubt:

[*Describe all of the physical elements of the offence, explain those elements, and relate them to the facts.*]

You do not need to find that each party to the agreement committed all of these acts. Even if they each only played a minor role, this part of the third element will be satisfied as long as all of the necessary acts were committed between the parties to the agreement.

The second part of this element requires the prosecution to prove that the commission of this offence was within the scope of the parties' agreement. That is, NOA and NO3P must have agreed to commit the acts that constitute that offence. NOA will not be guilty of committing NOO if that offence was outside the bounds of what s/he had agreed to.

To determine what acts were within the scope of the agreement, you must consider the beliefs the parties held at the time they made the alleged agreement. Whatever acts they all believed would or could be committed in the course of carrying out that agreement are to be treated as being within its scope.

[*If the offence committed may not have been the primary purpose of the agreement, add the following shaded section.*]

You will notice that I referred to acts that "would or could" be committed in the course of carrying out the agreement. This reflects the fact that the scope of an agreement includes any contingencies that are planned as part of that agreement. It is not limited to the acts the parties are definitely planning to carry out. So even if the parties were hoping to avoid committing a particular act, and did not think it was likely to be necessary, if there was a plan to perform that act if certain circumstances arose, then it should be treated as being within the scope of the agreement.

In this case the prosecution alleged that [*describe relevant prosecution evidence and/or arguments*]. The defence denied this, arguing [*describe relevant evidence and/or arguments*].

It is only if you are satisfied that the parties collectively performed all of the acts necessary to commit NOO, and that the commission of this offence was within the scope of the parties' agreement, that this third element will be met.

Withdrawal

[*If termination of the accused's involvement is in issue, add the following shaded section.*[340]]

The fourth element that the prosecution must prove is that the accused did not effectively terminate his/her involvement prior to the performance of any aspect of NOO.

The law says that, for a person not to be liable as someone who agreed to commit an offence, then s/he must terminate his/her involvement and take all reasonable steps to prevent the offence being committed. His/her termination must be timely and effective.

Whether the accused has taken all reasonable steps to prevent the offence is a question for you. You must apply your common sense and experience. For example, in some cases it will be enough for the accused to take back any tools he or she has provided for the commission of the crime. In some cases it may be necessary for the accused to inform the police of the agreement.

It is not for the defence to prove that s/he terminated his/her involvement in NOO in a timely and effective manner. It is the prosecution who must prove that NOA did not take all reasonable steps to prevent any part of NOO being committed.

In this case, the prosecution argued that the accused had not taken all reasonable steps to prevent NOO. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA

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[340] To reflect the different statutory language, this element of the charge is different to the termination element for a charge under s 11.2 (complicity).

terminated his/her involvement in a timely and effective manner. [*Insert relevant evidence and/or arguments.*]

Application of Law to Evidence

[*If not already done, apply the law to the relevant evidence here.*]

Defences

[*If any* defences *are open on the evidence, insert relevant directions.*]

Summary

To summarise, before you can find NOA guilty of NOO, the prosecution must prove to you beyond reasonable doubt:

One – the accused agreed with other people to commit an offence.

Two – that NOA and NO3P intended that an offence would be committed under the agreement

Three – that, in accordance with that agreement, the parties to the agreement between them performed all of the acts necessary to commit NOO.

[*If termination is relevant, add the following shaded section.*]

and Four – that NOA did not effectively terminate his/her earlier involvement prior to the offence being committed.

Last updated: 17 November 2022

5.8.2 Checklist: Commonwealth Joint Commission Accordance with Agreement

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused made an agreement with other people to commit an offence, and

2. The accused and at least one other party to the agreement intended that an offence would be committed; and

3. In accordance with the agreement, the parties between them performed all of the acts needed to commit the offence; and

4. The accused did not effectively terminate his/her involvement before the offence was committed.[341]

Agreement

1. Did the accused make an agreement with other people to commit the offence charged?[342]

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[341] This should be deleted if termination is not in issue.

[342] This checklist will need to be adapted if there is an issue about whether the offence charged is the same type of offence as the offence agreed to.

If Yes, then go to Question 2.1

If No, then the accused is not guilty of committing the offence charged by way of joint commission

Intention

2.1 Did the accused intend that an offence would be committed under the agreement?

Consider – Was the accused aware the offence would occur in the ordinary course of events?

If Yes, then go to Question 2.2

If No, then the accused is not guilty of committing the offence charged by way of joint commission

2.2 Did one other party to the agreement intend that an offence would be committed under the agreement?

If Yes, then the go to Question 3.1

If No, then the accused is not guilty of committing the offence charged by way of joint commission

Offence committed in accordance with agreement

3.1 Did the parties to the agreement commit all of the necessary acts to complete the offence?[343]

If Yes, then go to Question 3.2

If No, then the accused is not guilty of committing the offence charged by way of joint commission

3.2. Was the offence within the scope of the parties' agreement?

Consider – What beliefs did the parties hold at the time they made the agreement? Did they believe that the offence would or could be committed in the course of carrying out the agreement?

If Yes, then go to Question 4.1[344]

If No, then the accused is not guilty of committing the offence charged by way of joint commission

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[343] If the jury has received a separate checklist outlining the elements of the offence, it may be desirable to include a cross-reference to that checklist here, noting the elements of the offence must be proven for this element to be met.

[344] If termination is not in issue, the checklist ends here, and this should be adjusted to note that a Yes means that the accused is guilty of the offence charged.

Termination

4.1 Did the accused terminate his or her involvement in the agreement before any part of the offence was committed?

If Yes, then go to Question 4.2

If No, then the accused is guilty of committing the offence charged by way of joint commission (as long as you have also answered Yes to questions 1, 2 and 3)

4.2 Did the accused take all reasonable steps to prevent the offence from being committed?

Consider – What steps did the accused take? In the circumstances, were those all the steps s/he could reasonably take?

If Yes, then the accused is not guilty of committing the offence charged by way of joint commission

If No, then the accused is guilty committing the offence charged by way of joint commission (as long as you have also answered Yes to questions 1, 2 and 3)

Last updated: 17 November 2022

5.8.3 Charge: Commonwealth Joint Commission Course of Agreement

Click here to download a Word version of this charge

This Charge has been designed for use in cases where the accused is charged with being involved in the commission of an offence via Criminal Code (Cth) section 11.2A(1)(b)(ii)).

For other forms of complicity for Commonwealth offences, see:

i) Charge: Commonwealth Complicity – Type of offence in issue

ii) Charge: Commonwealth Complicity – Type of offence not in issue

iii) Charge: Commonwealth Joint Commission – Accordance with Agreement

NOA has been charged with the offence of [*insert charged offence*]. However, it has not been alleged that s/he committed that offence alone. Instead, the prosecution has alleged that NO3P committed that offence, but that NOA should be held responsible for NO3P's actions.

In order to find NOA guilty of [*insert charged offence*], the prosecution must prove the following [four/five] elements:[345]

One – the accused agreed with other people to commit an offence – [*insert agreed offence*].

Two – that the accused and NO3P intended that [*insert agreed offence*] would be committed under the agreement.

Three – that a party to the agreement committed [*insert charged offence*] in the course of carrying out the agreement.

Four – that NOA was reckless about whether [*insert charged offence*] would be committed in the course of carrying out the agreement.

[345] If termination is relevant, there are five elements. Otherwise, there are four elements.

[*If termination is relevant, add the following shaded section.*]

Five – that NOA did not effectively terminate his/her involvement prior to the offence being committed.

Before you can find NOA guilty of [*insert charged offence*], you must be satisfied that the prosecution has proven all [four/five] of these elements beyond reasonable doubt. I will now explain each of these elements in more detail.

Agree to Commit Offence

The first element that the prosecution must prove is that the accused agreed with other people to commit [*insert agreed offence*]. This is a different offence to [*insert charged offence*]. You must be satisfied that the accused agreed to commit [*insert agreed offence*].

A person can agree to commit an offence expressly, or you may infer that s/he agreed to commit the offence from the surrounding circumstances. You will recall what I have told you about inferences.[346]

[*If the content of the agreement, or the parties' understanding of the content, is in issue, add the following shaded section.*]

NOA must have agreed to commit an [*insert agreed offence*]. This element will not be satisfied if the accused agreed to pursue some other form of activity that is not criminal. However, you do not need to find that NOA and [*identify relevant co-offenders*] knew they were agreeing to commit a crime. This element will be satisfied as long as they agreed to do something which was, in fact, criminal.

Similarly, you do not need to find that all of the parties had the same purpose or intention when forming that agreement, or were all aware of the consequences of their actions. You do not even have to find that they all agreed on the precise terms of the agreement. For this element to be satisfied, you only need to find that they agreed to commit a criminal offence together.

An example of two people agreeing to commit an offence is where two people agree to commit a bank robbery together, with one of them to buy the gun and give it to the other, who will use it at the bank to steal the money. Each of the two people would have agreed to commit the particular offence of armed robbery.

[*If the timing of the agreement is in issue, add the following shaded section.*]

The law says that it does not matter whether the agreement was made before, or at the same time, as NOA and [*identify co-offenders*] started offending. For example, if a person were in the process of robbing a bank when he/she called on someone to help him/her unlock a safe, the person they called could be liable for the robbery even though he/she agreed to help after some of the work had already been done.

In this case, the prosecution alleged that [*specify parties*] agreed to commit [*insert agreed offence*]. They alleged that this agreement was made [*insert prosecution evidence about the formation of the agreement*].

[*If the defence denies that there was an agreement to commit an offence, add the following shaded section.*]

The defence denied this, arguing [*insert relevant evidence and/or arguments*].

It is only if you are satisfied, beyond reasonable doubt, that the accused agreed to commit an offence that this first element will be met.

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[346] This charge is based on the assumption that the judge has already instructed the jury about inferences. It will need to be modified if that has not been done.

Mental State

The second element that the prosecution must prove is that the accused and at least one other party to the agreement intended that [*insert agreed offence*] would be committed under the agreement. They must have intended the agreement to bring about NOO, or have been aware that NOO would occur in the ordinary course of events.

[*Identify physical elements of agreed offence, subject to any special liability provisions that apply.*]

It is only if you are satisfied that NOA *intended* to enter into an agreement to commit [*insert agreed offence*] that this second element will be met.

Commission of Charged Offence

The third element that the prosecution must prove is that, in the course of carrying out the agreement, a party to the agreement committed [*insert charged offence*].

There are also two parts to this element. First, you must be satisfied that a party to the agreement committed [*insert charged offence*]. This means that you must find that all of the following matters have been proven beyond reasonable doubt:

[*Describe all of the elements of the charged offence, explain those elements, and relate them to the facts.*]

The second part of this element requires the prosecution to prove that a party to the agreement committed [*insert charged offence*] in the course of carrying out the agreement.

In this case the prosecution alleged that [*describe relevant prosecution evidence and/or arguments tying the offending to the agreement*]. The defence denied this, arguing [*describe relevant evidence and/or arguments*].

It is only if you are satisfied that NO3P committed [*insert charged offence*], and that s/he committed this offence in the course of carrying out the agreement with NOA, that this third element will be met.

Recklessness

The fourth element the prosecution must prove is that, when NOA agreed to commit an offence, s/he was reckless about whether [*insert charged offence*] would be committed in the course of carrying out the agreement.

To satisfy this element, the prosecution must prove that NOA was aware of a substantial risk that NO3P would [*identify elements of charged offence*]. These are the same [*insert number of elements*] matters which the prosecution needed to prove in relation to the second element.

The prosecution must also show that it was unjustifiable for him/her to take that risk in the circumstances known to him/her. Whether taking such a risk is unjustifiable is a question of fact for you to determine. It does not matter whether NOA thought the risk was justified.

There is an important difference between this element and the second element. The second element looks at what happened in the course of carrying out the agreement. Has the prosecution proved that NO3P committed [*insert charged offence*]? In contrast, this element looks at what NOA was aware of at the time s/he made the agreement. Has the prosecution proved that s/he was aware of a substantial risk that someone would commit [*insert charged offence*]?

[*Identify relevant prosecution and defence evidence and arguments.*]

Withdrawal

[*If termination of the accused's involvement is in issue, add the following shaded section.*[347]]

The fifth element that the prosecution must prove is that the accused did not effectively terminate his/her involvement prior to the performance of any aspect of [*insert charged offence*].

The law says that, for a person not to be liable as someone who agreed to commit an offence, then s/he must terminate his/her involvement and take all reasonable steps to prevent the offence being committed. His/her termination must be timely and effective.

Whether the accused has taken all reasonable steps to prevent the offence is a question for you. You must apply your common sense and experience. For example, in some cases it will be enough for the accused to take back any tools he or she has provided for the commission of the crime. In some cases it may be necessary for the accused to inform the police of the agreement.

It is not for the defence to prove that s/he terminated his/her involvement in NOO in a timely and effective manner. It is the prosecution who must prove that NOA did not take all reasonable steps to prevent any part of [*insert charged offence*] being committed.

In this case, the prosecution argued that the accused had not taken all reasonable steps to prevent [*insert charged offence*]. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing that NOA terminated his/her involvement in a timely and effective manner. [*Insert relevant evidence and/or arguments.*]

Application of Law to Evidence

[*If not already done, apply the law to the relevant evidence here.*]

Defences

[*If any defences are open on the evidence, insert relevant directions.*]

Summary

To summarise, before you can find NOA guilty of [*insert charged offence*], the prosecution must prove to you beyond reasonable doubt:

One – the accused agreed with other people to commit an offence.

Two – that NOA and NO3P intended that an offence would be committed under the agreement

Three – that, in accordance with that agreement, the parties to the agreement between them performed all of the acts necessary to commit NOO.

Four – that NOA was reckless about whether NOO would be committed in the course of carrying out the agreement.

[*If termination is relevant, add the following shaded section.*]

and Five – that NOA did not effectively terminate his/her earlier involvement prior to the offence

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[347] To reflect the different statutory language, this element of the charge is different to the termination element for a charge under s 11.2 (complicity).

being committed.

Last updated: 17 November 2022

5.8.4 Checklist: Commonwealth Joint Commission Course of Agreement

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused made an agreement with other people to commit an offence, and the agreement was still in place when [*insert charged offence*] was committed; and

2. The accused and at least one other party to the agreement intended that an offence would be committed under the agreement; and

3. A party to the agreement committed the offence charged while carrying out the agreement; and

4. The accused was reckless about whether the offence would be committed in the course of the agreement; and

5. The accused did not effectively terminate his/her involvement before the offence charged was committed.[348]

Agreement

1. Did the accused make an agreement with other people to commit an offence?

If Yes, then go to Question 2.1

If No, then the accused is not guilty of committing the offence charged by way of joint commission

Intention

2.1 Did the accused intend that an offence would be committed under the agreement?

Consider – Was the accused aware that an offence would occur in the ordinary course of events?

If Yes, then go to Question 2.2

If No, then the accused is not guilty of committing the offence charged by way of joint commission

2.2 Did one other party to the agreement intend that an offence would be committed under the agreement?

If Yes, then go to Question 3.1

If No, then the accused is not guilty of committing the offence charged by way of joint commission

[348] This should be deleted if termination is not in issue.

Offence committed

3.1 Did a party to the agreement commit all of the necessary acts to complete the charged offence?[349]

If Yes, then go to Question 3.2

If No, then the accused is not guilty of committing the offence charged by way of joint commission

3.2. Did that person commit the charged offence while carrying out the agreement?

If Yes, then go to Question 4.1

If No, then the accused is not guilty of committing the offence charged by way of joint commission

Recklessness

4.1 Was the accused aware of a substantial risk that the charged offence would be committed while the agreement was being carried out?

If Yes, then go to Question 4.2

If No, then the accused is not guilty of committing the offence charged by way of joint commission

4.2 Was it unjustifiable for the accused to take that risk?

If Yes, then go to Question 5.1[350]

If No, then the accused is not guilty of committing the offence charged by way of joint commission

Termination

5.1 Did the accused terminate his or her involvement in the agreement before any part of the charged offence was committed?

If Yes, then go to Question 6.2

If No, then the accused is guilty of committing the offence charged by way of joint commission (as long as you have also answered Yes to questions 1, 2, 3 and 4)

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[349] If the jury has received a separate checklist outlining the elements of the offence, it may be desirable to include a cross-reference to that checklist here, noting which elements of the offence must be proven for this element to be met.

[350] If termination is not in issue, the checklist ends here, and this should be adjusted to note that a Yes means that the accused is guilty of the offence charged.

5.2 Did the accused take all reasonable steps to prevent the offence from being committed?

Consider – What steps did the accused take? In the circumstances, were those all the steps s/he could reasonably take?

If Yes, then the accused is not guilty of committing the offence charged by way of joint commission

If No, then the accused is guilty committing the offence charged by way of joint commission (as long as you have also answered Yes to questions 1, 2, 3 and 4)

Last updated: 17 November 2022

5.9 Innocent Agent (Victorian Offences)

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Overview

1. In some cases a person will intentionally cause the physical elements of an offence to be committed by someone who will him/herself be innocent of that offence (an "innocent agent"). In such cases, the person who caused the innocent agent to act in that way will be guilty as a principal offender. The actions of the innocent agent will be attributed to him/her (*Osland v R* (1998) 197 CLR 316; *R v Hewitt* [1997] 1 VR 301; *R v Cogan & Leak* [1976] QB 217*; White v Ridley* (1978) 140 CLR 342).
2. The accused's conduct in an innocent agent case will often be similar to that of a person who assists, encourages or directs the commission of an offence (see 5.2 Statutory Complicity (From 1/11/14)). However, the accused's liability in innocent agent cases is primary rather than derivative because the agent is not criminally responsible for the relevant conduct (*R v Hewitt* [1997] 1 VR 301).
3. The innocent agent doctrine is not concerned with a formal relationship of principal and agent. For that reason, it is sometimes referred to as the doctrine of "innocent instrument" (*White v Ridley* (1978) 140 CLR 342) or "non-responsible agent" (*Osland v R* (1998) 197 CLR 316 (McHugh J)).
4. To establish liability by way of the innocent agent doctrine, the prosecution must prove that:
    i) The accused intentionally caused a person to perform the acts which constitute the offence charged, in the circumstances necessary for the commission of that offence;
    ii) At the time the person performed those acts, the accused had the state of mind necessary to commit the offence; and
    iii) The agent is innocent of the offence (*R v Hewitt* [1997] 1 VR 301; *R v Cogan & Leak* [1976] QB 217; *Matusevich v R* (1977) 137 CLR 633; *White v Ridley* (1978) 140 CLR 342).
5. The accused may commit an offence using an innocent agent even if, for some legal reason, the accused could not commit the offence him/herself (see, e.g. *R v Cogan & Leak* [1976] QB 217).

Causing the Agent to Perform the Acts Constituting the Offence

6. There are three aspects to the first element:
    i) The innocent agent must have performed all of the acts necessary for the offence to be

committed, in the necessary circumstances;[351] and

ii) The accused's conduct must have caused the innocent agent to perform the relevant acts; and

iii) The accused's conduct must have been intentional.

7. The innocent agent does not need to have had the state of mind necessary for the commitment of the offence. It is the accused who must have had the requisite mental state (see below).

8. The accused does not need to be present when the offence is committed (*White v Ridley* (1978) 140 CLR 342; *Matusevich v R* (1977) 137 CLR 633).

9. It is a question of fact for the jury whether the accused's conduct "caused" the innocent agent to perform the relevant acts. This should be assessed in a common sense manner (*R v Hewitt* [1997] 1 VR 301).

10. The prosecution does not need to establish that the accused's acts deprived the innocent agent of his/her free will. An accused may, for example, induce the agent to perform the physical acts by some form of deception (*R v Hewitt* [1997] 1 VR 301; *White v Ridley* (1978) 140 CLR 342).

11. The innocent agent doctrine does not apply where the agent acts with the intention of implicating the principal in the charged offence (e.g. where the innocent agent is an undercover police officer). Such an agent does not act as the instrument of the principal, and so his/her acts cannot be attributed to the principal (*R v Pinkstone* (2004) 219 CLR 444).

Withdrawing From a Plan to Use an Innocent Agent

12. An accused may withdraw from a plan to use an innocent agent to commit an offence by issuing a timely countermand to the agent. This operates in the same way as the principles of withdrawal applicable to Statutory Complicity (see *White v Ridley* (1978) 140 CLR 342 and 5.2 Statutory Complicity (From 1/11/14) for further information).

13. In some cases, the withdrawal must be accompanied by all acts the accused can reasonably take to undo the effect of his/her previous encouragement or assistance and require the accused to inform the agent that, if s/he proceeds with the agreed course of action, s/he will be committing a criminal offence (*White v Ridley* (1978) 140 CLR 342).

Accused's Mental State

14. The second element examines the accused's state of mind. At the time the innocent agent performed the necessary acts (see above), the accused must have had the state of mind necessary to commit the relevant offence (*R v Hewitt* [1997] 1 VR 301; *R v Cogan & Leak* [1976] QB 217*; Matusevich v R* (1977) 137 CLR 633; *White v Ridley* (1978) 140 CLR 342).

Agent Must be Innocent

15. The third element requires the prosecution to prove that the agent is innocent of the charged offence. If the agent is criminally responsible for the offence, the prosecution must rely on a different form of complicity (*R v Hewitt* [1997] 1 VR 301; *R v Pinkstone* (2004) 219 CLR 444; *R v Franklin* (2001) 3 VR 9; *Latorre v R* [2012] VSCA 280, [44]–[57]).

---

[351] "Necessary circumstances" may include facts requires for an offence that are not performed by the offender. For example, the complainant's lack of consent in rape.

16. The requirement that the agent be innocent is not concerned with an absence of moral responsibility or fault. It is only concerned with whether or not the agent is legally responsible for the conduct. For this reason, the innocent agent is sometimes called a non-responsible agent or an innocent instrumentality (*Osland v R* (1998) 197 CLR 316; *R v Hewitt* [1997] 1 VR 301).

17. An agent can be innocent for this purpose if the agent is not legally responsible for his/her actions due to a mental impairment (*Matusevich v R* (1977) 137 CLR 633).

Last updated: 12 April 2018

5.9.1 Charge: Innocent Agent

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NOA has been charged with the offence of NOO.[352] However, it has not been alleged that s/he committed that offence him/herself. Instead, the prosecution has alleged that s/he committed it by using an "innocent agent".

The law says that if the accused intentionally causes another person to commit criminal acts, the accused may be legally responsible for those acts, even if the person who committed them – the so-called "innocent agent" – is not. This is one of the situations in which the law holds a person responsible for the actions of other people.

To prove that NOA is guilty of NOO,[353] the prosecution must prove 3 elements beyond reasonable doubt.

One – the accused intentionally caused another person to perform the acts that constitute the offence of NOO.

Two – at the time those acts were committed, the accused had the state of mind necessary to commit that offence.

Three – the person who committed those acts is innocent of that offence.

I will now explain each of these elements in more detail.

Acts of the Agent

The first element that the prosecution must prove is that the accused intentionally caused another person to perform all of the acts necessary to commit NOO, [in the necessary circumstances].[354]

In this case, that means that NOA caused NO3P to:

[*Describe and explain all the elements of the offence charged, other than those relating to the offender's mental state, and relate to the facts.*]

To find that NOA intentionally caused NO3P to commit these acts, you do not need to find that s/he deprived NO3P of his/her free will. It will be sufficient if s/he encouraged or persuaded him/her to perform these acts in some way. You should approach this question in a common sense manner.

---

[352] Name of Offence.

[353] If an alternative form of complicity is also argued, add "by using NO3P as an innocent agent".

[354] The phrase "in the necessary circumstances" should be added in cases where one or more elements of the crime require the physical acts to be committed under certain conditions (e.g. for sexual penetration to be committed in the absence of the complainant's consent).

The prosecution argued that NOA intentionally caused NO3P to commit the offence of NOO by [*describe relevant evidence and/or arguments*]. The defence denied this, arguing [*describe relevant evidence and/or arguments*].

It is for you to determine, based on all the evidence, whether the prosecution has proved, beyond reasonable doubt, that NOA did intentionally cause NO3P to commit the relevant acts.

State of Mind

The second element that the prosecution must prove is that, at the time NO3P committed the relevant acts, NOA had the state of mind necessary to commit the offence.

In this case, that means that NOA must have [*describe the relevant state of mind of the offence charged*].

The prosecution argued that NOA had this state of mind at the relevant time. [*Describe relevant evidence and/or arguments.*] The defence denied this, arguing [*describe relevant evidence and/or arguments*].

Innocence of Agent

The third element that the prosecution must prove is that NO3P is innocent of NOO for some reason.

In this case, the prosecution argued that NO3P is innocent of NOO because [*describe relevant evidence and/or argument, along with any relevant directions of law on the basis of the agent's innocence*]. The defence denied this, arguing [*describe relevant evidence and/or arguments*].

[*If the prosecution relies on a form of complicity as an alternative, add the following shaded section.*]

If you are unable to find that NO3P is innocent of NOO, you will need to consider an alternative basis of liability called [*identify relevant form of complicity*]. I will explain this basis of liability later.

Summary

To summarise, before you can find that NOA committed NOO,[355] the prosecution must prove to you, beyond reasonable doubt:

One – That NOA intentionally caused NO3P to perform the acts constituting the offence of NOO;[356] and

Two – That, when those acts were committed, NOA had the state of mind needed to commit NOO; and

Three – That NO3P is innocent of committing NOO.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of committing NOO.

Last updated: 12 April 2018

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[355] If an alternative form of complicity is also argued, add "by using NO3P as an innocent agent".

[356] This summary will need to be modified to include the phrase "in the necessary circumstances" if one or more elements of the crime require the physical acts to be committed under certain conditions (e.g. for sexual penetration to be committed in the absence of the complainant's consent).

5.10 Commission by Proxy (Commonwealth Offences)

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1. Section 11.3 of the *Criminal Code* states:

> A person who:
>
> (a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
>
> (b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;
>
> is taken to have committed that offence and is punishable accordingly.

2. In contrast to other forms of complicity in Division 11 of the *Criminal Code*, s 11.3 does not refer to the operation of special liability provisions (compare *Criminal Code* s 11.1(6A), 11.2(6), 11.2A(8), 11.4(4A), 11.5(7A)).
3. However, given that s 11.3(a) refers to "a fault element applicable to that physical element", it is likely that any relevant special liability provisions will apply to determine the applicable fault elements.
4. Commission by proxy varies from its common law equivalent, innocent agency, in several respects. For information on innocent agency at common law, see 5.9 Innocent Agent (Victorian offences).
5. First, there is no requirement that the proxy is innocent of the completed offence. Commission by proxy operates in conjunction with, rather than as an alternative to, other forms of complicity (see *Crimes Legislation Amendment (Serious and Organised Crime Bill 2009*, Explanatory Memorandum, Item 4).
6. Second, s 11.3(b) requires that the conduct of the proxy be conduct that would have constituted an offence if the accused had engaged in the conduct. This excludes the operation of the principle where the accused is legally incapable of committing the offence charged (see, e.g. *R v Cogan & Leak* [1976] QB 217). For example, where an offence only applies to conduct by a Commonwealth public official (see, e.g. *Criminal Code* ss 139.2, 142.2), s 11.3 cannot be used where only the proxy, and not the accused, is a Commonwealth public official (I Leader-Elliot, *The Commonwealth Criminal Code: A Guide for Practitioners*, Australasian Institute of Judicial Administration, 2002, 267).
7. While this provision has been in operation since 1995, there have been no reported judgments examining how it operates. Judges should therefore seek submissions on how the principles apply in cases where it arises.

Last updated: 12 April 2018

5.10.1 Charge: Commission by Proxy

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This charge should be inserted into a charge for the substantive offence after the judge lists the elements and before the judge explains the elements.

The judge will then need to adapt the directions on the elements of the offence, depending on the type of element in question.

If a physical element of consisting of conduct is in issue, the question will be "Did NOA cause NO3P to do this?"

If a physical element consisting of circumstance or result is in issue, the question will be "Did this circumstance or result exist (if relevant, in relation to NOA)?"

If a fault element is in issue, the question will be "Did NOA have this fault element?"

In this case, the prosecution has not alleged that NOA committed the offence him/herself. Instead, the prosecution has alleged that s/he committed it by using a proxy, NO3P.

The law says that if the accused causes another person to commit criminal acts, the accused is legally responsible for those acts.

So when I direct you about the elements, you will notice that the question for some elements is whether NOA caused NO3P to engage in certain conduct.

Last updated: 12 April 2018

6 Conspiracy, Incitement and Attempts

6.1 Conspiracy to Commit an Offence (Victoria)

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Overview

1. It is an offence for two or more legal persons to conspire to commit a criminal offence (*Crimes Act 1958* s 321; *Ahern v R* (1988) 165 CLR 87).
2. This is a form of inchoate liability, like attempt and incitement (*Board of Trade v Owen* [1957] AC 602; *R v Mbonu* (2003) 7 VR 273).
3. Conspiracy under *Crimes Act* s 321 is an indictable offence, regardless of whether or not the offence the accused conspires to commit is indictable.[357]
4. This topic also applies to a conspiracy charged under s 79 of the *Drugs, Poisons and Controlled Substances Act 1981*. A conspiracy under that Act must be a conspiracy to commit an offence under that Act (see, e.g. *R v Pepe* (2000) 2 VR 412).

Elements

5. Conspiracy to commit an offence has 3 elements:

    i) The accused and at least one other person entered into an agreement to pursue a criminal offence (the "principal offence");

    ii) The parties intended to form that agreement; and

    iii) The parties intended that the principal offence would be committed.

    Each of these elements is addressed in turn below.

[357] This can be compared with conspiracy under *Drugs, Poisons and Controlled Substances Act 1981* s 79, which will be a summary offence if the offence that the accused conspires to commit is a summary offence.

Agreement to Commit a Criminal Offence

6. For the first element to be met, the prosecution must prove that:
    - The accused and at least one other person entered into an agreement; and
    - The parties agreed to pursue a course of conduct that involved at least one of them committing the principal offence (*Crimes Act 1958* s 321).

Formation of the Agreement

7. The prosecution must establish that there was a common agreement between the parties to the conspiracy (*Gerakiteys v R* (1984) 153 CLR 317; *R v Coles* [1984] 1 NSWLR 726).
8. Agreement is an essential element of conspiracy. People who pursue a common intention to commit a crime will not be guilty of conspiracy if there is no agreement between them (*R v Barbouttis* (1995) 37 NSWLR 256; *R v Moran & Mokbel* [1999] 2 VR 87; *Macdonald v The King* [2023] NSWCCA 250, [23]).
9. It is not sufficient for the parties to have merely shared assumptions about future events. The prosecution must prove that the parties formed an agreement to work towards the principal offence (*R v Jones* [2000] NSWCCA 186; *R v Trudgeon* (1988) 39 A Crim R 252).
10. It is also not sufficient for the parties to have expected that, once certain conditions were satisfied, one of them would commit the principal offence. The parties must have agreed to pursue that offence (*R v Trudgeon* (1988) 39 A Crim R 252; *R v Moran & Mokbel* [1999] 2 VR 87).
11. The parties do not need to have entered a formal or written agreement (*Nirta v R* (1983) 79 FLR 190).
12. The agreement must have been communicated to the other conspirators (*R v Scott* (1978) 68 Cr App R 164).
13. The prosecution does not need to prove that the agreement came into existence at a specified time. The jury may infer the existence of the agreement from a course of conduct (*Nirta v R* (1983) 79 FLR 190; *R v Minuzzo and Williams* [1984] VR 417; *R v Orton* [1922] VLR 469; *Gerakiteys v R* (1984) 153 CLR 317).

Content of the Agreement

14. The agreement must have been to pursue a course of conduct that would involve the commission of the principal offence (*Crimes Act 1958* s 321).
15. The prosecution must prove that the course of conduct agreed upon would involve the commission of the principal offence, rather than some different offence, or an unspecified or undecided offence (*R v McCaul and Palmer* [1983] 2 VR 419; *R v Thomas* CCA Vic 29/09/1980; *R v Moran & Mokbel* [1999] 2 VR 87).
16. It is not necessary to prove that the agreement involved specification of the precise means or method by which the principal offence would be committed (*Macdonald v The King* [2023] NSWCCA 250, [23], [25]).
17. It is also not necessary to prove that the agreement involved mutual benefit to the various conspirators, or, in contractual terms, consideration flowing from each party. Similarly, it is not necessary to prove that each party to the conspiracy would be responsible for carrying out some overt act (*Macdonald v The King* [2023] NSWCCA 250, [47]).
18. Where the prosecution is based on a conspiracy to traffick in a specified drug, but the evidence establishes that the agreement related to a different drug, the conspiracy will not have been proven (*DPP v Johnson & Ors (Ruling No. 7)* [2007] VSC 579).
19. This element will usually not be met in cases where the evidence only establishes that the accused agreed to commit an offence of a certain class (such as a violent offence). In such cases, the jury will often be unable to exclude the possibility that the agreement was to commit a different offence within that class, rather than the principal offence (*R v McCaul and Palmer* [1983] 2 VR 419; *R v Thomas* CCA Vic 29/09/1980).

20. The agreement does not need to have specified who the particular victim would be, or how the offence would be carried out. There merely needs to have been an agreement to commit the principal offence (*R v Gill and Henry* (1818) 2 B and Ald 204; *R v Caldwell* (2009) 22 VR 93).

21. Where an agreement contemplated multiple criminal acts, the jury must unanimously find that it included an agreement to commit the principal offence (*Nirta v R* (1983) 79 FLR 190).

22. The content of the agreement can be inferred from the accused's conduct (*Nirta v R* (1983) 79 FLR 190; *R v Minuzzo and Williams* [1984] VR 417; *R v Orton* [1922] VLR 469; *Gerakiteys v R* (1984) 153 CLR 317).

23. It is not necessary that each party to the conspiracy actively participate in the commission of the planned offence (*Rolls v R; Sleiman v R* (2011) 34 VR 80; [2011] VSCA 401).

24. The requirement that one of the parties must agree to pursue a course of conduct that involves the commission of an offence includes committing the offence as a secondary party (*Bui v R; Hargrave v R* [2011] VSCA 404). For example, there is a conspiracy to murder where A and B agree that B would hire C, a stranger to the agreement, to kill D.

Intention to Form an Agreement

25. The second element requires the parties to have intended to form the agreement at the time the agreement was made (*R v Moran & Mokbel* [1999] 2 VR 87; *R v Thomson* (1965) 50 Cr App R 1; *Peters v R* (1998) 192 CLR 493).

26. Evidence that the accused had acted as if s/he had made an agreement may provide evidence of an intention to form an agreement, but is not conclusive. It can be rebutted by other evidence (*Peters v R* (1998) 192 CLR 493; *R v Thomson* (1965) 50 Cr App R 1; *R v O'Brien* [1954] SCR 666).[358]

Intent to Commit the Criminal Offence

27. The third element requires the accused, and at least one other party to the agreement, to have intended that the principal offence would be committed (*Crimes Act 1958* s 321(2)).

28. Recklessness is not a sufficient state of mind for conspiracy (*Giorgianni v R* (1985) 156 CLR 473).

29. The parties must have intended that the principal offence be committed, not some other offence (*R v Gemmell* (1985) 1 CRNZ 496; *Peters v R* (1998) 192 CLR 493).

30. Where the prosecution is based on a conspiracy to traffick in a specified drug, but the evidence establishes that the parties intended to traffick in a different drug, the conspiracy will not have been proven. It is not sufficient for the prosecution to prove that the accused had a generalised intention to traffick in drugs of that nature (*DPP v Johnson & Ors (Ruling No. 7)* [2007] VSC 579).

31. It is not necessary for the parties to have shared the same motive for wanting the principal offence to be committed, as long as they both intended that that offence would be committed (*Yip Chiu-Cheung v R* [1994] 3 WLR 514).

32. The accused's intention to commit the principal offence must be judged subjectively. This element will not be satisfied unless the prosecution can prove that the accused himself or herself actually intended that offence to be committed (*R v Thomson* (1965) 50 Cr App R 1).

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[358] This differs from contract law, where such a claim is not permitted.

33. It is therefore permissible for the accused to argue that, while s/he objectively *appeared* to agree to the commission of the principal offence, s/he privately did not support its commission.[359] It is for the prosecution to disprove such a claim, beyond reasonable doubt (*R v Thomson* (1965) 50 Cr App R 1).

Intention or Belief in Facts and Circumstances

34. The accused, and at least one other party to the agreement, must also have intended or believed that any fact or circumstance that was an element of the principal offence would exist at the time the offence was expected to take place (*Crimes Act 1958* s 321; *Bennett v R* (1998) 144 FLR 311).

35. The accused must have had more than a mere suspicion that the relevant facts or circumstances would exist. S/he must have had actual knowledge or personal belief in the existence of any facts necessary to make the proposed conduct criminal (see, e.g. *R v Barbouttis & Ors* (1995) 37 NSWLR 256; *R v Schipanski* (1989) 17 NSWLR 618; *Pereira v DPP* (1989) 82 ALR 217; *Bennett v R* (1998) 144 FLR 311).

36. The requirement that the accused intend or believe in the existence of any necessary facts or circumstances does not require agreement as to matter of law. This includes matter of law which involve the legal characterisation of certain acts. For example, in *Macdonald v The King* [2023] NSWCCA 250, the Court held that while the principal offence of misconduct in public offence required that the conduct be serious and merit criminal punishment, it was not necessary show that the conspirators *agreed* the conduct was serious and merited criminal punishment (see [77]–[81]).

37. It is not necessary to explain this requirement in every case. It only needs to be addressed if it is an issue in the case (see, e.g. *R v Massie* [1999] 1 VR 542).

Accused's Knowledge

38. These three elements will only be satisfied if the accused knew that the agreement either:

    - Constituted the formation of a scheme to commit a criminal offence; or
    - Brought him/her into an existing scheme (*R v Griffiths* [1966] 1 QB 589; *Aston & Burnell v R* (1987) 44 SASR 436).

39. While the parties must have known there was a plan to commit the principal offence, they do not need to have known the specific details of how that offence would be committed (*Aston & Burnell v R* (1987) 44 SASR 436).

40. The accused also does not need to have known the identity of the other parties to the agreement. The identity of co-conspirators is not an element of the offence. A person may be convicted of conspiring with a person or persons unknown (*R v Coles* [1984] 1 NSWLR 726; *Gerakiteys v R* (1984) 153 CLR 317; *R v Howes* [1971] 2 SASR 293; *Aston & Burnell v R* (1987) 44 SASR 436; *Ex parte Coffey: Re Evans* [1971] 1 NSWLR 434).

41. While the accused does not need to have known the identity of his or her co-conspirators, s/he must have known of their existence, been in agreement with them about the scope of the conspiracy, and shared a common design or purpose (*Aston & Burnell v R* (1987) 44 SASR 436; *R v Coles* [1984] 1 NSWLR 726; *Ex parte Coffey: Re Evans* [1971] 1 NSWLR 434).

42. The accused's liability depends on the scope of his or her actual agreement. A person should not be assumed to have agreed to commit an offence on the basis that it is likely s/he knew s/he was playing his or her part in a large criminal enterprise (*R v Trudgeon* (1988) 39 A Crim R 252).

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[359] This differs from contract law, where such a claim is not permitted.

43. Evidence that the accused was only involved in the conspiracy to a limited extent may, in some cases, be used as evidence that the accused was not aware of the full scope of the agreement. However, such evidence is not conclusive, and the jury must consider the extent of the accused's agreement, rather than his/her participation in the conspiracy (*Gerakiteys v R* (1984) 153 CLR 317; *R v Griffiths* [1966] 1 QB 589).

No Need for Overt Acts

44. It is not necessary to show that the accused actively participated in giving effect to the agreement by performing any overt acts (*Nirta v R* (1983) 79 FLR 190; *R v Bijkerk* (2000) 111 A Crim R 443; *R v Caldwell* (2009) 22 VR 93; but c.f. *Commonwealth Criminal Code* s 11.5).

45. However, the performance of such acts may be used as evidence of the existence of the agreement, or the intentions of the parties (*Nirta v R* (1983) 79 FLR 190; *R v Bijkerk* (2000) 111 A Crim R 443; *R v Caldwell* (2009) 22 VR 93).

46. The relationship between any given overt act and the conspiracy alleged whould be clearly spelt out (*R v Caldwell* (2009) 22 VR 93; *R v Theophanous* (2003) 141 A Crim R 216).

Conspiracy and Impossibility

47. A person may be convicted of conspiracy even if facts existed which made the commission of the principal offence impossible (*Crimes Act 1958* s 321(3); *R v Barbouttis* (1995) 37 NSWLR 256; *R v Kapeliotis & Mari* (1995) 122 FLR 461).

48. However, conspiracy is not committed if the accused erroneously believed s/he was conspiring to commit a crime. The crime that the parties conspired to commit must have been a real offence, not an imaginary one (see, e.g. *R v Sirat* (1986) 83 Cr App R 41).

Identification of the Conspiracy

49. In a conspiracy case, each accused is entitled to particulars of the people with whom it is alleged he or she conspired, and particulars of the scope of the conspiracy alleged (*R v Caldwell* (2009) 22 VR 93).

50. The prosecution must provide those particulars in the course of the opening address, at the very latest. They cannot simply open with the overt acts of which particulars have been given, leaving it to the end of the evidence to select from among them the conspiracy that seems to be the strongest (*R v Caldwell* (2009) 22 VR 93).

51. The prosecution must prove that the conspiracy was in the terms alleged in the indictment. The jury cannot convict the accused of a conspiracy that is different from the one alleged (*Gerakiteys v R* (1984) 153 CLR 317; *R v Coles* [1984] 1 NSWLR 726; *R v Ongley* (1940) 57 WN (NSW) 116; *DPP v Johnson & Ors (Ruling No. 7)* [2007] VSC 579; *R v Caldwell* (2009) 22 VR 93).

52. It is therefore important to determine:

    - The precise scope of any conspiracies alleged; and
    - Whether it is alleged that there was a single conspiracy between all of the relevant parties, or a set of different conspiracies (*Gerakiteys v R* (1984) 153 CLR 317).

Scope of the Conspiracy

53. Where a presentment alleges an agreement to commit two or more specific offences, each offence probably constitutes an essential element of the conspiracy. This means that, in such cases, the prosecution will need to prove that the conspiracy extended to all the offences for the charge to be made out (*R v Caldwell* (2009) 22 VR 93. See also *R v Roberts* [1998] 1 Cr App R 441).

54. Similarly, where a count of conspiracy to defraud alleges an agreement to achieve two or more distinct objectives, each of the objectives is an essential element which must be proved. The charge will not be made out by proof of just one of those objectives (*R v Caldwell* (2009) 22 VR 93).

55. Where particular victims are named in the presentment, the judge will need to determine whether the prosecution is alleging that there was a conspiracy to commit an offence against those specific people, or whether those people were named simply to supply sufficient particulars of the conspiracy alleged.

    - If it alleged that the conspiracy was to *commit an offence against those specific people*, the prosecution will need to prove that there was an agreement to commit the relevant offence against *all* of the named parties (see, e.g. *R v Maria* [1957] St R Qd 512, cited in *R v Caldwell* (2009) 22 VR 93).
    - If it is alleged that the conspiracy was simply to *commit the relevant offence*, with the names supplied to provide particulars of the conspiracy alleged, and to mark out its boundaries, the prosecution will *not* need to prove that the accused agreed to commit the offence against all of the named parties. Even if the accused did not intend to commit an offence against one or more of the named parties (or did not know the identity of all of the parties involved), the conspiracy will be established if they agreed to commit the relevant offence (*R v Caldwell* (2009) 22 VR 93. See also *R v Ongley (*1940) 57 WN (NSW) 116; *R v Deakin* (1972) 56 Cr App R 841).

Single Conspiracy or Multiple Conspiracies

56. For there to have been a single conspiracy, all of the parties to the agreement must have been aware of the scope of that agreement, and agreed to pursue the same offence (*Gerakiteys v R* (1984) 153 CLR 317; *R v Griffiths* [1966] 1 QB 589).

57. Where the scope of the parties' agreement varies, it will instead be necessary to allege multiple conspiracies. The nature of the conspiracies alleged will depend on the circumstances:

    - In some cases, there may be a series of related conspiracies, which all emanate from a central figure. The scope of these related conspiracies may vary, based on the knowledge and belief of the parties (*Gerakiteys v R* (1984) 153 CLR 317; *R v Griffiths* [1966] 1 QB 589).
    - In other cases, the conspiracies may operate like a chain, with each participant only aware of the adjacent parties and their particular role in the conspiracy (*R v Meyrick* (1930) 21 Cr App R 94; *R v Griffiths* [1966] 1 QB 589).

58. When a new party joins an existing conspiracy, an issue arises as to whether there is still a single (but expanded) conspiracy, or whether there are now two conspiracies. The answer depends upon the new party's knowledge and intentions:

    - If the new party is fully aware of the scope of the existing conspiracy, and agrees that the principal offence should be committed, there will be just one conspiracy.
    - If the new party is only aware of, and agrees to, part of the original conspiracy, there will be two conspiracies: a broad conspiracy between the original conspirators, and a narrower conspiracy which includes the new party (*Gerakiteys v R* (1984) 153 CLR 317; *O'Connell v R* (1844) 11 Cl & Fin 155).

59. While the jury cannot convict the accused of a conspiracy that is *different* from the one alleged by the prosecution, they can convict him/her of a conspiracy that is *narrower* – provided that it is not substantially different to the allegation s/he was required to meet (*Gerakiteys v R* (1984) 153 CLR 317).

Special Cases

Spouses

60. Ordinarily, spouses may not be convicted of conspiring together to commit any crimes other than murder or treason (*Crimes Act 1958* s 339).

61. However, spouses can be found guilty of conspiracy to commit an offence if they extend their agreement to include a third party (*R v Chrastny* [1991] 1 WLR 1381).

Companies

62. A company may be party to an agreement if the directors are party to the agreement (*R v McDonnell* [1966] 1 QB 233).

63. However, a 'sole person' company cannot form an agreement with its director (*R v McDonnell* [1966] 1 QB 233).

64. A director is capable of conspiring to defraud a company of which s/he later becomes the directing mind (*R v Maher* (1986) 83 FLR 332).

Police

65. It is possible to form a conspiracy with an undercover police officer, even if that officer only intends to commit the offence to gather evidence for a criminal prosecution (*Yip Chiu-Cheung v R* [1994] 3 WLR 514).

66. However, the officer must intend to commit the principal offence. There will be no conspiracy if the officer does not intend the offence to be carried out (*R v Anderson* [1986] AC 27).

67. A police officer who agrees to pursue a criminal offence will have entered into an agreement, even if s/he was under orders from a superior officer to do so (*R v Ong* [2007] VSCA 206).

Conspiracy and Attempts

68. Apart from the offence of "attempting to pervert the course of justice", a person may not be charged with conspiracy to commit an "attempted" crime (*Crimes Act 1958* s 321R; *R v Aydin* [2005] VSCA 87).

Consistency of Verdicts

69. The jury does not always need to reach the same verdict for each member of an alleged conspiracy (*Crimes Act 1958* s 321B; *R v Darby* (1982) 148 CLR 668).

70. The jury may reach different verdicts if there are differences in the admissible evidence against the various accused (*R v Darby* (1982) 148 CLR 668).[360]

71. Different verdicts are only impermissible if there is no factual basis on which the jury may convict one accused without convicting the other (*R v Darby* (1982) 148 CLR 668; *Mickelberg v R* (1989) 167 CLR 259).

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[360] If there are significant differences in the evidence that is admissible against the various accused, it is preferable that the judge order separate trials, so that the jury does not need to reconcile their verdicts (*R v Darby* (1982) 148 CLR 668).

72. In some cases, it will be appropriate to direct the jury that if they acquit one alleged member of the conspiracy, they must acquit the other member(s). However, the judge must *not* direct the jury that if they convict one accused, they must convict the other accused (*R v Aydin* [2005] VSCA 87).

Withdrawal

73. As the offence of conspiracy is complete at the time the agreement is formed, later withdrawal from a conspiracy is not a defence (*Woss v Jacobsen* (1985) 11 FCR 243; *Savvas v R* (1995) 183 CLR 1; *R v Caldwell* (2009) 22 VR 93).

Last updated: 9 November 2023

6.1.1 Charge: Conspiracy to Commit an Offence (Victoria)

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This charge has been drafted for trials involving a single accused. The charge will need to be adapted if multiple accused are tried together.

Charge

Conspiracy to commit NOO[361] is a crime. In order to find the accused guilty of this crime, there are 3 elements, each of which the prosecution must prove beyond reasonable doubt. I will list them for you and then explain each one in detail.

The first element that the prosecution must prove is that the accused made an agreement with at least one other person to commit the offence of NOO.[362] Throughout these directions I will call the people who it is alleged entered into that agreement, including the accused, the "parties".

The second element that the prosecution must prove is that the accused intended to make that agreement.

The third element that the prosecution must prove is that the parties intended that the offence of NOO would be committed.

Before you can find NOA guilty of conspiracy to commit NOO you must be satisfied that all three of these elements have been proven beyond reasonable doubt.

I will now explain each of these elements in more detail.

Agreement

The first element that the prosecution must prove is that the accused made an agreement with at least one other person to commit NOO. This requires you to be satisfied of two matters beyond reasonable doubt.

[361] Name of Offence.

[362] This charge is designed for the simple case in which the whole purpose of the alleged agreement was to commit the principal offence. If instead the agreement was to pursue a more complex course of conduct, which included the commission of the principal offence, the charge will need to be modified accordingly.

First, you must be satisfied that NOA and [*identify alleged co-conspirators*] actually made an agreement to commit certain acts. It is not enough for them to have independently decided to commit those acts, or to have simply expected those acts would be committed. They must have agreed to pursue those acts.

Second, you must be satisfied that, under that agreement, a person was supposed to commit the offence of NOO. A person commits NOO when s/he [*include elements of the principal offence. See* 7 Victorian Offences].

In this case the prosecution alleged that NOA formed an agreement with [*identify alleged co-conspirators*] to [*describe alleged object of conspiracy*]. [*Summarise relevant prosecution evidence and/or arguments.*] The defence denied this, arguing that [*describe relevant defence evidence and/or arguments*].

For this element to be met, you must be satisfied that an agreement was formed between NOA and [*identify alleged co-conspirators*], in the terms alleged by the prosecution.[363] If you are not satisfied that there was such an agreement, or that the agreement was in those terms, then this element will not be met.

Intention to Agree

The second element that the prosecution must prove is that, at the time the agreement was made, the accused intended to enter into that agreement. This requires you to be satisfied, beyond reasonable doubt, that NOA really meant to make that agreement, and did not just appear to agree with the other alleged parties.

The prosecution alleged that that was the case here. [*Describe relevant prosecution evidence and/or arguments.*] The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Intention to Commit the Criminal Offence

The third element that the prosecution must prove is that, when the parties made the agreement, they intended that the offence of NOO would be committed.

[*If there are particular facts or circumstances the parties must have believed in to commit the offence, add the following shaded section.*]

You must also be satisfied that the parties intended or believed that [*describe relevant facts or circumstances, e.g.* "NOV would not be consenting"] at the time the offence was to be committed.

For this element to be met, you must be satisfied that NOA and [*identify alleged co-conspirators*] definitely meant for the offence of NOO to be committed. It is not sufficient for them to have thought that maybe that offence should be committed, or to have intended to commit some other offence.

The prosecution argued that the parties did intend to commit NOO when they made the agreement. [*Describe relevant prosecution evidence and/or arguments.*] The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Accused's Knowledge

When determining the case against the accused, you will need to consider precisely what s/he knew at the time s/he made the alleged agreement.

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[363] In some cases it may be necessary to direct the jury that they can convict the accused of a conspiracy which is narrower than that alleged by the prosecution. In such cases, the alternative findings which are available to the jury should be explained.

The law says that the accused must have known that s/he was [forming/being brought into] a scheme to commit a criminal offence.

S/he must also have known the nature of the offence planned. That is, s/he must have known that it involved [*briefly summarise relevant elements of the principal offence, e.g.* "sexually penetrating the victim without her consent"].

However, s/he does not need to have known the specific details of how that offence was going to be carried out. [*Where relevant, add:* Nor does s/he need to have known the identity of the proposed victim(s).] It is sufficient for him/her to have known that the offence of NOO would be carried out, and to have intentionally agreed to pursue that offence.

[*Where it is possible that the accused did not know the identity of some of the alleged co-conspirators, add the following shaded section.*]

The accused also does not need to have known the identity of the other parties to the agreement. However, s/he does need to have known that there were other parties to the agreement, and to have been in agreement with them about the commission of the offence.

[*If it is alleged that the accused's agreement should be inferred from his/her involvement in a criminal enterprise, add the following shaded section.*]

In making your determination, it is important that you focus on precisely what each party actually knew about and agreed to. You should not assume that a person has agreed to commit an offence simply because s/he knew that it was likely that s/he was playing a part in a criminal enterprise that involved the commission of that offence. To convict the accused of conspiracy, you must find that s/he intentionally agreed to pursue that offence.

No Need for Overt Acts

You also do not need to find that the parties took any steps to carry out their agreement. The offence of conspiracy is committed when people intentionally agree to commit an offence, regardless of whether they act on that agreement.

You may, however, use evidence that the parties attempted to carry out the agreement as evidence that there was an agreement and as evidence of the terms of the agreement. For example, the prosecution says that [*describe relevant prosecution evidence and/or arguments*]. The defence reject this, saying [*describe relevant defence evidence and/or arguments*].

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of conspiracy to commit NOO, the prosecution must prove to you, beyond reasonable doubt:

One – That NOA and [*identify alleged co-conspirators*] made an agreement to commit NOO; and

Two – That the accused intended to make that agreement; and

Three – That the parties intended that the offence of NOO would be committed.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of conspiracy to commit NOO.

Inconsistent Verdicts

[*If there is no factual basis on which the jury can convict one accused without convicting a co-accused, add the following shaded section.*]

It is important to note that the evidence concerning this offence is identical in relation to both NOA and [*identify co-accused*]. This means that if you have decided that [*identify co-accused*] is not guilty of conspiracy to commit NOO, you must also find NOA not guilty of that offence.

Last updated: 3 October 2012

6.1.2 Checklist: Conspiracy to Commit an Offence (Victoria)

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused made an agreement with at least one other person to commit an offence (the "principal offence"); and
2. The accused intended to make that agreement; and
3. The parties intended that the principal offence would be committed.

Agreement

1. Did the accused make an agreement with at least one other person to commit the principal offence?

1.1 Did the accused and at least one other person make an agreement to commit certain acts?

If Yes, then go to Question 1.2

If No, then the accused is not guilty of conspiracy to commit the principal offence

1.2 Under that agreement, was a person supposed to commit the principal offence?

Consider – What are the elements of the principal offence?

If Yes, then go to Question 2

If No, then the accused is not guilty of conspiracy to commit the principal offence

Intention to Agree

2. At the time the agreement was made, did the accused intend to enter into that agreement?

If Yes, then go to Question 3

If No, then the accused is not guilty of conspiracy to commit the principal offence

Intention

3. When the parties made the agreement, did they intend that the principal offence would be committed?

If Yes, then the accused is guilty of conspiracy to commit the principal offence (as long as you have also answered Yes to questions 1.1, 1.2 and 2)

If No, then the accused is not guilty of conspiracy to commit the principal offence

Last updated: 5 October 2012

6.2 Conspiracy (Commonwealth)

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Application and interpretation

1. In relation to Commonwealth offences, the law of conspiracy is governed by s 11.5 of the *Criminal Code*.
2. The Criminal Code imports the common law concept of conspiracy, subject to explicit statutory modification (*R v LK & RK* (2010) 241 CLR 177 at [72] per French CJ; *Ansari v R* (2010) 241 CLR 299 at [21]).

Elements of Conspiracy to Commit an Offence

3. The elements of conspiracy are found in *Criminal Code* s 11.5(1). There is a single physical element and a default fault element of intention (*R v LK & RK* (2010) 241 CLR 177 at [131]–[132], [141]; *R (Cth) v Baladjam (No 4)* [2008] NSWSC 726 at [138]; *R v Ansari* (2007) 70 NSWLR 89 at [63]).
4. The prosecution must therefore prove:
   (a) The accused conspired with another person to commit an offence punishable by imprisonment for more than 12 months or a fine of 200 penalty units or more; and
   (b) The accused intended to conspire with that person in the manner alleged (*Criminal Code* s 11.1(1); *R v LK & RK* (2010) 241 CLR 177 at [131]–[132]).
5. In addition to the elements, there are three further matters which are "conditions of a finding of guilt" (*R v LK & RK* (2010) 241 CLR 177 at [140]). These are stated in *Criminal Code* s 11.5(2):
   (a) The person must have entered into an agreement with one or more other persons; and
   (b) The person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
   (c) The person or at least one other party to the agreement must have committed an overt act pursuant to the agreement (*Criminal Code* s 11.5(2)).
6. The first two of these matters explain the meaning of "conspired", while the overt act is a further matter that must be proved to the criminal standard, but has no associated fault element (*R v LK & RK* (2010) 241 CLR 177 at [141]; *Quaid v R* [2011] WASCA 141 at [168] per Buss JA).

First element: Conspiracy to commit a non-trivial offence

7. The first element the prosecution must prove is that the accused conspired with another person to commit an offence punishable by imprisonment for more than 12 months or by a fine of 200 penalty units or more (*Criminal Code* s 11.5(1); *R v Ansari* (2007) 70 NSWLR 89 at [63]; *R v LK & RK* (2010) 241 CLR 177 at [131]–[132]).
8. This requires proof of agreement and the subject matter of the agreement (*R v Ansari* (2007) 70 NSWLR 89 at [63]; *Standen v R* [2015] NSWCCA 211 at [394]–[395]).

Formation of agreement

9. The prosecution must establish that there was a common agreement between the parties to the conspiracy (*Gerakiteys v R* (1984) 153 CLR 317; *R v Coles* [1984] 1 NSWLR 726).

10. Agreement is an essential element of conspiracy. People who pursue a common intention to commit a crime will not be guilty of conspiracy if there is no agreement between them (*R v Barbouttis* (1995) 37 NSWLR 256; *R v Moran & Mokbel* [1999] 2 VR 87).

11. It is not sufficient for the parties to have merely shared assumptions about future events. The prosecution must prove that the parties formed an agreement to work towards the principal offence (*R v Jones* [2000] NSWCCA 186; *R v Trudgeon* (1988) 39 A Crim R 252; *R v Moran & Mokbel* [1999] 2 VR 87).

12. The date of entry into the conspiracy is generally not an essential fact. Unless there would be unfairness to an accused, a jury can find that the accused joined the conspiracy later than the date alleged by the prosecution (see *Damoun v R* [2015] NSWCCA 109 at [28]. See also *Nirta v R* (1983) 79 FLR 190; *R v Minuzzo and Williams* [1984] VR 417; *R v Orton* [1922] VLR 469; *Gerakiteys v R* (1984) 153 CLR 317).

13. The parties do not need to have entered a formal or written agreement (*Nirta v R* (1983) 79 FLR 190).

14. The agreement must have been communicated to the other conspirators (*R v Scott* (1978) 68 Cr App R 164).

15. An agreement is a state of affairs for the purpose of the *Code*. A conspiracy exists and continues to exist while the agreement remains in existence. For this reason, the provisions of the *Code* can apply to criminalise pre-existing agreements, which remain in existence after amendment to the conspiracy provisions of the *Code* (*Agius v R* (2013) 248 CLR 601 at [47], [49]).

16. Thus, each day a party adheres to the agreement is another day on which the offence of conspiracy is committed (*Agius v R* (2013) 248 CLR 601 at [43]).

17. The focus of the offence is therefore on the existence of an agreement, rather than the *entry into* an agreement (*Agius v R* (2013) 248 CLR 601 at [58] per Gageler J).

18. Section 11.5(2)(b) of the *Criminal Code* means that the offence is not committed if the other party or parties were only pretending to make an agreement with no intention of carrying it out. This replicates the common law position (*R v Ansari* (2007) 70 NSWLR 89 at [60]. See also *Peters v R* (1998) 192 CLR 493 at [62]).

Subject matter of agreement

19. The prosecution must prove that that the conspiracy was in the terms alleged in the indictment. The jury cannot convict the accused of a conspiracy that is different from the one alleged (*Gerakiteys v R* (1984) 153 CLR 317; *R v Coles* [1984] 1 NSWLR 726; *R v Ongley* (1940) 57 WN (NSW) 116; *DPP v Johnson & Ors (Ruling No. 7)* [2007] VSC 579; *R v Caldwell* (2009) 22 VR 93).

20. The prosecution must prove that the course of conduct agreed upon would involve the commission of the principal offence, rather than some different offence, or an unspecified or undecided offence (*R v McCaul and Palmer* [1983] 2 VR 419*; R v Thomas* CCA Vic 29/09/1980; *R v Moran & Mokbel* [1999] 2 VR 87).

21. Where the prosecution is based on a conspiracy to traffick in a specified drug, but the evidence establishes that the agreement related to a different drug, the conspiracy will not have been proven (*DPP v Johnson & Ors (Ruling No. 7)* [2007] VSC 579).

22. Where the evidence only establishes an agreement to commit an offence of a certain class, the jury will often be unable to exclude the possibility that the agreement was to commit a different offence to the one charged which is also within the same general class (*R v McCaul and Palmer* [1983] 2 VR 419; *R v Thomas* CCA Vic 29/09/1980).

23. The agreement does not need to have specified who the particular victim would be, or how the offence would be carried out. There merely needs to have been an agreement to commit the principal offence (*R v Gill and Henry* (1818) 2 B and Ald 204; *R v Caldwell* (2009) 22 VR 93).

24. Each accused is entitled to particulars of the people with whom it is alleged he or she conspired, and particulars of the scope of the conspiracy alleged (*R v Caldwell* (2009) 22 VR 93).

25. The prosecution must provide those particulars in the course of the opening address, at the very latest. They cannot simply open with the overt acts of which particulars have been given, leaving it to the end of the evidence to select from among them the conspiracy that seems to be the strongest (*R v Caldwell* (2009) 22 VR 93).

26. It is therefore important to determine:

    - The precise scope of any conspiracies alleged; and
    - Whether it is alleged that there was a single conspiracy between all of the relevant parties, or a set of different conspiracies (*Gerakiteys v R* (1984) 153 CLR 317).

Scope of the Conspiracy

27. Where the charge alleges an agreement to commit two or more specific offences, each offence probably constitutes an essential element of the conspiracy. This means that, in such cases, the prosecution will need to prove that the conspiracy extended to all instances of the offence for the charge to be made out (*R v Caldwell* (2009) 22 VR 93 at [71]. See also *R v Roberts* [1998] 1 Cr App R 441).

28. Similarly, where a charge of conspiracy to defraud alleges an agreement to achieve two or more distinct objectives, each of the objectives is an essential element which must be proved. The charge will not be made out by proof of just one of those objectives (*R v Caldwell* (2009) 22 VR 93 at [71]).

29. Where particular victims are named in the indictment, the judge will need to determine whether the prosecution is alleging that there was a conspiracy to commit an offence against those specific people, or whether those people were named simply to supply sufficient particulars of the conspiracy alleged:

    - If it alleged that the conspiracy was to *commit an offence against those specific people*, the prosecution will need to prove that there was an agreement to commit the relevant offence against *all* of the named parties (see, e.g., *R v Maria* [1957] St R Qd 512, cited in *R v Caldwell* (2009) 22 VR 93).
    - If it is alleged that the conspiracy was simply to *commit the relevant offence*, with the names supplied to provide particulars of the conspiracy alleged, and to mark out its boundaries, the prosecution will *not* need to prove that the accused agreed to commit the offence against all of the named parties. Even if the accused did not intend to commit an offence against one or more of the named parties (or did not know the identity of all of the parties involved), the conspiracy will be established if they agreed to commit the relevant offence (*R v Caldwell* (2009) 22 VR 93. See also *R v Ongley* (1940) 57 WN (NSW) 116; *R v Deakin* (1972) 56 Cr App R 841).

Single Conspiracy or Multiple Conspiracies

30. Where a single conspiracy is charged, the prosecution must prove that all of the parties to the agreement were aware of the scope of that agreement, and agreed to pursue the same offence (*Gerakiteys v R* (1984) 153 CLR 317; *R v Griffiths* [1966] 1 QB 589).

31. Where the scope of the parties' agreement varies, the prosecution must instead allege multiple different conspiracies. The nature of the conspiracies alleged will depend on the circumstances:

    - In some cases, there may be a series of related conspiracies, which all emanate from a central figure. The scope of these related conspiracies may vary, based on the knowledge and belief of the parties (*Gerakiteys v R* (1984) 153 CLR 317; *R v Griffiths* [1966] 1 QB 589).
    - In other cases, the conspiracies may operate like a chain, with each participant only aware of the adjacent parties and their particular role in the conspiracy (*R v Meyrick* (1930) 21 Cr App R 94; *R v Griffiths* [1966] 1 QB 589).

32. When a new party joins an existing conspiracy, an issue arises as to whether there is still a single (but expanded) conspiracy, or whether there are now two conspiracies. The answer depends upon the new party's knowledge and intentions:

    - If the new party is fully aware of the scope of the existing conspiracy, and agrees that the principal offence should be committed, there will be just one conspiracy.
    - If the new party is only aware of, and agrees to, part of the original conspiracy, there will be two conspiracies: a broad conspiracy between the original conspirators, and a narrower conspiracy which includes the new party (*Gerakiteys v R* (1984) 153 CLR 317; *O'Connell v R* (1844) 11 Cl & Fin 155).

33. While the jury cannot convict the accused of a conspiracy that is *different* from the one alleged by the prosecution, they can convict him/her of a conspiracy that is *narrower* – provided that it is not substantially different to the allegation s/he was required to meet (*Gerakiteys v R* (1984) 153 CLR 317).

Intention that offence be committed

34. The requirement that the accused must have "conspired with another person *to commit* an offence" does not mean that the parties to the conspiracy must intend to personally commit the intended offence. A charge of conspiracy will remain available where the accused conspires with another person that a third party who is not part of the conspiracy will commit the intended offence (*Ansari* (2007) 70 NSWLR 89 at [9]; *R (Cth) v Baladjam (No 4)* [2008] NSWSC 726 at [150]–[151]).

Conspiracy and knowledge of essential facts

35. A person cannot form an agreement to commit an offence unless he or she knows or believes in the existence of facts which would make the agreed conduct an offence (*Quaid v R* [2011] WASCA 141 at [174] per Buss JA; *R v LK & RK* (2010) 241 CLR 177 at [72] per French CJ and [117] per Gummow, Hayne, Crennan, Kiefel and Bell JJ).

36. The prosecution must prove that the accused and at least one other party to the conspiracy held the knowledge of the essential facts at the same time (*Standen v R* [2015] NSWCCA 211 at [409]).

37. However, because conspiracy is a continuing offence, it is not necessary to prove that this shared knowledge was held on a precise date. Rather, the prosecution can prove that the accused and at least one other person were participants in the agreement to commit an offence in the period alleged in the indictment and that they held the necessary intention, knowledge or belief in at the same time (*Standen v R* [2015] NSWCCA 211 at [418], [424]).

38. The accused must have had more than a mere suspicion that the relevant facts or circumstances would exist. S/he must have had actual knowledge or personal belief in the existence of any facts necessary to make the proposed conduct criminal (see, e.g., *R v Barbouttis & Ors* (1995) 37 NSWLR 256; *R v Schipanski* (1989) 17 NSWLR 618; *Pereira v DPP* (1989) 82 ALR 217; *Bennett v R* (1998) 144 FLR 311).

39. It is not necessary to explain this requirement in every case. It only needs to be addressed if it is an issue in the case (see, e.g., *R v Massie* [1999] 1 VR 542).

40. The accused also does not need to have known the identity of the other parties to the agreement. The identity of co-conspirators is not an element of the offence. A person may be convicted of conspiring with a person or persons unknown (*R v Coles* [1984] 1 NSWLR 726; *Gerakiteys v R* (1984) 153 CLR 317; *R v Howes* [1971] 2 SASR 293; *Aston & Burnell v R* (1987) 44 SASR 436; *Ex parte Coffey: Re Evans* [1971] 1 NSWLR 434).

41. While the accused does not need to have known the identity of his or her co-conspirators, s/he must have known of their existence, been in agreement with them about the scope of the conspiracy, and shared a common design or purpose (*Aston & Burnell v R* (1987) 44 SASR 436; *R v Coles* [1984] 1 NSWLR 726; *Ex parte Coffey: Re Evans* [1971] 1 NSWLR 434).

Conspiracy and intention to commit agreed offence

42. As part of proof of the first element, the prosecution must show that the accused and at least one other party to the agreement intended that an offence would be committed pursuant to the agreement (*Criminal Code* s 11.5(2)(b)). This is subject to the operation of any special liability provision (*Criminal Code* s 11.5(7A)).

43. This rule applies even where the substantive offence includes fault elements short of intention, such as recklessness. The offence of conspiracy is not committed where the parties are reckless as to whether an offence would be committed as a result of the agreement (see *Ansari v R* (2007) 70 NSWLR 89 at [33], [67]).

44. Intention that the offence be committed requires proof that the accused and at least one other person intended that acts be performed which, if carried out in accordance with the agreement, would amount to commission of the offence (*Ansari v R* (2010) 241 CLR 299 at [61]).

45. While the majority of the High Court in *Ansari* explicitly rejected the suggestion that the accused and another party to the conspiracy must intend that each physical element and its associated fault element would exist, this conclusion was reached in the context of a case where one of the fault elements was recklessness and the conspiracy involved a party to the conspiracy committing the offence (see also *Papadimitriou v R* [2011] WASCA 140 at [94]).

46. Later cases have shown that where a party to the conspiracy would commit the completed offence, the appropriate direction is that the prosecution must prove that the accused and another party to the conspiracy intended that all the physical elements of the completed offence would exist (see *Papadimitriou v R* [2011] WASCA 140 at [94]; *Standen v R* [2015] NSWCCA 211 at [394]).

47. In contrast, where the agreement involves the physical commission of the offence by a third party who is not party to the agreement, French CJ and the New South Wales Court of Criminal Appeal have held that the conspiracy may be proved by showing that the accused intended the third party to act with the state of mind necessary for the commission of the offence, even if that state of mind is one of recklessness (see *R v LK & RK* (2010) 241 CLR 177 at [75] per French CJ; Ansari v R (2010) 241 CLR 299 at [26], [37]; *R v Ansari* (2007) 70 NSWLR 89 at [87]–[88]. See also *Quaid v R* [2011] WASCA 141 at [260] per Hall J).

48. Any special liability provision that applies to an offence also applies to a conspiracy to commit that offence (*Criminal Code* s 11.5(7A)).

49. 'Special liability provision' is defined as:

    (a) A provision that provides that absolute liability applies to one or more (but not all) of the physical elements of an offence; or

    (b) A provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew a particular thing; or

    (c) A provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew or believed a particular thing (*Criminal Code* Dictionary).

50. Fault elements such as knowledge, recklessness and negligence are not 'special liability provisions'.

51. In addition, strict liability, as defined in *Criminal Code* s 6.1, does not fit within the definition of special liability provision. Therefore, where strict liability applies, the common law rule that an accused must know the essential facts for an offence of conspiracy will continue to apply, and the prosecution must prove awareness of those facts (*R v Ansari* (2007) 70 NSWLR 89 at [84]).

52. An example of how a special liability provision operates can be seen in a conspiracy to import a commercial quantity of a border controlled drug. In such a case, the combined effect of *Criminal Code* ss 11.5(7A) and 307.1(3) is that absolute liability applies in relation to the quantity (*Le v R* [2016] VSCA 100; *Quaid v R* [2011] WASCA 141 at [176] per Buss JA; *DPP v Kola* [2024] HCA 14, [23], [26]).

53. In *DPP v Kola*, the High Court observed:

> an obvious tension between the prosecution being required to prove that the accused was a party to an agreement to import a commercial quantity of a border controlled drug but not being required to prove that the accused knew or believed that the amount to be imported pursuant to the agreement would be a commercial quantity. … The resolution follows from recognising the difference between the intended scope of the agreement to which the accused was a party and any subjective belief or knowledge of the accused as to what the anticipated performance of that agreement would entail ([2024] HCA 14, [27]).

54. The High Court explained the difference between the scope of the agreement and the subjective knowledge or belief of the accused with a series of examples:

> If two passengers on a commercial aircraft agree to import cocaine by secreting the drug in one of their (small) pockets, then the weight of the drug that would be imported pursuant to that agreement would not be a commercial quantity. If one of the passengers, without recourse to the other, places 3 kg of cocaine in their suitcase, then the other passenger is not culpable for conspiracy to import a commercial quantity of the drug as the placement of cocaine in the suitcase was not undertaken pursuant to their agreement. The scope of their agreement did not extend that far. However, if the two passengers agree to import as much cocaine as will fit into a particular suitcase and that amount is not less than 2 kg, then they will each be culpable, even if it is not proved that they knew that the amount that was, or could be, placed in the suitcase was, or would be, not less than 2 kg. In that case, the scope of their agreement is such that the weight of the border controlled drug that would have been imported if the agreement to commit the offence was successfully executed is a commercial quantity. Moreover, the passenger will still be culpable even if they mistakenly but reasonably believed that the amount that was, or would be, placed in the suitcase would not be, or could not be, 2 kg or more. Such a belief is irrelevant in relation to a physical element that attracts absolute liability (*DPP v Kola* [2024] HCA 14, [29]).

55. This directs attention to the objectively intended outcome of the specific activity planned as part of the conspiracy, without the prosecution needing to prove any subjective knowledge or awareness of that objectively intended outcome.

56. When directing the jury about the quantity element on an offence like conspiracy to import a commercial quantity of a border controlled drug, the judge must address the risk of the jury convicting simply on the basis that the accused was party to an agreement to import a border controlled drug, and the alleged co-conspirators set about importing a commercial quantity without reference to the accused (*DPP v Kola* [2024] HCA 14, [35]).

57. There is no fixed method of directing the jury which addresses this risk. Instead, the judge must explain the law in a manner that relates it to the facts of the case and the issues to be decided. This will require explaining that the prosecution must prove that the scope of the agreement the accused joined was to import a commercial quantity, that the prosecution need not prove the accused intended to import a commercial quantity and the distinction between these two matters (*DPP v Kola* [2024] HCA 14, [37]–[38]).

58. Where an offence involves circumstances of aggravation which are not elements of the offence, proof of conspiracy does not involve proof of those circumstances of aggravation, or agreement as to those circumstances (*Keung v R* [2008] NSWCCA 193 at [36]).

Second element: Intention to conspire

59. The second element is that the accused intended to conspire with another person to commit an offence (*Criminal Code* s 11.5(1)).

60. This requires proof that the accused meant to conspire, in accordance with the first element (*Criminal Code* s 5.2).

61. Evidence that the accused had acted as if s/he had made an agreement may provide evidence of an intention to form an agreement, but is not conclusive. It can be rebutted by other evidence (*Peters v R* (1998) 192 CLR 493; *R v Thomson* (1965) 50 Cr App R 1; *R v O'Brien* [1954] SCR 666).[364]

Addition matter for proof: Overt act

62. To prove a conspiracy to commit an offence, the prosecution must prove that a party to the conspiracy committed an overt act pursuant to the agreement (*Criminal Code* s 11.5(2)(c)).

63. While this is not an element of the offence, it is a requirement for conviction. It must be proved to the criminal standard of beyond reasonable doubt (*R v LK & RK* (2010) 241 CLR 177 at [141]).

64. As an essential matter for proof by the prosecution, the jury must be unanimious about the existence of a particular overt act (*R v Lake* [2007] QCA 209 at [67]).

65. The Code does not define the term 'overt act'. According to the ordinary meaning of the phrase, it refers to a plainly apparent act. Thus, the prosecution must prove that a party to the alleged conspiracy did something which it is plainly apparent as having been committed as part of the agreement.

66. In order for an act to qualify, it must be carried out with the intention of advancing the conspiracy (*DPP v Fattal* [2013] VSCA 276 at [21]).

67. The overt act may be committed by the accused, or any other party to the conspiracy. It is not necessary to prove that each party commits an overt act to crystalise his or her involvement in a conspiracy (*R v Lake* [2007] QCA 209 at [52], [62]).

68. Similarly, it is not necessary that each party to the conspiracy planned to actively participate in the commission of the planned offence (*Rolls v R; Sleiman v R* (2011) 34 VR 80).

Conspiracy and Impossibility

69. As under Victorian law, a person may be found guilty of conspiracy to commit an offence even if facts exist which made it impossible to commit the contemplated offence (*Criminal Code* s 11.5(3)(a)).

70. However, it is likely that, as at common law, the agreement must be to commit a real offence, not an imaginary one (see, e.g., *R v Sirat* (1986) 83 Cr App R 41).

Defences

Inconsistency

71. Under *Criminal Code* s 11.5(4)(a), a person cannot be found guilty of conspiracy to commit an offence if:

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[364] This differs from contract law, where such a claim is not permitted.

all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal.

Person for whose benefit or protection the offence exists

72. *Criminal Code* s 11.5(4)(b) provides that a person cannot be found guilty of conspiracy to commit an offence if:

    He or she is a person for whose benefit or protection the offence exists.

73. A similar provision exists in *Crimes Act 1958* s 324(3) for statutory complicity. In relation to Victorian law, this provision ensures that a person under the age of 16 cannot be found guilty of being a party to the offence of sexual penetration of him/herself (see, e.g., *R v Whitehouse* [1977] QB 868).

Withdrawal

74. The *Criminal Code* provides a defence of withdrawal. This defence is available where:
    (a) Before the commission of an overt act pursuant to the agreement;
    (b) The person withdrew from the agreement; and
    (c) Took all reasonable steps to prevent the commission of the offence (*Criminal Code* 11.5(5)).
75. The requirement to take all reasonable steps to prevent commission of the offence invites attempt to what steps were available and whether those steps were reasonable. In some cases, it may require ceasing association with the co-conspirators and may also require informing the police, at least anonymously (see *Visser v R* [2015] VSCA 168 at [80]).
76. If there are no reasonable steps available, then no steps are required (*Miller v Miller* (2011) 242 CLR 446 at [104]).
77. This differs from the common law position, where the offence is complete when the agreement is formed and so there is no opportunity for withdrawal (see *Woss v Jacobsen* (1985) 11 FCR 243; Savvas v R (1995) 183 CLR 1; *R v Caldwell* (2009) 22 VR 93).
78. However, in relation to joint activity, both the common law and statute recognises a defence of withdrawal where a person communicates the withdrawal and takes all reasonable steps to undo the effect of his or her previous assistance or encouragement. See Statutory Complicity for more information on this form of withdrawal.

Differences between Commonwealth conspiracy and common law conspiracy

79. The common law principles regarding conspiracy inform the meaning of s 11.5 of the *Criminal Code*, except as expressly modified by the text of the Code (*Agius v R* (2013) 248 CLR 601 at [32]; *R v LK & RK* (2010) 241 CLR 177 at [59], [72], [93]).
80. There are five key differences between the *Code* and the common law (see *Keung v R* [2008] NSWCCA 193 at [35]; *Dickson v R* (2010) 241 CLR 491; *R v Ansari* (2007) 70 NSWLR 89 at [66], [83]–[84]).
81. First, the *Code* contains a requirement that the offence in question be punishable by imprisonment of at least 12 months or a fine of 200 penalty units. In contrast, the common law offence of conspiracy is available in relation to all offences.
82. Second, the *Code* does not apply to an agreement to commit a lawful act by unlawful means.
83. Third, the parties must have performed an overt act in furtherance of the conspiracy (*Criminal Code* s 11.5(2)(c)).

84. Fourth, a person may escape liability under the *Code* if he or she withdraws from the conspiracy before the commission of any overt acts (*Criminal Code* s 11.5(5)).

85. Fifth, as a result of subsection (7A), the accused does not need to be aware of any facts of the completed offence for which absolute liability applies (*Criminal Code* s 11.5(7A)).

86. As a result of these differences, there is a direct inconsistency between the conspiracy provisions in the *Criminal Code* and conspiracy provisions under the *Crimes Act 1958*. As a result, where the conspiracy involves a conspiracy to engage in conduct which is covered by both Commonwealth and State law, section 109 of the *Australian Constitution* operates to render State law inoperative to the extent of the inconsistency (*Dickson v R* (2010) 241 CLR 491).

87. One example of this inconsistency is where a person is charged with conspiracy to steal goods. If the goods are Commonwealth property, then the prosecution must use a charge of conspiracy under the *Criminal Code* and cannot charge a person with conspiracy to commit theft under the *Crimes Act 1958* (*Dickson v R* (2010) 241 CLR 491).

Dismissal of conspiracy charges in the interests of justice

88. Section 11.5(6) of the *Criminal Code* gives judges a broad discretion to dismiss a charge of conspiracy if 'it thinks that the interest of justice require it to do so'. This matches the provision that previously existed in *Crimes Act 1914* (Cth) s 86(7).

89. This provision gives statutory recognition to frequently expressed judicial concerns about the appropriateness of bringing conspiracy charges in certain circumstances, especially where a substantive offence has been committed and there is a sufficient and effective charge available (*R (Cth) v Baladjam (No 4)* [2008] NSWSC 726 at [38], [48]. See also *R v Hoar* (1981) 148 CLR 32).

90. In general, selection of charges is a matter for the prosecution and the exercise of prosecutorial discretion is unreviewable. While s11.5(6) is an incursion into that general state of affairs, the court must keep the general rule in mind when exercising the power to dismiss conspiracy charges under the *Code* (*R v Elomar* [2014] NSWCCA 303 at [493]).

91. The provision provides a broad judicial discretion. While no list of considerations can be complete, relevant matters may include:

    - The likely complexity of the trial;
    - The presence of evidentiary difficulties;
    - The risk in a joint trial that an accused may be prejudiced by the admission of evidence admissible only against certain other accused;
    - Whether there may be sentencing difficulties due to the conspiracy charge;
    - Whether other potential sources of injustice might result from proceeding with a conspiracy charge;
    - The need to respect prosecutorial discretion in the laying of charges;
    - Whether proceeding with a conspiracy charge would constitute an abuse of process, such as where conspiracy is charged following or parallel to charges for the completed offence;
    - Whether there is an overlap of elements of the substantive offence and the alleged overt acts of the conspiracy;
    - Whether severance is a more appropriate remedy than dismissal;
    - Whether a substantive charge would properly capture the scope of the accused's conduct, or whether a conspiracy charge more appropriately captures the planned conduct for multiple separate criminal acts as part of an ongoing criminal organisation (*R v Dowding* [2000] VSC 439 at [20]; *R (Cth) v Baladjam (No 4)* [2008] NSWSC 726 at [38], [47]; *R v Hoar* (1981) 148 CLR 32; *Shepherd v R* (1988) 37 A Crim R 303 at 309-310; *Standen v DPP (Cth)* [2011] NSWCCA 187).

92. In exercising this discretion, the judge may also need to consider *Criminal Procedure Act 2009* s 195, which provides that a charge for a conspiracy to commit an offence and the commission of that offence must be tried separately, unless the court considers that it would be in the interests of justice for the charges to be tried together.

93. When considering the operation of *Criminal Procedure Act 2009* s 195, the court must look at the details of the allegations, and not merely whether the conspiracy involves an offence against the same provision as a substantive charge on the same indictment (*R v Jacobson (Ruling No 2)* [2014] VSC 368 at [58]).

Requirement for DPP consent

94. Proceedings for an offence of conspiracy under the *Criminal Code* must not be commenced without the consent of the Director of Public Prosecutions (*Criminal Code* s 11.5(8)).

95. A Director's consent to prosecute may be in general term. However, if the consent refers to a precise offence, it will not authorise a prosecution for different conduct (*R v Morrison* [2010] QSC 446; *Traveland Pty Ltd v Doherty* (1982) 63 FLR 41 at 48).

96. Where there are differences between the indictment and the consent, it will be a question for the court whether those differences alter the substance of the allegation so that the offence charged is not the one which the Director approved. This is determined by examining the nature of the charges, rather than the proposed evidence (see *Traveland Pty Ltd v Doherty* (1982) 63 FLR 41 at 48; *Gilmour v Midways Springwood Pty Ltd* (1980) 49 FLR 36).

97. For example, the indictment may identify fewer named co-conspirators than the Director's consent. Unless the absence of those named co-conspirators alters the nature of the conspiracy alleged, such a change will not produce a conclusion that the proceeding was commenced without consent (see *R v Morrison* [2010] QSC 446 at [25]

98. The Code contains an exception which allows a person to be arrested, charged, remanded or bailed for an offence of conspiracy before the Director gives the necessary consent (*Criminal Code* s 11.5(8)).

99. This exception likely modifies the general rule that applies in Victorian criminal procedure that a proceeding commences when the charge-sheet is filed (*Criminal Procedure Act 2009* s 5. See also *Judiciary Act 1903* ss 79, 80).

100. While it is not entirely certain, it appears likely that the common law on commencement of proceedings applies and so the consent must be obtained no later than the arraignment of the accused on the trial indictment (see *R v B* (2008) 76 NSWLR 533 at [87], [96]–[97]; *R v Evans* [1964] VR 717. See also *Judiciary Act 1903* s 80).

Defences, procedures, limitations and qualifying provisions

101. *Criminal Code* s 11.5(7) provides that:

> Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

102. This applies to matters which are extrinsic to the elements of the offence, rather than the requirement that the prosecution prove all elements of the offence (*R v Onuorah* (2009) 76 NSWLR 1 at [35]).

Complicity, Duplicity and Multiple Acts

103. As at common law, a charge of conspiracy under s 11.5 of the *Criminal Code* may allege a conspiracy to engage in multiple acts of criminality (*R (Cth) v Baladjam (No 4)* [2008] NSWSC 726 at [96]; *R v B* (2008) 76 NSWLR 533 at [22]).

104. However, where the alleged conspiracy does not involve offences of a similar character, the judge may need to intervene to preserve the fairness of the trial process (*R (Cth) v Baladjam (No 4)* [2008] NSWSC 726 at [112]). See also 'Dismissal of conspiracy charges in the interests of justice' above.

105. Where an agreement contemplated multiple criminal acts, the jury must unanimously find that it included an agreement to commit the principal offence which is charged in the indictment (*Nirta v R* (1983) 79 FLR 190).

106. In addition, section 400.12 of the *Criminal Code* allows the prosecution to aggregate multiple discrete acts of money laundering into a single charge. This provision is equally applicable to a charge of conspiracy to commit an offence to which s 400.12 applies (*Tan v R* (2011) 35 VR 109 at [44]).

Last updated: 14 May 2024

6.2.1 Charge: Conspiracy (Commonwealth)

Click here to download a Word version of this charge

This charge is designed for cases where the parties agree that a member of the conspiracy will commit the substantive offence. The direction must be modified if the conspiracy contemplates a third party committing the substantive offence.

I must now direct you about the crime of conspiracy to commit NOO. To prove this crime, the prosecution must prove the following three elements beyond reasonable doubt:

One – The accused conspired with another person to commit NOO;

Two – The accused intended to conspire with that other person to commit NOO;

Three – The accused or another party to the conspiracy committed an 'overt act' to advance the agreement.

I will now explain each of these elements in more detail

Conspiracy

The first element looks at what the accused did. The prosecution must prove that the accused conspired with another person to commit NOO. This requires you to be satisfied of three matters beyond reasonable doubt.

First, the prosecution must prove that NOA and [*identify alleged co-conspirator(s)*] entered into an agreement. Was there an agreement between the accused and at least one other person?

Second, you must look at the content of the agreement. Was it an agreement to commit NOO? For this part of the element, the prosecution must prove that there was an agreement to:

[*identify and explain all physical elements of the substantive offence*]

Third, the accused and at least one other party to the agreement must have intended that NOO be committed. This means that they must have intended that:

[*identify all physical elements of the substantive offence, except for any elements which are subject to a special liability provision. See* 6.2 Conspiracy (Commonwealth) *for guidance*]

[*If there are any elements subject to a special liability provision, add the following shaded section*]

You will have noticed a difference in what I said the prosecution must prove about the scope of the agreement, and the intentions of the accused and at least one other party. To prove this offence, the prosecution must prove there was an agreement to [*identify relevant special liability element*], but they do not need to prove the parties intended that [*identify relevant special liability element*]. Let me explain the difference. To prove there was an agreement to [*identify relevant special liability element*], the prosecution must prove the agreement related to the [*identify factual basis for the relevant element*] and not to some other [*insert relevant term, e.g.* substance / container / object]. But the prosecution does not have to prove

the parties knew, believed or intended that the [*identify factual basis for the relevant element*] was [*identify relevant special liability element*].

[*If there any no relevant special liability provisions, add the following shaded section*]

In other words, the prosecution must prove both that the accused agreed to the planned offence and intended the planned offence be committed.

When considering this element, you must consider precisely what NOA knew at the time he allegedly agreed to commit NOO.

You must be satisfied that NOA knew he was [forming / joining] an agreement to commit a criminal offence. S/he must have known the nature of the offence planned. However, s/he did not need to know details of how the offence was going to be carried out. [*Where relevant, add*: S/he also does not need to have known the identity of the proposed victims].

[*Where it is possible that the accused did not know the identity of some of the alleged co-conspirators, add the following shaded section*]

NOA did not need to know the identity of the other parties to the agreement. However, s/he must know that there were other parties. He must have agreed with them to commit the offence. It is impossible to form an agreement with yourself.

[*If it is alleged that the accused's agreement should be inferred from his/her involvement in a criminal enterprise, add the following shaded section*]

In making your decision, you must consider what each party knew and agreed to. Do not assume that a person agreed to commit an offence simply because s/he knew it was likely s/he was part of a criminal enterprise that involved the commission of NOO. To convict the accused of conspiracy to commit NOO, you must find s/he intentionally agreed to commit NOO.

[*Refer to relevant evidence and arguments of prosecution and defence*]

For this element to be met, you must be satisfied that there was an agreement between NOA and [at least one of] [*identify alleged co-conspirators*], in the terms alleged by the prosecution. You must also be satisfied that NOA and another co-conspirator intended to commit NOO. If you are not satisfied of any of the three matters I have identified, then this element will not be met.

Intention to Agree

The second element is that NOA intended to enter the agreement. You must be satisfied that NOA really meant to make the agreement and did not just appear to agree.

The prosecution argued that NOA meant to make the agreement. [*Refer to relevant prosecution evidence and/or arguments*]. The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

An Overt Act

The third element is that a party to the agreement committed an 'overt act' to advance the agreement.

The first element looked at whether there was an agreement. This element looks at what was done as part of the agreement.

In this case, the prosecution has identified [*number*] of overt acts they say were performed as part of the agreement. These are [*identify alleged overt acts*].

In relation to each of these alleged overt acts, ask yourself two questions.

One – Am I satisfied beyond reasonable doubt that this act occurred?

Two – Am I satisfied beyond reasonable doubt that this act was performed with the intention of advancing the agreement?

In other words, one – did the act occur and two – why was the act performed?

Remember, an overt act can be committed by any party to the agreement. The prosecution does not have to prove that NOA committed the overt act.

To prove this element, you must all agree that a particular overt act was performed as part of the agreement. It is not enough that half of you are satisfied about [*insert one overt act*] and half of you are satisfied about [*insert another overt act*]. You must all agree.

[*Refer to relevant prosecution and defence evidence and/or arguments*]

Withdrawal

[*If the evidence raises the defence of withdrawal, add the following shaded section*]

The law allows a person to withdraw from a conspiracy and avoid conviction in certain circumstances. The defence argues that these circumstances exist in this case.

The accused does not need to prove that s/he withdrew from the conspiracy. As I have told you, the prosecution must prove all matters beyond reasonable doubt. The prosecution must therefore prove that NOA did not withdraw from the conspiracy.

There are three parts to withdrawal.

One – The accused withdrew from the agreement;

Two – The accused took all reasonable steps to prevent the commission of the offence;

Three – The withdrawal was complete before the commission of an overt act as part of the agreement.

The prosecution will prove that NOA did not withdraw from the conspiracy if it can disprove one or more of these three matters.

The prosecution argues that [*identify relevant arguments and evidence*]. The defence disputes this, and argues that [*identify relevant arguments and evidence*].

Summary

To summarise, you can only convict NOA of conspiracy to commit NOO if you are satisfied, beyond reasonable doubt:

One – NOA conspired with another person to commit NOO;

Two –NOA intended to conspire with another person to commit NOO;

Three – NOA or another party to the conspiracy committed an 'overt act' to advance the agreement.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of conspiracy to commit NOO.

Inconsistent verdicts

[*If there is a risk of inconsistent verdicts, add the following shaded section*]

It is important to note that the evidence concerning this offence is identical for both NOA and [*identify co-accused*]. If you decide that [*identify co-accused*] is not guilty of conspiracy to commit NOO, you must also find NOA not guilty of that offence.

Last updated: 14 May 2024

6.2.2 Checklist: Conspiracy (Commonwealth)

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused conspired with another person to commit [*insert name of offence*]; and

2. The accused intended to conspire with that person to commit [*insert name of offence*]; and

3. The parties committed an overt act to advance the agreement.

Conspiracy

1. Did the accused conspire with another person to commit [*insert name of offence*]?

1.1 Did the accused and at least one other person make an agreement?

If Yes, then go to Question 1.2

If No, then the accused is not guilty of conspiracy to commit [*insert name of offence*]

1.2 Was that agreement an agreement to commit [*insert name of offence*]?

If Yes, then go to Question 1.3

If No, then the accused is not guilty of conspiracy to commit [*insert name of* offence]

1.3 Did the accused and a party to the agreement intend that [*insert name of* offence] be committed?

Consider – What are the elements of [*insert name of offence*]*?*

If Yes, then go to Question 2

If No, then the accused is not guilty of conspiracy to commit [*insert name of offence*]

Intention to Agree

2. At the time the agreement was made, did the accused intend to enter into that agreement?

If Yes, then go to Question 3

If No, then the accused is not guilty of conspiracy to commit [*insert name of offence*]

An Overt Act

3. Has a party to the agreement committed an overt act to advance the agreement?

If Yes, then the accused is guilty of conspiracy to commit [*insert name of offence*] (as long as you have also answered Yes to questions 1.1, 1.2, 1.3 and 2)

If No, then the accused is not guilty of conspiracy to commit [*insert name of offence*]

Last updated: 5 October 2016

6.3 Incitement (Victoria)

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Overview

1. Inciting a person to pursue a course of conduct that will, if acted upon, involve the commission of an offence by the person incited and/or the inciter is an indictable offence (*Crimes Act 1958* s 321G).[365]
2. This is a form of inchoate liability, like attempt and conspiracy (see, e.g. *Board of Trade v Owen* [1957] AC 602).
3. Incitement is an indictable offence, regardless of whether or not the incited offence is indictable (*Crimes Act 1958* s 321G).
4. Incitement is a substantive offence, and is committed upon completion of the inciting conduct, regardless of whether the incitement is successful. This distinguishes incitement from accessorial liability (see, e.g. *R v Massie* [1999] 1 VR 542; *Dimozantos v R* (1993) 178 CLR 122).

Elements

5. Incitement has two elements:

   i) The accused incited a person to pursue a course of conduct that would, if acted upon, involve the commission of an offence (the "principal offence"); and

   ii) At the time of the inciting conduct, the accused intended that the principal offence would be committed.

   Each of these elements is addressed in turn below.

Inciting Conduct

6. For the first element to be met, the prosecution must prove that:
   - The accused incited a person to pursue a particular course of conduct; and
   - If the proposed course of conduct had have been followed, an offence would have been committed by the accused,[366] the person incited, or both the accused and the person incited (*Crimes Act 1958* s 321G).
7. To "incite" includes commanding, requesting, proposing, advising, encouraging or authorising (*Crimes Act 1958* s 2A).

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[365] The common law offence of incitement has been abolished (*Crimes Act 1958* s 321L).

[366] The accused will incite a person to pursue a course of conduct that involves the commission of an offence by the accused (and not the person incited) where the person incited would be the innocent agent of the accused (Criminal Law Working Group, *Report on Incitement*, 1982).

8. A command or request that is made conditional on some further event can still be incitement, even if the accused has no control over that other event (*R v Massie* [1999] 1 VR 542; *R v Zhong* [2003] VSCA 56).

9. However, in some cases a command or request may be subject to so many conditions, or be dependent on such unlikely events, that there is not an incitement (*R v Zhong* [2003] VSCA 56).

10. While the incitement needs to have come to the knowledge of the person incited, it does not need to have had any particular effect on him/her. S/he does not need to have formed an intention to commit the principal offence, nor taken any steps to commit that offence, for this element to be met (*R v Dimozantos* (1991) 56 A Crim R 345; *R v Massie* [1999] 1 VR 542; *R v Zhong* [2003] VSCA 56).

11. It is not necessary for the accused to have originated the idea of inciting the criminal conduct. The idea could have originated with a third person, or even with the person to be incited (*R v Massie* [1999] 1 VR 542).

12. There is an unresolved issue whether it is permissible to charge an offence of "incitement to incite". One example where this could be relevant is where it is alleged that A encouraged B to either hire or encourage C to kill D. The Court of Appeal considered this issue in *Najibi v R* [2016] VSCA 177 and held that it was not necessary to finally decide, because the prosecution case did not, in truth, involve an alleged incitement to incite. However, in obiter, the Court indicated that in its preliminary view, it was likely that there was no prohibition on a charge of "incitement to incite" (at [153]–[160]).

Intention of Accused

13. The second element requires the accused to have intended that the principal offence be committed (*Crimes Act 1958* s 321G(2)(a)).

14. If the intended conduct will not be an offence unless it is committed with a particular state of mind, then the accused must intend that the person who would commit the principal offence have that state of mind (Criminal Law Working Group, *Report on Incitement*, 1982).

15. Where the principal offence requires the principal offender to have caused a particular result (e.g. the victim's death), the prosecution must prove that the accused intended the principal offender to bring about that result. This is required even if the intention to bring about that result is not necessary to convict the principal offender of the principal offence (*R v Massie* [1999] 1 VR 542).[367]

Intention or Belief in Facts and Circumstances

16. The accused must also intend or believe that any fact or circumstance that is an element of the offence will exist at the time the offence is expected to take place (*Crimes Act 1958* s 321G).

17. This requirement concerns facts or circumstances that are themselves elements of the principal offence. It does not require the accused to have intended or believed that the specific facts or circumstances which are required, in a particular case, to prove the elements of the principal offence, would be in existence at the relevant time (*R v Wilson* [2004] VSCA 120; *R v Massie* [1999] 1 VR 542).

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[367] For example, in a murder case, the prosecution does not need to prove that the principal offender intended the victim to die. It is sufficient to prove that s/he intended for the victim to be really seriously injured (but s/he in fact died). However, in an incitement to commit murder case, the prosecution must prove that the accused intended the principal offender to cause the victim's death. If s/he only intended the victim to suffer really serious injury, then s/he should instead be convicted of incitement to intentionally cause serious injury (see, e.g. *R v Massie* [1999] 1 VR 542).

18. It is not necessary to explain this requirement in every case. It only needs to be addressed if it is an issue in the case (*R v Massie* [1999] 1 VR 542).

Intention where the accused is also the principle offender

19. An accused's culpability can be based on inciting an innocent agent to pursue a course of conduct that will involve the commission of an offence by the accused (*Crimes Act 1958* s 321G(1)(b)).

20. In such a case, this element will be met if the accused has the necessary mental state. It is no defence that the person incited did not share that mental state (Criminal Law Working Group, *Report on Incitement*, 1982; *Crimes Act 1958* s 321G(1)(b). See also *Osland v R* (1998) 197 CLR 316; *R v Hewitt* [1997] 1 VR 301; *R v Cogan & Leek* [1976] QB 217; *Matusevich v R* (1977) 137 CLR 633; *White v Ridley* (1978) 140 CLR 342).

Incitement and Impossibility

21. A person may be convicted of incitement even if facts existed which made the commission of the principal offence impossible (*Crimes Act 1958* s 321G).

22. However, incitement is not committed if the accused erroneously believed s/he was inciting a crime. The crime incited must have been a real offence, not an imaginary one (*R v Sirat* (1986) 83 Cr App R 41).

Jury Directions and Statutory Language

23. It is generally unnecessary and undesirable to repeat the language of s 321G to the jury verbatim (*R v Massie* [1999] 1 VR 542).

24. The judge should only explain so much of s 321G as is relevant to the case (*R v Massie* [1999] 1 VR 542).

25. In a simple case, it is unnecessary to direct the jury concerning the requirement that the accused incite someone to "pursue a course of conduct". It is sufficient to direct the jury that the accused must incite a person to commit a crime (*R v Massie* [1999] 1 VR 542).

Last updated: 16 February 2017

6.3.1 Charge: Incitement (Victoria)

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This charge has been written for cases in which the accused incites another person to commit an offence. The charge will need to be modified for situations where the accused incites a person to pursue a course of conduct that involves the commission of an offence by the inciter.

Inciting a person to commit NOO[368] is a crime.[369] In order to find the accused guilty of incitement to commit NOO, the prosecution must prove 2 elements beyond reasonable doubt.

The first element that the prosecution must prove is that the accused incited a person to commit the offence of NOO.

The second element that the prosecution must prove is that the accused intended the offence of NOO to be committed.

[368] Name of Offence.

[369] *Crimes Act 1958* s 321G.

Before you can find NOA guilty of incitement to commit NOO you must be satisfied that both of these elements have been proven beyond reasonable doubt. I will now explain these elements in detail.

Inciting Conduct

The first element that the prosecution must prove is that the accused incited a person to commit a crime.

A person can "incite" someone to do something in a variety of ways. For example, s/he can [*insert appropriate definitions, such as* instruct, command, encourage, request, authorise, propose or advise] them to do it.

In this case it is alleged that NOA "incited" NO3P to commit the offence of NOO. A person commits NOO when s/he [*describe and explain the relevant elements of the principal offence. See* 7 Victorian Offences *for the elements of the primary offence*].

It is for you to determine whether NOA incited NO3P to commit NOO. In making this determination, you do not need to consider the effect of NOA's conduct on NO3P. As long as NOA incited NO3P to [*describe the course of conduct that would constitute the principal offence*], it does not matter whether that incitement was successful or not. In this case, the prosecution alleged that NOA incited NO3P to commit NOO by [*describe relevant prosecution evidence and/or arguments*]. The defence disputed this, arguing [*describe relevant defence evidence and/or arguments*].

Intention

The second element that the prosecution must prove is that the accused intended the offence of NOO to be committed. This requires you to be satisfied, beyond reasonable doubt, that NOA intended that NO3P [*describe relevant conduct and necessary state of mind of NO3P*, *e.g.* "intentionally kill NOV without lawful excuse" or "intentionally sexually penetrate NOV without his/her consent"].

[*If there are particular facts or circumstances the accused must have believed in to commit the offence, add the following shaded section.*]

You must also be satisfied that NOA intended or believed that [*describe relevant facts or circumstances*, *e.g.* "NOV would not be consenting"] at the time the offence was to be committed.

The prosecution submitted that this element has been met in this case. [*Describe relevant prosecution evidence and/or arguments.*] The defence responded [*describe relevant defence evidence and/or arguments*].

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of incitement to commit NOO, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA incited NO3P to commit NOO; and

Two – that NOA intended that NOO would be committed.

If you find that either of these elements have not been satisfied beyond reasonable doubt, then you must find NOA not guilty of incitement to commit NOO.

Last updated: 14 November 2008

6.3.2 Checklist: Incitement (Victoria)

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Two elements the prosecution must prove beyond reasonable doubt:

1. The accused incited a person to commit the principal offence; and
2. The accused intended the principal offence to be committed.

Incitement

1. Did the accused incite a person to commit the principal offence?

Consider – "Inciting" an offence includes commanding, requesting, proposing, advising, encouraging or authorising it.

Consider – The incitement does not need to have been successful.

If Yes, then go to Question 2

If No, then the accused is not guilty of incitement to commit the principal offence

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Intention

2. Did the accused intend the principal offence to be committed?

If Yes, then the accused is guilty of incitement to commit the principal offence (as long as you have also answered Yes to question 1)

If No, then the accused is not guilty of incitement to commit the principal offence

Last updated: 14 November 2008

6.4 Attempt (Victoria)

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Overview

1. Attempting to commit an indictable offence is an indictable offence (*Crimes Act 1958* s 321M).[370]
2. Attempt is a form of inchoate liability, like conspiracy and incitement (see, e.g. *Board of Trade v Owen* [1957] AC 602).
3. Attempting to commit an indictable offence has 2 elements:
   i) The accused intended to commit an indictable offence; and
   ii) The accused attempted to commit that offence.

Each of these elements is addressed in turn below.

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[370] The common law offence of attempt has been abolished (*Crimes Act 1958* s 321S).

Intention to Commit an Indictable Offence

4. The first element requires the accused to have intended to commit an indictable offence ("the principal offence") (*Crimes Act 1958* s 321N; *Britten v Alpogut* [1987] VR 929; *DPP v Stonehouse* [1978] AC 55).

5. The accused must have intended to commit the principal offence and not some other offence (*Knight v R* (1992) 175 CLR 495; *McGhee v R* (1995) 183 CLR 82; *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719).

6. This requires the accused to have intended to perform the physical elements of the principal offence (*McGhee v R* (1995) 183 CLR 82).

7. Where the principal offence requires the accused to have caused a particular result (e.g. the victim's death), the prosecution must prove that the accused intended to bring about that result. This is required even if the intention to bring about that result is not necessary to convict the accused of the principal offence (*Knight v R* (1992) 175 CLR 495; *McGhee v R* (1995) 183 CLR 82; *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719).[371]

8. Intention requires more than an expectation that a particular result is likely. For this element to be met, the accused must have acted with the purpose of bringing about the attempted result (*Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719).

9. Recklessness and negligence are not sufficient states of mind for the crime of attempt (*Giorgianni v R* (1985) 156 CLR 473; *Alister & Ors v R* (1984) 154 CLR 404).

Intention or Belief in Facts and Circumstances

10. The accused must also intend or believe that any fact or circumstance that is an element of the offence will exist at the time the offence is expected to take place (*Crimes Act 1958* s 321N).

11. This requirement concerns facts or circumstances that are themselves elements of the principal offence. It does not require the accused to have intended or believed that the specific facts or circumstances which are required, in a particular case, to prove the elements of the principal offence, would be in existence at the relevant time (*R v Wilson* [2004] VSCA 120).

Act of Attempt

12. The second element requires the accused to have attempted to commit the principal offence. For this element to be satisfied, the accused's conduct must have been:

    (a) More than merely preparatory to the commission of the offence; and

    (b) Immediately and not remotely connected with the commission of the offence (Crimes Act 1958 s 321N(1)).

13. While various tests have been developed to assist in the interpretation of this element (see, e.g. *R v Barker* (1924) NZGLR 393; *R v De Silva* [2007] QCA 301; *R v Haas* [1964] Tas SR 1; *R v Nicholson* (1994) 14 Tas R 351), no definitive test beyond the words of the statute has been endorsed in Victoria.

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[371] For example, in a murder case, the prosecution does not need to prove that the accused intended the victim to die. It is sufficient to prove that the accused intended for him/her to be really seriously injured (but s/he in fact died). However, in an attempted murder case, the prosecution must prove that the accused intended the victim to die. If s/he only intended the victim to suffer really serious injury, then s/he should instead be convicted of attempting to intentionally cause serious injury (see, e.g. *Knight v R* (1992) 175 CLR 495).

14. The dividing line between mere preparation and completed attempt is thus not the subject of clear guidance, and every case will depend on its facts (*Partington v Williams* (1975) 62 Cr App R 220; *R v Williams; Ex parte the Minister for Justice and Attorney-General* [1965] Qd SR 86; *Nicholson v R* (1994) 14 Tas R 351).

15. At a general level, an attempt is sometimes described as the beginning of the commission of the crime (*R v De Silva* [2007] QCA 301).

16. The point at which the accused moves beyond mere preparation, and starts the commission of the crime, is generally indeterminate. Two tests that have been developed to try to help determine when this may happen are:

    - The 'last act test'. This requires the accused to have performed all of the acts that s/he needed to do in order to complete the offence (*R v De Silva* [2007] QCA 301; *R v Barker* (1924) NZGLR 393); and
    - The 'unequivocal act test'. This requires the accused's conduct, in all the circumstances, to be unequivocally referable to an intention to complete the principal offence (*R v Nicholson* (1994) 14 Tas R 351; *R v Barker* (1924) NZGLR 393).

17. It has been held that while the unequivocal act test can be a useful guide for determining whether the accused's conduct has moved beyond mere preparation, it is not a prescriptive rule (*R v Nicholson* (1994) 14 Tas R 351).

Defences to Attempt

18. The prosecution must disprove any defences that are raised on the evidence (*Fingleton v R* (2005) 227 CLR 166; *Zecevic v DPP* (1987) 162 CLR 645; *Pemble v R* (1971) 124 CLR 107).

19. While provocation may be a partial defence to murder,[372] it is not a defence to attempted murder (*McGhee v R* (1995) 183 CLR 82).

Attempt and Impossibility

20. The offence of attempt is not limited to conduct that, if it had not been interrupted, would have resulted in the commission of the crime (*Britten v Alpogut* [1987] VR 929).

21. For example, a person may be convicted of attempting to commit an offence even if facts existed which made the commission of the principal offence impossible (*Crimes Act 1958* s 321N; *Britten v Alpogut* [1987] VR 929; *R v Cogley* [1989] VR 799).

22. However, an attempt is not committed if the accused erroneously believed s/he was committing a crime. The crime attempted must have been a real indictable offence, not an imagined crime (*Britten v Alpogut* [1987] VR 929).

Attempt and Inchoate liability

23. The law recognises that a person cannot attempt to conspire or attempt to be a secondary party to an offence (whether under the principles of statutory complicity or common law complicity) (*Franze v R* (2014) 46 VR 856).

24. Conversely, it is possible for a person to be a secondary party to an attempted offence. This occurs, for example, when the person enters into an agreement to complete an offence and that agreement only produces an attempt at the contemplated offence. The distinction lies between a joint attempt, which is legally possible, and an attempt to agree, which is not (*Franze v R* (2014) 46 VR 856).

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[372] Provided the offence was committed prior to 23 November 2005: see Provocation.

Last updated: 2 March 2015

6.4.1 Charge: Attempt (Victoria)

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When directing a jury about attempt, adapt the relevant offence direction from Part 7: Victorian Offences and add the following instruction as part of the relevant conduct element.

Attempt

The law says that for a person to be guilty of attempting to commit a crime, you must be satisfied that NOA did something that was more than mere preparation for the commission of that offence, but was immediately and not remotely connected with its commission.

When a person commits an offence, s/he will often perform various acts leading up to its commission. For example, s/he may make the initial decision to commit the offence, and may plan how s/he will carry it out. In some cases s/he may purchase the necessary tools or weapons.

It for you to determine, using your common sense, whether NOA's conduct moved beyond merely preparing to commit the offence.

The prosecution argued that this element has been met in this case. [*Describe relevant prosecution evidence and/or arguments*.] The defence denied this, arguing that [*describe relevant defence evidence and/or arguments*].

Impossible Attempts

[*If the accused could not have completed the offence for any reason, add the following shaded section.*]

In this case you have heard evidence that NOA could not have committed NOO because [*insert reason for the impossibility of the completion of the offence, e.g.* "the gun was not loaded"]. This fact is not relevant to your determination.

The law does not excuse a person who attempts to commit an offence, but fails due to incompetence or because of factors outside his/her knowledge or control. This means that, as long as the two elements of this offence are satisfied, the accused will be guilty of attempted NOO, even if s/he was attempting to do something that was impossible.

Last updated: 22 September 2012

6.4.2 Charge: Attempted Rape (Victoria) (1/1/08–30/06/15)

Click here to download a Word version of this charge

This charge is provided to show how an offence direction can be modified into an attempt direction.

The elements

I must now direct you about the crime of attempted rape. That crime has the following 4 elements.

One – The accused attempted to sexually penetrate the complainant in the way alleged.

Two – The accused did this intentionally.

Three – The complainant did not consent to the intended sexual penetration.

Four – the accused had one of the following three states of mind about the complainant's consent

(a) The accused was aware that the complainant was not consenting, or

(b) The accused was aware that the complainant might not be consenting, or

(c) The accused was not giving any thought to whether the complainant was not or might not be consenting.

Before you can find NOA guilty of attempted rape you must be satisfied that the prosecution has proved all four of these elements beyond reasonable doubt.

I will now explain each of these elements in detail.

Sexual Penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused attempted to sexually penetrate the complainant in the way alleged. [*If in issue, add*: The prosecution must also prove that the accused did this act consciously, voluntarily, and deliberately.[373]]

To understand this element, I will first explain when the law says that a person commits an attempt and then I will explain what the law means by sexual penetration.

Attempt

The law says that for a person to be guilty of attempting to commit a crime, you must be satisfied that NOA did something that was more than mere preparation for the commission of that offence, but was immediately and not remotely connected with its commission.

When a person commits an offence, s/he will often perform various acts leading up to its commission. For example, s/he may make the initial decision to commit the offence, and may plan how s/he will carry it out. In some cases s/he may purchase the necessary tools or weapons.

It is for you to determine, using your common sense, whether NOA's conduct moved beyond merely preparing to commit the offence.

The prosecution argued that this element has been met in this case. [*Describe relevant prosecution evidence and/or arguments*.] The defence denied this, arguing that [*describe relevant defence evidence and/or arguments*].

Act of sexual penetration

I will now explain the words sexual penetration. The law defines the term sexual penetration to include a number of different acts. In this case the prosecution must prove that NOA introduced [*identify item or body part*, *e.g.* "his penis"] to any extent into NOC's [vagina/anus/mouth].

[*If relevant add:*

- An act of sexual penetration is complete even if NOA's [*identify item or body part*] did not go all the way into NOC's [vagina/anus/mouth]. Even slight penetration is enough.
- Sexual penetration requires actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface*, *e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation.]

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the

[373] Described in the instructions within this charge as the "voluntariness" requirement.

vagina. So the prosecution can prove this element by proving that NOA attempted to introduce [*identify body part or object*] to any extent between the outer lips of NOC's vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

According to the law, the introduction of an object or body part other than the penis into the [vagina/anus] of a complainant does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the attempted insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert relevant evidence or competing arguments about proof of sexual penetration*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed voluntariness in issue, add the shaded section.*]

As I have directed you, the prosecution must prove that the accused attempted to sexually penetrate the complainant consciously, voluntarily, and deliberately.

This requirement is in issue here because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case*, *e.g.* "NOA introduced his finger into NOC's vagina *deliberately*, and not accidentally" or "NOA was *conscious* and not asleep and dreaming at the time of the penetration"].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the attempted sexual penetration was intentional.[374]

[*If intention is not in issue, add the shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.*

- The accused admits that s/he intentionally sexually penetrated the complainant.
- If you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so *intentionally*.]

[374] Because rape is an offence of basic intent (the intent to commit the physical act of penetrating the complainant) proof of the intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Instead, mental state issues related to the act of penetration should generally be addressed by voluntariness directions. This will be the case if the issue is negation of intent by involuntariness, unconsciousness or accident. If different "intention" issues arise, this charge should be adapted.

Consent

The third element that the prosecution must prove is that the complainant was not consenting to the intended sexual penetration.

The law says that consent means free agreement. So the prosecution must prove that NOC did not freely agree to being sexually penetrated by NOA [at the time in question].

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because she or he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence the complainant did not indicate agreement, add the following shaded section if relevant*.]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the attempted sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where evidence is given about the absence of physical resistance, lack of physical injury or past consensual sex, add the following shaded section if relevant to the facts in issue.*]

The law also says that you are not to regard the complainant as having freely agreed just because:

● [*if relevant*] the complainant did not protest or physically resist the accused;

● [*if relevant*] the complainant did not sustain physical injury;

● [*if relevant*] the complainant agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proven beyond reasonable doubt that NOC did not consent to the intended sexual penetration.

In determining whether NOC did not freely agree to be sexually penetrated, you must consider all of the relevant evidence, including what s/he is alleged to have said and done, or not said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about [his/her] state of mind at that time.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this third element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

State of Mind of the Accused

The fourth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of attempted sexual penetration the accused:

- was aware that the complainant was not or might not be consenting to the intended sexual penetration; or
- was not giving any thought to whether the complainant was not or might not be consenting to the intended sexual penetration.[375]

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.[376]

Belief in consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, before you can find NOA guilty of attempted rape the prosecution must prove to you beyond reasonable doubt:

One – that NOA attempted to sexually penetrate NOC in the way alleged; and

Two – that NOA intended to sexually penetrate NOC; and

Three – that NOC did not consent to the intended sexual penetration; and

Four – that at the time of the attempted sexual penetration NOA either:

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[375] It will only be necessary to direct the jury on the second state of mind, 'not giving any thought to whether the complainant was consenting', in rare cases.

[376] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

- was aware that the complainant was not or might not be consenting to the intended sexual penetration; or
- was not giving any thought to whether the complainant was not or might not be consenting to the intended sexual penetration.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of attempted rape.

Last updated: 27 February 2014

7 Victorian Offences

7.1 General Directions

7.1.1 Voluntariness

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The Voluntariness Requirement

1. The existence of a voluntary act or omission is an essential element of a crime. The accused must not be convicted for an act or omission which was independent of his or her will (*Ryan v R* (1967) 121 CLR 205; *R v O'Connor* (1979) 146 CLR 64*; R v Falconer* (1990) 171 CLR 30; *R v Marijancevic* (2009) 22 VR 576).
2. Unless it is expressly excluded by statute, the voluntariness requirement applies to every offence (*Bratty v AG for Northern Ireland* [1963] AC 386; *R v O'Connor* (1979) 146 CLR 64; *He Kaw Teh* (1985) 157 CLR 523; *Jiminez v R* (1992) 173 CLR 572).
3. This includes offences which do not require proof of *mens rea* (see, e.g. *R v Carter* [1959] VR 105; *Edwards v Macrae* (1991) 25 NSWLR 89).
4. Where the relevant fault element is negligence, the negligent act or omission must have been committed voluntarily (*R v Martin* (1983) 9 A Crim R 376; *R v Tajber* (1986) 13 FCR 524).
5. The cause of any involuntariness is irrelevant. A person whose actions are involuntary cannot be found guilty of an offence (*R v O'Connor* (1979) 146 CLR 64; *Jiminez v R* (1992) 173 CLR 572).

When is an Act or Omission "Voluntary"?

Acts

6. An act is committed voluntarily if it is subject to the control and direction of the accused's will (*Ryan v R* (1967) 121 CLR 205; *R v O'Connor* (1979) 146 CLR 64; *R v Falconer* (1990) 171 CLR 30).
7. For an act to be voluntary, the accused does not need to have intended to *attain the result* caused by doing that act. It is sufficient that he or she was conscious of the nature of the act committed, and chose to do an act of that nature (*R v Falconer* (1990) 171 CLR 30; *R v Williamson* (1996) 67 SASR 428).
8. A person who is not conscious or aware of what he or she is doing acts involuntarily. However, the key issue is the lack of the exercise of will, not the lack of consciousness or knowledge (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ). See also *R v Schaeffer* (2005) 13 VR 337).
9. It is therefore possible for a person to act involuntarily even though he or she is conscious and has some awareness of what is happening (*R v Radford* (1985) 42 SASR 266; *R v Falconer* (1990) 171 CLR 30). See 8.8 Automatism for further information.

10. The accused does not need to have appreciated the wrongfulness of his or her conduct for it to have been voluntary. However, the level of the accused's awareness and understanding of his or her actions is a factor to be taken into account in determining whether he or she acted voluntarily (*R v Morrison* (2007) 171 A Crim R 361).

11. The fact that a person's thought processes were affected by a mental illness does not mean that he or she acted involuntarily. There is a distinction between an unwilled act and a willed act that is the product of a diseased mind (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ); *R v Falconer* (1990) 171 CLR 30. See also *R v Harm* (1975) 13 SASR 84).

12. An act is not to be regarded as involuntary simply because:

    - The accused cannot remember it;
    - The accused could not control his or her impulse to do it;
    - It was unintentional or its consequences were unforeseen (*Bratty v AG for Northern Ireland* [1963] AC 386; *R v Radford* [1985] 42 SASR 266; *R v King* (2005) 155 ACTR 55. See also *Nolan v R* WA CCA 22/5/97).

13. Although it is sometimes said that acts committed under duress are "involuntary" or "unwilled", it is incorrect to treat duress as related to the voluntariness requirement. A person who acts under duress deliberately chooses to perform some act (although under constrained circumstances), and thus acts "voluntarily" in the sense outlined in this commentary (see, e.g. *R v Palazoff* (1986) 43 SASR 99).

Omissions

14. Although it is often stated that a person can only be held criminally responsible for voluntary omissions (see, e.g. *Ryan v R* (1967) 121 CLR 205; *R v Falconer* (1990) 171 CLR 30), it is not clear when an omission should be considered to be involuntary.

Types of Involuntary Acts

15. There are at least five types of acts that may raise issues of voluntariness:

    - Involuntary muscular movements, such as spasms, convulsions and reflex actions;
    - Acts performed whilst asleep;
    - Accidental actions;
    - Acts performed in a state of automatism;
    - Acts performed in a state of gross intoxication.

16. This topic only addresses the first two types of involuntary actions. See 7.1.4 Accident, 8.8 Automatism and 8.7 Common Law Intoxication for information concerning the other types of involuntary actions.

Involuntary muscular movements

17. An act which results from a muscular movement that occurs without any control by the mind is involuntary (*Bratty v AG for Northern Ireland* [1963] AC 386; *Ryan v R* (1967) 121 CLR 205).

18. It is clear that this includes:

    - Spasms and convulsions (*Bratty v AG for Northern Ireland* [1963] AC 386; *Ryan v R* (1967) 121 CLR 205);

- Actions which a person is physically compelled to do by an external force;[377] and
- "Reflex action" in the strict neurological sense (i.e., a predictable and nearly instantaneous movement in response to a stimulus) (*Ryan v R* (1967) 121 CLR 205 (Windeyer J)).

19. However, the term "reflex action" is also used to denote the probable but unpredictable reaction of a person when startled. It is unclear whether such a reaction is relevantly "involuntary":
    - In some cases the court seems to have accepted that such an instinctive reaction is involuntary (see, e.g. *R v Ugle* (2002) 211 CLR 171);
    - In other cases it has been suggested that an act is not to be treated as involuntary simply because the mind worked quickly and impulsively (*Ryan v R* (1967) 121 CLR 205 (Windeyer J); *Murray v R* (2002) 211 CLR 193 (Gaudron J)).
20. If the latter position is accepted, it will not be sufficient to tell the jury to acquit if they find that the accused acted reflexively. They will need to decide whether that reflex action was itself an unwilled act (*Murray v R* (2002) 211 CLR 193 (Gaudron J)).

Acts performed while asleep

21. A person cannot be held criminally responsible for an action committed while asleep. Such acts are necessarily involuntary (*Jiminez v R* (1992) 173 CLR 572; *Kroon v R* (1990) 55 SASR 476).
22. However, the accused may be held criminally responsible for acts committed prior to falling asleep, such as driving while fatigued and aware of a real risk of falling asleep (see, e.g. *Jiminez v R* (1992) 173 CLR 572; *Kroon v R* (1990) 55 SASR 476. See also *Maher v Russell* Tas SC 22/11/93).[378]
23. For information concerning actions committed whilst sleepwalking, see 8.8 Automatism.

Which Act Must be Voluntary?

24. It is the "deed which would constitute the crime" that must be performed voluntarily (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ)).
25. Precisely which act (or omission) must be committed voluntarily will differ depending on the offence in question. For example:
    - In relation to murder, it is the "act that caused the death" (*Ryan v R* (1967) 121 CLR 205; *R v Falconer* (1990) 171 CLR 30);
    - In relation to manslaughter by unlawful and dangerous act, it is the "unlawful and dangerous act that exposed the victim to an appreciable risk of serious injury" (*R v Haywood* [1971] VR 755; *R v Williamson* (1996) 67 SASR 428).

Acts and Consequences

26. It is the *act* which must be voluntary, not its *consequences* (*Ryan v R* (1967) 121 CLR 205; *R v Falconer* (1990) 171 CLR 30; *R v King* (2005) 155 ACTR 55; *R v Abdul-Rasool* (2008) 18 VR 586).
27. Thus, in relation to murder, the accused does not need to have voluntarily caused the *death*. It is sufficient if he or she voluntarily committed the *death-causing act* (*R v Falconer* (1990) 171 CLR 30; *R v Ugle* (2002) 211 CLR 171; *Murray v R* (2002) 211 CLR 193).

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[377] Physically compelled acts must be distinguished from acts performed under the mental compulsion of threats. As noted above, while the defence of duress may be available to a person who commits such acts, the acts are not involuntary in the sense outlined in this topic (*R v Palazoff* (1986) 43 SASR 99).

[378] In such circumstances, the issues of causation and contemporaneity will need to be carefully addressed (see, e.g. *Jiminez v R* (1992) 173 CLR 572).

28. While in most cases it will not be difficult to identify which act must be voluntary (*R v Williamson* (1996) 67 SASR 428), occasionally there may be a dispute about precisely what constitutes the "act" and what constitutes the "consequences". For example, where the accused is charged with murdering another person by striking them with a stick, it could be argued that:

    - The "act" is *wielding the stick*, and the "consequence" is the stick striking the victim and causing his or her death; or
    - The "act" is *striking the victim*, and the "consequence" is causing his or her death (see *Kolian v R* (1968) 119 CLR 47).

29. The law in this area is not settled, with some judges holding that it is the bodily action alone (e.g. wielding the stick) which must be voluntary, and others looking more broadly at the aspect of the offence which creates the liability to punishment (e.g. striking the victim) (see, e.g. *Vallance v R* (1961) 108 CLR 56; *Kaporonovski v R* (1973) 133 CLR 209; *Kolian v R* (1968) 119 CLR 47; *R v Falconer* (1990) 171 CLR 30; *R v Williamson* (1996) 67 SASR 428; *Murray v R* (2002) 211 CLR 193; *R v Ugle* (2002) 211 CLR 171; *R v Winter* [2006] VSCA 144).

30. It has been suggested that neither view should be rigidly adhered to, and that the matter should be resolved on a case by case basis (*Kaporonovski v R* (1973) 133 CLR 209 (Walsh J); *R v Williamson* (1996) 67 SASR 428).

31. However, judges have been urged to avoid an overly refined analysis when addressing this issue (*Murray v R* (2002) 211 CLR 193 (Gummow and Hayne JJ); *R v Katarzynski* [2005] NSWCCA 72).

Causal Acts

32. Where an offence requires proof that the accused's actions caused a particular result, it is the *causal act* that must be voluntary (*Ryan v R* (1967) 121 CLR 205; *Kolian v R* (1968) 119 CLR 47; *R v Katarzynski* [2005] NSWCCA 72).

33. For example, in relation to murder it is the *act that caused the victim's death* that must have been voluntary (see, e.g. *Kolian v R* (1968) 119 CLR 47; *R v Winter* [2006] VSCA 144).

34. In particular, where the case involves a scuffle over a weapon, the prosecution must prove that the particular use of the weapon to inflict the death-causing or injury-causing wound was voluntary. For example, in *Herodotou v The Queen*, to prove that the act was voluntary, the prosecution needed to prove that the accused intended to inflict the particular stab wound which caused death, given the evidence that the accused and the deceased had been grappling over a knife (*Herodotou v The Queen* [2018] VSCA 253, [123]–[124]).

35. Where there is a dispute about which act caused the requisite result, it is for the jury to determine (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ); *R v Demirian* [1989] VR 97; *Royall v R* (1991) 172 CLR 378; *R v Katarzynski* [2005] NSWCCA 72). See 7.1.2 Causation for guidance on this issue.

36. In such cases, the jury's determination of the voluntariness issue may differ depending on what they find to be the causal act. For example, where it is alleged that the accused murdered the victim by shooting him or her, and the jury accepts that the trigger was pulled involuntarily:

    - They must acquit the accused if they find that the causal act was *firing the gun*;
    - They may convict the accused if they find that the causal act was *drawing the gun in the circumstances in which it was drawn* (e.g. cocked and loaded, with no safety catch applied), which the accused did voluntarily (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ). See also *Royall v R* (1991) 172 CLR 378; *Murray v R* (2002) 211 CLR 193; *R v Katarzynski* [2005] NSWCCA 72; *Koani v R* [2017] HCA 42).

37. Consequently, where there are multiple possible causal acts in issue, it is important that the judge identify the different possibilities and explain the consequences of the jury's findings (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ, Menzies J); *Murray v R* (2002) 211 CLR 193 (Callinan J); *White v Ridley* (1978) 140 CLR 342; *Royall v R* (1991) 172 CLR 378 (Mason CJ); *R v Katarzynski* [2005] NSWCCA 72; *Koani v R* [2017] HCA 42).

Knowledge of Circumstances

38. In most cases, an act may be voluntary even if the accused is unaware of fundamental facts that will determine his or her culpability. Knowledge of the circumstances in which an act is committed is generally a component of intention not volition (*R v O'Connor* (1979) 146 CLR 64).

39. For example, where the accused is charged with murder, the accused does not need to have known that the victim would be shot to make the discharge of the gun a voluntary act (see, e.g. *Ryan v R* (1967) 121 CLR 205).[379]

40. However, some acts require a certain level of knowledge. For example, if it is held that the act that must have been voluntary in a particular case was *stabbing* the victim, this requirement will only be met if the accused knew there was a knife in his or her hand (*R v Williamson* (1996) 67 SASR 428; *R v Winter* [2006] VSCA 144. See also *Kolian v R* (1968) 119 CLR 47; *Duffy v R* (1981) WAR 72).

The Evidentiary Presumption of Voluntariness

41. Ordinarily, the prosecution does not need to address the issue of voluntariness. Instead, they may rely on the evidentiary presumption that an act done by an apparently conscious person was done voluntarily (the "evidentiary presumption of voluntariness") (*R v Falconer* (1990) 171 CLR 30. See also *Bratty v AG for Northern Ireland* [1963] AC 386; *Ryan v R* (1967) 121 CLR 205; *R v Radford* [1985] 42 SASR 266; *Bush v R* (1993) 43 FCR 549; *Hawkins v R* (1994) 179 CLR 500; *MG v R* (2010) 29 VR 305).[380]

42. The evidentiary presumption of voluntariness reflects the ordinary and universal experience that a person's will ordinarily accompanies his or her actions (*R v Falconer* (1990) 171 CLR 30; [1990] HCA 49).

43. The evidentiary presumption of voluntariness is a provisional presumption only. Unlike the presumption of sanity,[381] it does not put the legal burden on the defence. The burden of proving voluntariness always remains on the prosecution (*R v Falconer* (1990) 171 CLR 30; *Bratty v AG for Northern Ireland* [1963] AC 386 (Lord Denning); *Ryan v R* (1967) 121 CLR 205 (Barwick CJ); *R v Radford* [1985] 42 SASR 266; *R v Marijancevic* (2009) 22 VR 576).

44. Thus, if the evidentiary presumption of voluntariness is displaced, the prosecution must prove, beyond reasonable doubt, that the relevant act or omission was voluntary (*Ryan v R* (1967) 121 CLR 205; *R v O'Connor* (1979) 146 CLR 64; *R v Falconer* (1990) 171 CLR 30; *R v Marijancevic* (2009) 22 VR 576).

45. For the evidentiary presumption of voluntariness to be displaced, there must be sufficient evidence from which it may reasonably be inferred that the relevant act was involuntary (*R v Falconer* (1990) 171 CLR 30; *Bratty v AG for Northern Ireland* [1963] AC 386 (Lord Denning); *Ryan v R* (1967) 121 CLR 205 (Barwick CJ); *R v Youssef* (1990) 50 A Crim R 1; *R v Marijancevic* (2009) 22 VR 576).

46. The mere fact that the accused has made a credible assertion of a lack of memory is not sufficient to displace the presumption (*R v O'Connor* (1980) 146 CLR 64 (Barwick CJ)).

47. See 7.1.4 Accident, 8.8 Automatism and 8.7 Common Law Intoxication for information concerning some of the circumstances in which the presumption will be displaced.

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[379] The accused's lack of knowledge will, however, be relevant to the question of whether he or she intended to cause death or really serious injury.

[380] The evidentiary presumption of voluntariness is sometimes called the "presumption of mental capacity" (see, e.g. *Bratty v AG for Northern Ireland* [1963] AC 386; Ryan v R (1967) 121 CLR 205).

[381] See 8.4 Mental Impairment.

When Must the Jury be Directed about Voluntariness?

48. For most offences,[382] it will only be necessary to direct the jury about voluntariness if the evidentiary presumption of voluntariness has been displaced (*R v Falconer* (1990) 171 CLR 30; *Bratty v AG for Northern Ireland* [1963] AC 386; *Ryan v R* (1967) 121 CLR 205; *R v Marijancevic* (2009) 22 VR 576; *Cvetkovic v R* [2010] NSWCCA 329).

49. As there ordinarily will not be sufficient evidence to displace the presumption, it will usually not be necessary to give a direction on voluntariness (*Ryan v R* (1967) 121 CLR 205; *R v Falconer* (1990) 171 CLR 30; *R v Fowler* [1999] VSCA 135; *R v Le Broc* (2000) 2 VR 43; *R v Chang* (2003) 7 VR 236).

50. Where the presumption has been displaced:

    - The jury *must* be specifically directed about voluntariness (*R v Falconer* (1990) 171 CLR 30; *Ryan v R* (1967) 121 CLR 205; *R v Ugle* (2002) 211 CLR 171; *Murray v R* (2002) 211 CLR 193; *R v Marijancevic* (2009) 22 VR 576. But see *R v Tucker* (1984) 36 SASR 135); and
    - A direction must be given even if not requested or sought by either party (*R v Falconer* (1990) 171 CLR 30; *MG v R* (2010) 29 VR 305).

Content of the Charge

51. Where a voluntariness direction is required, the judge must:

    - Specifically direct the jury that one element of the offence that the prosecution must prove is that the relevant act (or omission) was voluntary;
    - Explain the meaning of that element; and
    - Relate the law to the evidence (*R v Tait* [1973] VR 151; *Ryan v R* (1967) 121 CLR 205; *MG v R* (2010) 29 VR 305).

Give a separate voluntariness direction

52. When voluntariness is in issue, the jury must be specifically directed about it (*R v Ugle* (2002) 211 CLR 171; *Stevens v R* (2005) 227 CLR 319 (Kirby and Callinan JJ); *MG v R* (2010) 29 VR 305).

53. It is not sufficient to direct the jury that the accused's acts must have been intentional. The judge must draw to the jury's attention any matters which can show that the prosecution has not proven the relevant act was voluntary (*R v Ugle* (2002) 211 CLR 171; *Murray v R* (2002) 211 CLR 193 (Callinan J); *Stevens v R* (2005) 227 CLR 319 (Kirby and Callinan JJ); *MG v R* (2010) 29 VR 305. But see *R v Tucker* (1984) 36 SASR 135).[383]

54. As the issue of voluntariness is logically anterior to issues such as whether the act was committed in self-defence, or whether it was done with the requisite intention, it should be addressed first (*R v Ugle* (2002) 211 CLR 171; *Stevens v R* (2005) 227 CLR 319 (Kirby and Callinan JJ)).

Define voluntariness

55. The judge must explain the legal meaning of "voluntariness" to the jury (*R v Tait* [1973] VR 151).

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[382] For some offences, such as murder, the jury should always be directed about voluntariness. Where this is the case, the issue of voluntariness is addressed in the commentary for that offence.

[383] Although a judge should direct the jury about voluntariness and intention separately, where the issue of voluntariness is factually subsumed by the issue of intention an omission to direct the jury about voluntariness may not give rise to a substantial miscarriage of justice (see, e.g. *MG v R* (2010) 29 VR 305; *Coulson v R* [2010] VSCA 146).

56. This requires the judge to explain to the jury that the relevant act must have been the product of the accused's will (*R v Tait* [1973] VR 151).

57. No set form of words is essential (*R v Tait* [1973] VR 151).

58. It is not necessary to tell the jury that "the mind must accompany the act", although that may be an appropriate direction in some cases (*R v Tait* [1973] VR 151).

59. The words "conscious" and "deliberate" may be used to help the jury to assess and understand whether the relevant act was voluntary (*R v Schaeffer* (2005) 13 VR 337. See also *Ryan v R* (1967) 121 CLR 205; *R v Winter* [2006] VSCA 144).

60. If the word "deliberate" is used, the judge must:

    - Make clear that it refers to deliberately *committing the act* in question, rather than deliberately *causing a particular result*;
    - Not suggest that a "deliberate" act differs from a "voluntary" act. While the word "deliberate" may be used to help explain the concept of voluntariness, it is not a separate requirement;
    - Not define the term "deliberate" by reference to whether the result of that act was reasonably foreseeable (*R v Schaeffer* (2005) 13 VR 337).[384]

61. To avoid confusing the issue of voluntariness with that of intention, judges should not use the word "intentional" to describe the voluntariness requirement (*R v Marijancevic* (2009) 22 VR 576. See also *Kolian v R* (1968) 119 CLR 47 (Barwick CJ); *MG v R* (2010) 29 VR 305).

Identify the relevant act

62. Where there are multiple possible acts in issue, it is important that the judge carefully identify the act that must have been voluntary (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ, Menzies J); *Murray v R* (2002) 211 CLR 193 (Callinan J); *Royall v R* (1991) 172 CLR 378 (Mason CJ)).

63. In some cases the question of which act must have been committed voluntarily will be a factual issue for the jury to resolve. This will be the case, for example, in a murder trial involving multiple possible causes of death. In such a case, it is for the jury to determine:

    - What acts were done by the accused;
    - Which of those acts they consider to have caused the death;[385] and
    - Whether the act they consider to have caused the death was committed voluntarily (*Murray v R* (2002) 211 CLR 193 (Gaudron and Kirby JJ); *Ryan v R* (1967) 121 CLR 205 (Barwick CJ); *Royall v R* (1991) 172 CLR 378 (Mason CJ); *R v Katarzynski* [2005] NSWCCA 72)

64. Where there are multiple possible causal acts in issue, it is important that the judge clearly identify the different possibilities and explain the consequences of the jury's findings (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ, Menzies J); *Murray v R* (2002) 211 CLR 193 (Callinan J); *Royall v R* (1991) 172 CLR 378 (Mason CJ)).

Explain any knowledge requirements

65. In some cases the judge must tell the jury that they need to be satisfied that the accused had knowledge of certain facts in order to find that he or she acted voluntarily (see, e.g. *R v Williamson* (1996) 67 SASR 428; *R v Winter* [2006] VSCA 144).

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[384] See 7.1.4 Accident for further information.

[385] See 7.1.2 Causation for assistance with this issue.

66. For example, where the accused is charged with murder by stabbing, and claims that he did not know he was holding a knife when he punched the victim, the jury must be directed that in order to find that the stabbing was voluntary, they must be satisfied that the accused knew he was holding a knife (see, e.g. *R v Williamson* (1996) 67 SASR 428; *R v Winter* [2006] VSCA 144. See also *Duffy v R* (1981) WAR 72).

Relate the law to the evidence

67. The judge must relate the law to the evidence (*R v Tait* [1973] VR 151; *Ryan v R* (1967) 121 CLR 205; *MG v R* (2010) 29 VR 305).

68. The jury may take into account the sequence of acts leading up to the act in question (e.g. choosing to carry a knife) in determining whether the relevant act was voluntary (*R v Ugle* (2002) 211 CLR 171 (Callinan J); *Murray v R* (2002) 211 CLR 193 (Callinan J)).

Do not tell the jury about the presumption of voluntariness

69. The jury should not be told that there is a presumption that an act done by a person who is apparently conscious is done voluntarily (*Murray v R* (2002) 211 CLR 193 (Gummow and Hayne JJ); *Middleton v R* [2000] WASCA 213; *R v Marijancevic* (2009) 22 VR 576).

70. The jury also should not be told to only consider the issue of voluntariness if they are satisfied that there is at least a reasonable possibility the accused's actions were involuntary. It is for the judge to determine whether there is a sufficient evidentiary basis for the issue of voluntariness to be considered. Once such a basis has been established, it is for the jury to decide whether the prosecution have proved beyond reasonable doubt that the relevant act was voluntary (*R v Marijancevic* (2009) 22 VR 576).

Last updated: 27 March 2019

7.1.1.1 Charge: Voluntariness

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This charge should be used where there is sufficient evidence to displace the evidentiary presumption of voluntariness,[386] and the voluntariness requirement is not addressed in the relevant offence charge.

If it is alleged that the accused's actions were "accidental", care must be taken to ensure that the argument relates to voluntariness rather than intention. See 7.1.4 Accident for assistance.

The charge has been designed as an additional element to insert after the conduct element, with the numbering of subsequent elements to be altered accordingly.

With suitable modifications, it may instead be incorporated into the directions about the conduct element, as an additional matter the prosecution must prove (see, e.g. the first element of the rape charges).

[386] See 7.1.1 Voluntariness for guidance.

Voluntariness

The [*insert number*] element the prosecution must prove beyond reasonable doubt is that the accused's act of [*describe act, e.g.* "driving"] was a voluntary act.[387]

The law says that an act is committed voluntarily if it is subject to the control and direction of a person's will.

Some examples of involuntary acts include:

- Acts committed by an unconscious person, such as a sleepwalker or a person rolling over in bed;
- Some acts that are committed accidentally, such as when a person trips over and breaks something he or she is holding;[388] and
- Acts committed in certain mental states where the mind loses control of the body's actions, such as may occur when a person suffers from concussion.

In each of these examples, the person's actions are involuntary because they are unwilled. The person has exercised no control or direction over his or her bodily movements.

[*If it is alleged that the accused caused a particular result, add the following shaded section.*]

The focus of this element is on NOA's conduct, not the consequences of that conduct. Thus, NOA does not need to have intended to [*describe result, e.g.* "injure NOV"] for his/her actions to have been voluntary. It is sufficient that his/her act of [*describe act, e.g.* "driving"] was willed.

[*In rare cases where the accused needs to have known a particular fact for his/her acts to have been voluntary, add the following shaded section.*]

Some actions cannot be done voluntarily unless the person is aware of certain facts when doing them. For example, a person cannot shoot someone voluntarily if s/he is not aware that he or she is holding a gun.

In this case, to find that NOA's act of [*describe act, e.g.* "stabbing"] was voluntary, you must find that s/he knew [*describe relevant matter*, e.g. "that s/he was holding a knife when s/he hit NOV].

[Where relevant, the remainder of this charge should be replaced by 8.7.1 Charge: Intoxication and 7.1.1 Voluntariness.]

The defence has argued that NOA's act of [*describe act, e.g.* "driving"] was not voluntary because [*identify reason for alleged involuntariness, e.g.* "s/he was asleep at the time"].

[*Summarise relevant evidence and arguments*.]

If the prosecution cannot prove that NOA [*describe act, e.g.* "drove"] voluntarily, then you must find him/her not guilty of [*identify offence*].

Last updated: 30 September 2011

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[387] Judges must take care to precisely identify which act must have been committed voluntarily. In some cases this will be a matter for the jury to determine. See "Which Act Must be Voluntary?" in 7.1.1 Voluntariness for guidance.

[388] If it is alleged that the accused's actions were "accidental", care must be taken to ensure that the argument relates to voluntariness rather than intention. See 7.1.4 Accident for assistance.

7.1.2 Causation

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When is it Necessary to Address Causation?

1. Most offences criminalise the performance of certain acts, regardless of the consequences of those acts (e.g. rape, theft, trafficking in a drug of dependence). It will generally not be necessary to address the issue of causation when directing the jury about such offences.
2. However, some offences require the accused's actions to have led to a particular result. For example, before a person is convicted of murder, their actions must have caused the victim to die. It is in relation to these result-oriented offences that causation may be an issue.
3. While most of the law in this area has been developed in the context of homicide offences, the principles are of broader application. They will, for example, apply to the offences specified in ss 16–18 and 24 of the *Crimes Act 1958*, which require the accused's acts to have caused injury or serious injury.

When Does Conduct "Cause" a Result?

4. For an accused's conduct to have "caused" a result, it must have "contributed significantly" to that result, or been a "substantial and operating cause" of it (*Royall v R* (1991) 172 CLR 378; *R v Rudebeck* [1999] VSCA 155; *R v Stein* (2007) 18 VR 376; *R v Withers* [2009] VSCA 306*; R v Aidid* (2010) 25 VR 593).
5. The act must be one that an ordinary person would hold, as a matter of common sense, to be a cause of the result. The mere fact that the accused's conduct contributed causally to a result, or was a necessary cause of the result, is not sufficient (*Royall v R* (1991) 172 CLR 378).
6. The accused may be liable for "causing" a result even if his or her conduct was not the direct or immediate cause of that result (*Royall v R* (1991) 172 CLR 378; *R v Withers* [2009] VSCA 306*; R v Aidid* (2010) 25 VR 593).
7. The accused does not need to be the sole cause of the result. A person can be criminally liable for something that has multiple causes, even if he or she is not responsible for all of those causes (*Royall v R* (1991) 172 CLR 378; *R v Stein* (2007) 18 VR 376; *R v Withers* [2009] VSCA 306*; R v Aidid* (2010) 25 VR 593).
8. The accused can "cause" a result by act or omission (*Royall v R* (1991) 172 CLR 378).

Which Conduct Must Cause the Result?

9. It is generally not necessary for the jury to determine which of the accused's acts caused the relevant result, as long as they are satisfied that that result was caused by one of the accused's acts.
10. However, in some cases it will be necessary for the jury to determine which particular act caused the relevant result, before they can find the accused guilty. For example, if there are multiple possible causal acts, and the accused's mental state may have differed when s/he committed those acts, the jury will need to determine which of those acts caused the result – so that they can ascertain whether the accused held the appropriate mental state when s/he committed that particular act (*Arulthilakan v R; Mkoka v R* (2003) 203 ALR 259; *R v McLachlan* [1999] 2 VR 553).
11. Similarly, the jury will need to determine which specific act caused the requisite result if the accused may have involuntarily committed one or more of the relevant acts. In such a case, for the accused to be found guilty, the jury will need to be satisfied that s/he voluntarily committed an act that they find caused the criminal result (*Ryan v R* (1967) 121 CLR 205; *R v Butcher* [1986] VR 43). See 7.1.1 Voluntariness for further information.

12. Where the offence is one of specific intent (such as murder), the jury must be satisfied that the accused acted with an intent to cause a particular result through that act. It is not sufficient that the accused engaged in the causal act while incidentally possessing the relevant state of mind. For an example of where this principle arose, see *Koani v R* [2017] HCA 42, where the accused may have shot the deceased due to his negligent handling of a shotgun, and the High Court held that the prosecution could not prove intentional murder by combining the accused's negligence with an intention to kill.

13. In some cases the terms of the offence will specify the type of conduct which must have caused the relevant result. For example, the offence of "culpable driving caused by gross negligence" contrary to s 318(2)(b) of the *Crimes Act 1958* requires the death of the victim to have been caused by a grossly negligent act. It is not enough that the accused was driving in a grossly negligent manner at the time of the death, if that gross negligence was not a substantial and operating cause of the death (*R v Feketa* (1982) 10 A Crim R 287; *R v Heron* [2003] VSCA 76).[389]

Complicating Factors

Intervening Acts

14. Difficulties in proving causation may arise if another act or event intervenes between the commission of the accused's conduct and the criminal result. In such situations, the accused remains liable if his or her conduct is still a substantial operating cause of the result when it occurs. This is because his or her acts or omissions can still properly be said to be the cause of the act, even if some other cause is also operating (*R v Evans & Gardiner* (No 2) [1976] VR 523; *R v Smith* (1983) 76 Cr App R 279*; R v Aidid* (2010) 25 VR 593).

15. However, the accused will not be liable if his or her conduct is merely the setting in which another cause operates. In such circumstances, the result cannot properly be said to have been caused by the accused's conduct (*R v Evans & Gardiner* (No 2) [1976] VR 523; *R v Smith* (1983) 76 Cr App R 279).

Acts of the Victim

16. Difficulties in proving causation may also arise if there is evidence that the victim's own actions were a cause of the result. For example, the victim may injure him or herself while attempting to flee the accused.

17. In such cases, the accused's conduct will still be considered to be a legal cause of the result if the victim's acts were a "natural consequence" of that conduct (*Royall v R* (1991) 172 CLR 378 (Mason CJ, Deane and Dawson JJ)*; R v Aidid* (2010) 25 VR 593).

18. Where victims are injured or killed while responding to a threat created by the accused, their actions will only be a "natural consequence" of the accused's conduct if their fear of the accused was well-founded, and their response to the threat was "reasonable" (*Royall v R* (1991) 172 CLR 378 (Brennan, Deane, Dawson, Toohey and Gaudron JJ)*; R v Aidid* (2010) 25 VR 593. But see McHugh J and Mason CJ; *R v Lee* (2005) 12 VR 249).

Failure to Intervene

19. Difficulties in proving causation may also arise where the consequences of the accused's conduct could have been averted by the reasonable intervention of either the victim or a third-party.

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[389] It should be noted that culpable driving alleged contrary to ss 318(2)(c) & (d) of the *Crimes Act 1958* does not require proof of this same causal nexus: *R v Ciantar* (2006) 16 VR 26.

20. Australian courts have declined to articulate a special test for these cases. The question for determination is whether or not the accused's original act or omission remains a substantial, operating cause of the result (*R v Evans & Gardiner* (No 2) [1976] VR 523).

Content of the Charge

21. Where causation is straightforward, it may be sufficient simply to instruct the jury that the prosecution must prove, beyond reasonable doubt, that the accused's conduct caused the relevant result (*Royall v R* (1991) 172 CLR 378, *R v Le Broc* (2000) 2 VR 43, *R v Ince* [2001] VSCA 214).

22. It will generally be necessary to elaborate upon this direction in more complex cases, such as:

    (a) Where the result would not have occurred if the victim or a third party had not committed an intervening act; or

    (b) Where the result could have been prevented if the victim or a third party had taken action to avoid the consequences of the accused's conduct; or

    (c) Where one or more of the possible causal acts may have been involuntary (Royall v R (1991) 172 CLR 378; Koani v R [2017] HCA 42).

23. Directions about intervening acts should ordinarily be made by reference to the facts of the case, rather than being couched in abstract terms (*Royall v R* (1991) 172 CLR 378).

24. If it is necessary to direct the jury about the intervening acts of the victim, the jury should generally not be told that the victim's acts need to be foreseeable. Such a direction is likely to confuse the issue (*Royall v R* (1991) 172 CLR 378. But see *R v Aidid* (2010) 25 VR 593).

25. If detailed directions are given, they should be balanced with an instruction that the question of causation is not a philosophical or a scientific question. It is a question to be determined by the jury by applying their common-sense to the facts as they find them, keeping in mind that the purpose of the inquiry is to attribute legal responsibility in a criminal matter (*Campbell v R* [1981] WAR 286; *Royall v R* (1991) 172 CLR 378; *R v Withers* [2009] VSCA 306).

26. If a "but for" test is to be incorporated into the directions on causation, care should be taken to ensure that it does not undermine the "substantial cause" direction, thus leading the jury to consider that a negligible cause might suffice (*Royall v R* (1991) 172 CLR 378; *Arulthilakan v R; Mkoka v R* (2003) ALR 259).

Causation and Accessorial Liability

27. Where culpability is alleged to arise by some form of extended accessorial liability, it will generally be necessary to adapt the causation charge. See Part 5: Complicity for further information.

Last updated: 19 March 2018

7.1.2.1 Charges: Causation

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Causation

For many offences it will be unnecessary to give any direction in respect of causation (see 7.1.2 Causation). Where some direction is required, in most cases a very basic direction will be sufficient. Such directions are incorporated into the charges for offences which commonly require them.

Additional Charges

Multiple Possible Causes or Combined Causes

In this case you have heard evidence that [*insert relevant result*] [was/may have been] caused by [multiple possible/a combination of] causes. [*Insert relevant evidence*.]

The law says that for NOA's act[s] to have caused [*insert relevant result*], it does not need to have been the only cause of that result. You may find that his/her act[s] caused [*identify relevant result*] if [it was/they were] a substantial or significant cause of that result.

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

Intervening Acts/Failure to Intervene

In this case you have heard evidence that [*identify relevant result*] did not follow immediately from the alleged act[s] of the accused, and that [*describe intervening acts*] may have occurred in between.

The law says that for NOA's act[s] to have caused [*insert relevant result*], [it does/they do] not need to have been the only cause of that result, or the direct or immediate cause. You may find that his/her act[s] caused [*identify relevant result*] if [it was/they were] a substantial or significant cause of that result.

In making this determination, you need to decide whether it was the accused's act[s] which caused [*insert relevant result*], or whether [that act/those acts] merely provided the setting for the later act[s] of [*insert intervening act*] which in truth caused the result. If his/her acts only provided the setting, then s/he did not cause the result, and you must find him/her not guilty of [*insert offence*].

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

Indirect Cause

This direction has been drafted for use in cases in which the victim could be seen to have caused the ultimate result while attempting to escape the violence of the accused. While it could be adapted for use in other cases where the accused could be seen to have indirectly caused the relevant result, care should be taken in doing so.

This charge should not be given where a simpler "intervention" direction can be given (see above). It should also not be given where NOA purposively compelled NOV to commit the causal conduct.

In this case you have heard evidence suggesting that [*identify result*] was only indirectly caused by the acts of the accused. [*Insert relevant evidence*.]

The law says that for an accused's act[s] to have caused [*insert relevant result*], [it does/they do] not need to have been the direct or immediate cause of that result. You may find that his/her act[s] caused [*identify relevant result*] if [it was/they were] a substantial or significant cause of that result.

However, you can only find the accused responsible for the indirect results of his/her acts if the prosecution can prove two matters to you, beyond reasonable doubt.

First, the prosecution must prove that NOA's acts caused [*identify the ultimate result, e.g.* "NOV's death"]. In this case, that means that NOA's acts were a substantial or significant cause of [*identify immediate causal event*, *e.g.* "NOV fleeing NOA's violence"], which in turn caused [*identify the ultimate result*, *e.g.* "NOV's death"].

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

Secondly,[390] the prosecution must prove that NOV acted out of a well-founded or reasonable fear of NOA, and that NOV's acts of self-preservation were a natural consequence of NOA's conduct.

Here, the evidence was [*describe evidence relevant to reasonableness of NOV's response*]. It is for you to determine if NOV's reaction was reasonable and well-founded. If you find that NOV over-reacted to NOA's conduct, then you must find that the accused was not responsible for [*identify result*], and find him/her not guilty of [*insert offence*].

Last updated: 20 June 2007

7.1.3 Recklessness

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1. In Victoria, an accused is said to have been reckless if they acted in the knowledge that a particular harmful consequence would probably result from their conduct, but they decided to continue their actions regardless of that consequence (*DPP Reference No 1 of 2019* [2021] HCA 26; *DPP Reference No 1 of 2019* [2020] VSCA 181; *R v Campbell* [1997] 2 VR 585).
2. This definition applies to all Victorian offences involving recklessness (*R v Nuri* [1990] VR 641; *R v Campbell* [1997] 2 VR 585; *R v Kalajdic* [2005] VSCA 160; *DPP Reference No 1 of 2019* [2021] HCA 26; *DPP Reference No 1 of 2019* [2020] VSCA 181).
3. Recklessness requires foresight on the part of the accused (of the probable consequences of his or her actions) and indifference as to whether or not those consequences occur (*R v Nuri* [1990] VR 641).
4. When explaining recklessness, judges may tell the jury that the accused must have been aware that his or her conduct would probably cause the relevant consequence, but decided to go ahead anyway. The words "but decided to go ahead anyway" do not make proof that the accused was indifferent to the consequences of his or her conduct an element of the offence. Instead, the purpose of the words is to distinguish recklessness from intention. Judges may modify or omit the words "but decided to go ahead anyway" if the words could mislead or confuse the jury (see *Ignatova v R* [2010] VSCA 263; *R v Crabbe* (1985) 156 CLR 464; *R v Sofa* Vic CA 15/10/1990; *R v Nuri* [1990] VR 641; *R v Campbell* [1997] 2 VR 585; *R v Wilson* [2005] VSCA 78).
5. The word "probable" means likely to happen (*R v Crabbe* (1985) 156 CLR 464).
6. The word "might" should not be used in relation to recklessness. It is a misdirection to say that recklessness is established when the accused knew that particular consequences "might" occur. Recklessness means that the accused knew that those consequences would probably occur (*R v Crabbe* (1985) 156 CLR 464; *R v Campbell* [1997] 2 VR 585).
7. It is not necessary to prove that the accused acted recklessly in relation to the actual victim, as long as the accused had acted recklessly in relation to the risk of their behaviour causing injury to some person (*La Fontaine v R* (1976) 136 CLR 62; *R v Bacash* [1981] VR 923).
8. Use of the word "reckless" should be avoided in charging the jury in murder trials, as it is liable to confuse them. Instead, the jury should be directed that the accused must have foreseen that death or really serious injury was a probable consequence of their actions (*La Fontaine v R* (1976) 136 CLR 62).

[390] This part of the direction will have to be substantially modified if applied to offences not addressing escape–based harm.

Commonwealth offences

9. For offences against the Commonwealth *Criminal Code*, recklessness is defined in s 5.4:

> (1) A person is reckless with respect to a circumstance if:
>
> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (2) A person is reckless with respect to a result if:
>
> (a) he or she is aware of a substantial risk that the result will occur; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (3) The question whether taking a risk is unjustifiable is one of fact.
>
> (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element (Criminal Code s 5.4).

Last updated: 28 October 2022

7.1.3.1 Charge: Recklessness

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For you to be satisfied that the accused's actions were reckless, the prosecution must prove beyond reasonable doubt that when NOA [*insert details of relevant actions*], [he/she] knew that [his/her] actions would probably cause [*insert details of relevant consequence*], but [he/she] went ahead with [his/her] actions anyway.

It is not enough for NOA to have known that [*insert details of relevant consequence*] might possibly occur. For this element to be satisfied, the prosecution must prove beyond reasonable doubt that NOA knew that [*insert details of relevant consequence*] would probably result from [his/her] actions.

Last updated: 2 July 2020

7.1.4 Accident

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Overview

1. In the Code jurisdictions there is a specific defence of "accident", which excuses the accused from responsibility for events which are the unintended, unforeseeable consequences of a willed act (see, e.g. *Kaporonovski v R* (1973) 133 CLR 209; *R v Van Den Bemd* (1994) 179 CLR 137). There is no such defence in Victoria (*R v Fowler* [1999] VSCA 135).
2. However, where a person commits an act "accidentally", one or more of the elements of the charged offence may not be met. It is this type of "accident" that is the focus of this topic.

Meaning of "Accident"

3. The word "accident" is ambiguous. It is sometimes used to refer to an involuntary act, and sometimes used to refer to an unintentional act (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ); *R v Fowler* [1999] VSCA 135; *Stevens v R* (2005) 227 CLR 319).

4. As the necessary directions will differ depending on the way in which the term "accident" is used in a case, it is essential that judges clarify what is meant by the term whenever it is used.

Involuntary Acts

5. In some cases, an act which is committed independently of the accused's will is described as an "accident" (e.g. where the accused trips over and "accidentally" bumps into someone) (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ); *R v Fowler* [1999] VSCA 135; *R v Schaeffer* (2005) 13 VR 337).
6. As the existence of a voluntary act is an essential element of a crime, the accused must not be convicted for such "accidental" acts (*Ryan v R* (1967) 121 CLR 205; *R v O'Connor* (1979) 146 CLR 64*; R v Falconer* (1990) 171 CLR 30; *R v Fowler* [1999] VSCA 135).[391]
7. Where this type of "accident" is in issue, it is for the prosecution to prove, beyond reasonable doubt, that the relevant act was voluntary (*Ryan v R* (1967) 121 CLR 205; *R v O'Connor* (1979) 146 CLR 64; *R v Falconer* (1990) 171 CLR 30; *R v Fowler* [1999] VSCA 135).
8. See 7.1.1 Voluntariness for further information concerning the voluntariness requirement.

Unintentional Acts

9. In some cases, the word "accident" is used to refer to an outcome that the accused did not intend to cause. For example, where the accused shoots a gun intending only to scare the victim, but unintentionally kills him or her, the killing may be said to be "accidental" (see, e.g. *Ryan v R* (1967) 121 CLR 205 (Barwick CJ); *R v Fowler* [1999] VSCA 135; *R v Schaeffer* (2005) 13 VR 337).
10. In such cases, the claim is *not* that the accused acted involuntarily (e.g. in the example provided above, it is not disputed that the accused fired the gun voluntarily). The claim is that the accused did not intend to cause the outcome that resulted from his or her actions (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ); *R v Fowler* [1999] VSCA 135).
11. The accused's guilt in such cases will depend on what offence he or she is charged with. For instance, in the example provided above:
    - The accused must be acquitted of murder (as he or she did not intend to cause death or really serious injury);
    - The accused may be convicted of manslaughter (if the jury finds that he or she caused the victim's death by an unlawful and dangerous act) or assault (as he or she intended to create an apprehension of immediate and personal violence).

When Must the Jury be Directed about Accident?

12. It is not necessary to direct the jury about accident simply because it has been suggested that an act or outcome was accidental. A direction is only required where there is some evidence of accident on which a reasonable jury could act (*Mancini v DPP* [1942] AC 1; *Bratty v AG for Northern Ireland* [1963] AC 386; *R v Fowler* [1999] VSCA 135; *R v Chang* (2003) 7 VR 236).
13. Judges must therefore determine whether it is open on the evidence for the jury to find:
    - That the relevant act was involuntary; or

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[391] While the accused must not be convicted for such accidental acts, he or she may be held criminally responsible for acts committed immediately prior to the accident (see, e.g. *Jiminez v R* (1992) 173 CLR 572; *Kroon v R* (1990) 55 SASR 476).

- That the accused did not have the intention required for proof of the relevant offence (see, e.g. *R v Fowler* [1999] VSCA 135).

14. The judge only needs to direct the jury about whichever matter is in issue. For example, where it is alleged that the accused's acts were "accidental" in the sense of being unintentional, there is no need to focus on the issue of voluntariness (*R v Edwards* [2005] VSCA 92).
15. However, the fact that the issue of voluntariness may logically be subsumed within the issue of intention does not relieve the judge of the duty to direct the jury about voluntariness where it is in issue (*Stevens v R* (2005) 227 CLR 319 (Kirby and Callinan JJ)).
16. In some cases, the judge may need to direct the jury about both voluntariness and intention (see, e.g. *R v Schaeffer* (2005) 13 VR 337).
17. Where the evidence leaves open the possibility that the accused's acts were accidental (in either sense), the trial judge must give a direction, even if defence counsel has not raised the matter or requested a direction (*R v Fowler* [1999] VSCA 135; *Stevens v R* (2005) 227 CLR 319).

Content of the Charge

18. The issue of accident is most appropriately integrated into the judge's charge on voluntariness or intention. It should not be treated as a separate defence (*R v Schaeffer* (2005) 13 VR 337).
19. Care must be taken not to reverse the onus of proof by suggesting that it is for the accused to establish the "defence" of accident. The onus always remains on the prosecution to prove voluntariness and intention beyond reasonable doubt (*R v Cascone* Vic CA 4/6/98).
20. If the word "accidental" has been used by the parties or the judge, care must be taken to explain how it has been used (i.e., to refer to involuntary and/or unintentional acts) (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ); *R v Schaeffer* (2005) 13 VR 337).
21. The judge must *not* direct the jury to acquit the accused if they find that the result caused by the accused's action was not intended or foreseen, and would not reasonably have been foreseen by an ordinary person. Such a direction is only appropriate in the Code jurisdictions (*R v Schaeffer* (2005) 13 VR 337; *R v Fowler* [1999] VSCA 135).
22. Where accident is open on the evidence, but not raised by defence counsel, a detailed exposition of the issue may not be required (see, e.g. *R v Fowler* [1999] VSCA 135 (Batt JA)).
23. See 7.1.1 Voluntariness for information about charging the jury on the issue of voluntariness.

Last updated: 26 September 2011

7.1.5 Course of Conduct Charges

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Background

1. In July 2015 course of conduct charges were introduced as a mode of charging sexual offences and certain other relevant offences.
2. A course of conduct charge is a single charge for a single offence, which incorporates multiple incidents of the same offence committed on more than once occasion over a specified period (*Criminal Procedure Act 2009* Schedule 1, clause 4A(1),(2),(6)).
3. The 'course of conduct charge' is modelled on a similar charge available in the UK (Rule 14.2 of the *Criminal Procedure Rules 2010* (UK)).
4. This form of charge was introduced to deal with repeat and systematic sexual offending. As a rule of criminal procedure, it is a method of pleading a charge, rather than a discrete offence (*Clifton v The Queen* [2021] VSCA 111, [24]; compare *Crimes Act 1958* s 49J – Persistent sexual abuse of a child under 16).

Operation of course of conduct charges

5. Course of conduct charges are available only for 'relevant offences'. The list of relevant offences focuses on those for which the rules of duplicity and particularisation can sometimes interfere with effective prosecution, such as repeated acts of sexual abuse and other high volume offences.
6. A relevant offence is defined as:
    - a sexual offence, as defined in section 3 of the *Crimes Act 1958* with reference to the offences under the following Subdivisions of Division 1 of Part 1:
    - (8A) – Rape and sexual assault,
    - (8B) – Incest,
    - (8C) – Sexual offences against children,
    - (8D) – Sexual offences against persons with a cognitive impairment,
    - (8E) – Other sexual offence,
    - (8EAA) – Sexual servitude, or
    - under any corresponding previous enactment (*Criminal Procedure Act 2009* Schedule 1, Note to clause 4A(1)).
    - any offence under the following provisions of the *Crimes Act 1958*:
    - division 2 of Part I – Theft and similar or associated offences; excluding sections 75 (Robbery), 75A (Armed robbery), 76 (Burglary), 77 (Aggravated burglary), 78 (Unlawfully taking control of an aircraft), 80 (Removal of articles from places open to the public) and 91 (Going equipped for stealing etc);
    - division 2AA of Part I – Identity crime;
    - division 2A of Part I – Money laundering;
    - division 2B of Part I – Cheating at gambling; and
    - subdivision (6) of Division 3 of Part I – Computer offences.
7. A single charge sheet may contain both a course of conduct charge and an alternative ordinary charge of the offence covered by the course of conduct charge (*Criminal Procedure Act 2009*, Schedule 1, clause 5(3)). The alleged date of commission of the alternative charge must be within the period to which the course of conduct charge relates.
8. However, a charge–sheet or indictment must not contain both a course of conduct charge and a charge for an offence against s 47A of the *Crimes Act 1958* (persistent sexual abuse of a child under the age of 16) in the alternative (*Criminal Procedure Act 2009*, Schedule 1, clause 5(5)).
9. The consent of the DPP is required before a charge–sheet containing a course of conduct charge is filed or signed (*Criminal Procedure Act 2009* Schedule 1, clause 4A(12)).

Requirements of course of conduct charges

10. A course of conduct charge is only available if:
    (a) each incident constitutes an offence under the same provision; and
    (b) for a charge for a sexual offence, each incident relates to the same complainant; and
    (c) the incidents take place on more than one occasion over a specified period; and

(d) the incidents taken together amount to a course of conduct having regard to their time, place or purpose of commission and any other relevant matter (Criminal Procedure Act 2009 Schedule 1, clause 4A(2)(a)–(d)).

11. The requirement that the incidents take place on more than one occasion means that there must be a 'clear separation in time or circumstances between the acts' (*Tognolini v The Queen* (2011) 32 VR 104; [2011] VSCA 113).

12. The 'specified period' identified under clause 4A(2)(c) is a particular and not an element (*DPP v Jarvis* [2018] VSCA 173).

13. In cases where evidence emerges which refers to offending which may have occurred outside the specified period, the judge will need to consider whether prosecution should have leave to amend the indictment to expand the period specified. A court may grant leave to amend particulars if it does not cause injustice to the accused. In most cases, where the evidence led does not match the particulars, the court will grant leave to amend the particulars (*DPP v Jarvis* [2018] VSCA 173, [13]. See also *Criminal Procedure Act 2008* s 165).

14. If the court does not grant leave to amend the particulars, it will be necessary to decide whether:

- to direct the jury that the evidence from outside the period can only be used as relationship or context evidence;
- to direct the jury that the evidence from outside the period must be disregarded; or
- if there is no evidence of multiple offences within the specified period, to grant a no-case submission (*DPP v Jarvis* [2018] VSCA 173, [25]–[27]).

15. More than one type of act may be alleged in a course of conduct charge to prove an element of the offence, provided the offence charged remains the same. In relation to sexual offences specifically, an 'act' in this context includes sexual penetration as defined by s 37D and sexual touching within the meaning of Subdivision (8A) (rape and sexual assault) of the *Crimes Act 1958* (*Criminal Procedure Act 2009* Schedule 1, clause 4A(3),(4)). The section includes the example of a course of conduct charge for a sexual offence which may allege acts of digital penetration as well as acts of penetration with an object.

16. Course of conduct charges are designed to enable the prosecution of a series of offending where the specific details of any one instance of the offending cannot be disclosed in enough detail to prove that individual offence. Clause 4A(9) states that:

> … to prove a course of conduct charge, it is not necessary to prove an incident of the offence with the same degree of specificity as to date, time, place, circumstance or occasion as would be required if the accused were charged with an offence constituted only by that incident.

17. Specifically, it is not necessary to prove:

(a) any particular number of incidents of the offence or the dates, times, places, circumstances or occasions of the incidents; or

(b) that there were distinctive features differentiating any of the incidents; or

(c) the general circumstances of any particular incident (Criminal Procedure Act 2009 Schedule 1, clause 4A(10)).

18. In a prosecution for a course of conduct charge it is not necessary that the complainant's evidence can be distilled into individual incidents or occasions. The course of conduct provisions are designed to reduce the level of specificity required by the common law. A course of conduct charge is not defective, and an accused trial is not unfair, where the prosecution leads evidence that the accused regularly committed the alleged offence over a period, even if there are no differentiating features of separate occasions (*Harlow v The Queen* [2018] VSCA 234, [61]–[67]).

Similar international schemes

19. The Victorian 'course of conduct' charge is modelled on similar systems in England and New Zealand, which may provide some guidance on the operation of this new Victorian provision.

20. In England, rule 14.2(2) of the *Criminal Procedure Rules 2010* states:

> More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission.

21. Paragraph 14A.10–14A.13 of the UK *Criminal Practice Directions* [2013] EWCA Crim 1631 provides the following guidance on the use of this device:

> The circumstances in which such a count may be appropriate include, but are not limited to, the following:
> (a) the victim on each occasion was the same, or there was no identifiable individual victim as, for example, in a case of the unlawful importation of controlled drugs or of money laundering;
> (b) the alleged incidents involved a marked degree of repetition in the method employed or in their location, or both;
> (c) the alleged incidents took place over a clearly defined period, typically (but not necessarily) no more than about a year;
> (d) in any event, the defence is such as to apply to every alleged incident without differentiation. Where what is in issue differs between different incidents, a single "multiple incidents" count will not be appropriate, though it may be appropriate to use two or more such counts according to the circumstances and to the issues raised by the defence.
> ...
> For some offences, particularly sexual offences, the penalty for the offence may have changed during the period over which the alleged incidents took place. In such a case, additional "multiple incidents" counts should be used so that each count only alleges incidents to which the same maximum penalty applies.
> In other cases, such as sexual or physical abuse, a complainant may be in a position only to give evidence of a series of similar incidents without being able to specify when or the precise circumstances in which they occurred. In these cases, a 'multiple incidents' count may be desirable. If on the other hand, the complainant is able to identify particular incidents of the offence by reference to a date or other specific event, but alleges that in addition there were other incidents which the complainant is unable to specify, then it may be desirable to include separate counts for the identified incidents and a 'multiple incidents' count or counts alleging that incidents of the same offence occurred 'many' times. Using a 'multiple incidents' count may be an appropriate alternative to using 'specimen' counts in some cases where repeated sexual or physical abuse is alleged. The choice of count will depend on the particular circumstances of the case and should be determined bearing in mind the implications for sentencing set out in *R v Canavan*; *R v Kidd*; *R v Shaw* [1998] 1 W.L.R. 604, [1998] 1 Cr. App. R. 79, [1998] 1 Cr. App. R. (S.) 243.

22. Despite being available since 2010, there is little jurisprudence on the operation of this provision. It is, however, clear that the jury must be satisfied that the accused pursued a course of conduct. This requires proof of the accused engaging in the relevant conduct on multiple occasions. If the jury is only satisfied beyond reasonable doubt that the accused committed the offence on a single occasion, then the 'course of conduct' charge is not proved (see *A v R* [2015] EWCA Crim 177).

23. Under the *Criminal Procedure Act 2011* (NZ) section 20, the prosecution can charge a 'representative charge' where:

    (a) multiple offences of the same type are alleged; and

(b) the offences are alleged to have been committed in similar circumstances over a period of time; and

(c) the nature and circumstances of the offences are such that the complainant cannot reasonably be expected to particularise dates or other details of the offences.

24. In New Zealand, the prosecution should only use a representative charge where it is unable to provide the particulars necessary to identify an alleged offence at common law. The accused is entitled to have each specific allegation separately tested under the criminal process (*KAW v R* [2012] NZCA 520).

25. The New Zealand Court of Appeal has provided the following guidance on when a representative charge is appropriate:

(a) if the evidence is sufficiently detailed that the prosecution can charge specific acts (without overloading the indictment), that should be done;

(b) representative charges are appropriate where there is a pattern of repeated behaviour and the complainant cannot distinguish the dates or details of the events;

(c) repetitive acts which can be distinguished from each other should be charged separately (KAW v R [2012] NZCA 520).

26. Relevant points of distinction can include:

- the location of the alleged offending;
- the nature of the conduct engaged in on each occasion;
- the availability of different defences in relation to each occasion (*KAW v R* [2012] NZCA 520; *Gamble v R* [2012] NZCA 91).

27. In Victoria, the 'course of conduct' provisions in *Criminal Procedure Act 2009* Schedule 1 do not include a requirement that the alleged offences have been committed 'in similar circumstances'. Rather, the incidents must be connected by the time, place or purpose of their commission, and any other relevant matter, such that they amount to a course of conduct (clause 4A(2)(d)). It may be possible to distinguish different incidents from each other, for example, because they happened at different locations, but nevertheless find they formed a course of conduct owing to the time or purpose of their commission.

28. Judges will need to determine whether the principles which have developed in the UK and New Zealand also apply in relation to the Victorian provisions.

Proving a 'course of conduct'

29. The prosecution must prove that the incidents of the accused's conduct, taken together, amount to a course of conduct having regard to their time, place or purpose and any other relevant matter (*Criminal Procedure Act 2009* Schedule 1, clause 4A(2)(d) and (8)).

30. This requirement to prove that the incidents amount to a course of conduct operates in addition to the need to prove that the incidents occurred on more than one occasion. It is wrong for a prosecutor to suggest that the offence is proved only by proving that the offending occurred on more than one occasion (*Clifton v The Queen* [2021] VSCA 111, [36]–[39]).

31. It is also wrong for a prosecutor to suggest that course of conduct charges are 'easy … to prove'. Such a submission can erode the burden and standard of proof, and undermine the need for the jury to be satisfied beyond reasonable doubt that the conduct amounts to a course of conduct (*Clifton v The Queen* [2021] VSCA 111, [41]–[43])

32. A course of conduct charge conceives the offence as a single charge of a general course of conduct rather than as a number of individual acts. This may mean that a course of conduct can be proved by generalised evidence of multiple occasions, such as evidence in the form of what would typically or routinely occur. In such cases, the jury may be able to find a course of conduct without being satisfied of the details of any individual occasion (Criminal Law Review, *Review of Sexual Offences*, Consultation Paper (2013), Part 12).

33. As long as the prosecution proves a course of conduct by the accused, it is not necessary to prove a particular number of incidents of the offending, distinctive features of any individual incidents or the general circumstances of any particular incident (*Criminal Procedure Act 2009* Schedule 1, clause 4A(10)). The incidents of the offence may all involve the same kind of offending, in the same place, at the same time of day, or in similar circumstances, and there is no need to focus on an unusual occasion.

34. Since neither the general circumstances nor any distinctive or unusual features of a particular occasion need to be proved, course of conduct charges attempt to circumvent the limitation of having to bring evidence to prove the occurrence of each occasion specifically (as described by McHugh J in *KRM v The Queen* (2001) 206 CLR 221).

35. According to the report by the Department of Justice which led to the development of the legislation, the course of conduct charge specifically responds to the problem where the complainant describes what the accused 'would' do, that is, what would typically or routinely occur as part of the alleged offending (Criminal Law Review, *Review of Sexual Offences*, Consultation Paper (2013), Part 12, [12.2.1]). Under the general law, 'it is not possible as a matter of law for generalised evidence of multiple occasions to supply proof beyond reasonable doubt of a specific occasion' (see *REE v R* [2010] VSCA 124; *R v SLJ* (2010) 24 VR 372). But, it appears that evidence of a generalised course of conduct – what the accused would ordinarily do – will be sufficient to prove a course of conduct charge, if accepted by the jury beyond reasonable doubt.

36. One other offence which requires a course of conduct is stalking (*Crimes Act 1958* s 21A).

37. In relation to stalking, a course of conduct requires a pattern of conduct which evidences a continuity of purpose. This requires the conduct to occur on more than one occasion or to occur in a protracted manner on a single occasion. That mere fact that conduct occurs on more than one occasion is not enough by itself to establish a course of conduct for the purpose of stalking; there must still be a continuity of purpose (*Berlyn v Brouskos* (2002) 134 A Crim R 111; *RR v R* [2013] VSCA 147).

38. However, in contrast to stalking, clause 4A(8) makes it clear that determining whether there is a course of conduct must take into account the time, place or purpose of commission and any other relevant matters. This suggests that it would be wrong to import the "continuity of purpose" requirement from stalking into course of conduct charges, as that would elevate purpose over the other factors identified in the Act.

39. A course of conduct can be proven having regard to the time, place or purpose of the incidents, or any other relevant matter (*Criminal Procedure Act 2009* Schedule 1, clause 4A(9)). These factors may be used to show a regularity to the offending, for example, that it happened every month, or when the complainant was left alone with the accused after school, or at a particular place over and again, or because of a regular purpose, such as sexual gratification or the exercise of power over the victim. Other relevant matters may include evidence of similarity or regularity in the accused's method of offending (Explanatory Memorandum, Crimes Amendment (Sexual Offence and Other Matters) Bill 2014).

40. The more occasions of offending, the more likely a course of conduct is to be found, particularly where the incidents form a regular or systematic pattern of offending. Conversely, if there are only two or three occasions of offending, the complainant is more likely to be able to remember the specific details of each incident so that they can each be charged separately and a course of conduct charge will not be necessary or appropriate (Explanatory Memorandum, Crimes Amendment (Sexual Offence and Other Matters) Bill 2014).

41. In this way the course of conduct charge was intended to be most effective in precisely the type of situations where specific incidents of an offence can be most difficult for a complainant to provide, that is, where it involves systematic or repeated commission of the offence in question (Criminal Law Review, *Review of Sexual Offences*, Consultation Paper (2013), Part 12).

Comparison to the general criminal law

42. The concept of a course of conduct is similar to a 'continuous' offence, such as that of drug trafficking by, for example, continuously running a drug trafficking business (*Giretti v R* (1986) 24 A Crim R 112). This approach recognises the conduct as a whole, including its regularity and repetition, and allows the cumulation of separate acts if the prosecution can prove the underlying course of conduct.

Course of conduct and unanimity

43. The operation of the requirement of unanimity in relation to the new course of conduct charge has not yet been determined.

44. In relation to the offence of stalking, Victorian courts have confirmed on several occasions that the jury only needs to be unanimous about the conclusion that the accused has engaged in a course of conduct and it is not necessary to be unanimous about the particular acts which make up that course of conduct (see *R v Hoang* (2007) 16 VR 369; *Worsnop v R* (2010) 28 VR 187).

45. Similarly, New Zealand courts have held, in relation to their representative charge scheme, that the jury does not need to be unanimous about the particular transaction or event on which liability is based or the specific offences represented by the charges (*Ahsin & Rameka v R* [2014] NZSC 153, [206] and footnote 117; c.f. *KAW v R* [2012] NZCA 520 (suppressed)).

46. The following factors indicate that unanimity is not required as to the particular incidents making up a course of conduct:

    - a course of conduct charge can be proved without proving any incidents of the offence with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged only with that incident of the offence (*Criminal Procedure Act 2009* Schedule 1, clause 4A(9));
    - it is not necessary to prove any particular number of incidents of the offence or the dates, times, places, circumstances or occasions of the incidents; that there were distinctive features differentiating any of the incidents; or the general circumstances of any particular incident (*Criminal Procedure Act 2009* Schedule 1, clause 4A(10));
    - the necessary particulars need not include particulars of any specific incident of the offence, including its date, time, place, circumstances or occasion and need not distinguish any specific incident from any other (*Criminal Procedure Act 2009* Schedule 1, clause 4A(11)); and
    - course of conduct charges are aimed at more effectively prosecuting the kind of offences where complainants are less likely to remember specific details. A course of conduct can be proved by generalised evidence of multiple occasions, such as evidence in the form of what would typically or routinely occur rather than evidence of the details of any individual occasions (Criminal Law Review, *Review of Sexual Offences*, Consultation Paper (2013), Part 12).

47. The factors listed above, along with the principles developed in relation to stalking, and the approach taken in New Zealand in relation to its representative charge scheme, indicate that, as a general rule, the jury does not need to be unanimous about the specific acts which form the course of conduct. Until there is any further authority on the matter judges should assume that no direction about unanimity is required.

Last updated: 21 July 2021

7.1.5.1 Charge: Course of Conduct Charges

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Course of conduct charge

Warning! These provisions have not been subject to any appellate consideration, including the significance of the period specified on the indictment and the matters that must be considered to determine whether conduct amounts to a course of conduct. Judges should seek submissions from parties on these and other relevant matters.

In this case, the prosecution charged NOA with committing [*insert relevant offence*] as a course of conduct.

I will first give you directions about [*insert relevant offence*] and then explain what it means, in law, to commit that offence as a course of conduct.

[*Adapt and insert directions on relevant offence*.]

Proof of a course of conduct charge

To prove that NOA committed NOO as a course of conduct, the prosecution must also prove that the incidents of the offending by NOA within the specified period on the indictment, taken together, amount to a course of conduct.

To decide whether this is proved, you must consider the time, place or purpose of the commission of the offences, and any other relevant matters.

[*Add the following shaded section only if the prosecution rely on the time of the incidents to show a course of conduct*.]

In relation to time, this may refer to both the period over which the incidents are alleged to have occurred as well as the timing of the incidents. Here, the evidence is that this conduct occurred [regularly/*refer to relevant evidence*] over a period of [X days, weeks, months or years]. [*Refer to relevant prosecution and defence arguments.*]

[*Add the following shaded section only if the prosecution rely on the place of the incidents to show a course of conduct*.]

In relation to place, if the incidents are alleged to have occurred in the same place, that may be an important factor in deciding if a course of conduct has been established. However, if the incidents are alleged to have occurred at different places, that does not mean that the incidents taken together cannot form a course of conduct. You must consider place along with the time and purpose of the commission of the incidents and any other relevant matter. For example, you might find that if the incidents are said to have happened regularly, time will be a more important factor than the place where the incidents are alleged to have occurred. [*Refer to relevant prosecution and defence evidence and arguments.*]

[*Add the following shaded section only if the prosecution rely on the purpose of offences to show a course of conduct. Note that this is unlikely to be relevant for sexual offences*.]

In relation to the purpose for which the offences are said to have been committed, if the purpose is the same or similar across the incidents, that is likely to be an important factor. [Refer *to relevant prosecution and defence evidence and arguments.*]

[*Add the following shaded section if the prosecution rely on any other relevant matters to show a course of conduct*.]

In relation to other relevant matters, in this case [*Refer to any other relevant matters. Refer also to prosecution and defence evidence and arguments*].

You must decide whether the accused engaged in conduct that constitutes NOO more than once within the period specified on the indictment and whether those incidents amount to a course of conduct.

[*If the timeframe specified in the indictment is in issue, add the following shaded section*.]

Although you do not need to be satisfied about the actual dates that each incident relied upon occurred, you must be satisfied beyond reasonable doubt that the incidents that you find constitute the course of conduct all fall within the timeframe alleged in the indictment. The indictment specifies a timeframe of [*insert specified period*].

[*Refer to relevant prosecution and defence evidence and argument*.]

[*If the complainant in a sexual offence case gives evidence of what would 'usually' or 'routinely' occur, add the following shaded section*.]

The law says that a course of conduct can be proved by evidence from a complainant about what would normally occur without giving evidence of the details of any individual incident or incidents. The law says that you can conclude from such generalised evidence that NOA engaged in a course of conduct. You will remember what I said earlier about drawing conclusions.

[*If there is an issue about the imprecision of the number of incidents, add the following shaded section*.]

You do not need to be satisfied of the exact number of incidents of the offending, or of the circumstances of any one individual incident, in order to find a course of conduct.

[*If the evidence included allegations of multiple offences committed within the one incident, add the following shaded section*.]

You must be satisfied that there is more than one incident. It is not enough for the prosecution to prove that NOA committed NOO more than once during a short, isolated occasion.

[*If the relevant offence comprised different types of acts on different occasions, add the following shaded section*.]

As I have already told you, NOO may be committed in different ways. [*Insert summary of different acts alleged to have constituted the offence, for example, digital penetration one on occasion and by penetration with an object on another*.] As long as the accused committed NOO more than once, it does not matter that the acts making up that offence were different from one incident to another.

[*If there is offending relating to more than one complainant and involves a sexual offence, add the following shaded section*.]

The prosecution submits you should be satisfied that NOA committed the offence of NOO with NOC on more than one occasion, and not some other person. [*Refer to relevant prosecution and defence evidence and arguments.*]

In deciding whether prosecution has proved that NOA committed NOO as a course of conduct, you do not need to unanimously agree that specific incidents occurred. This means that seven of you might be satisfied beyond reasonable doubt that incidents one, two and three occurred and constituted a course of conduct, and five of you might be satisfied beyond reasonable doubt that there was a course of conduct due to incidents four, five and six. In that situation, you would still have a unanimous decision that there was a course of conduct.

You can each accept or reject different parts of the evidence in reaching your verdict. You must be unanimous in your verdict, whether guilty or not guilty, not in how you reach that conclusion.

Ultimately, what the prosecution must prove is that between [*insert relevant dates*], NOA [*insert statement of offence*, e.g. 'intentionally took part in an act of sexual penetration with a child under 16, NOV'] as a course of conduct.

[*Refer to relevant parts of the prosecution and defence case*.]

[*If this element is not in issue, add the shaded section*.]

In this case it is not disputed that, if the alleged incidents occurred, they amounted to a course of conduct by the accused. You should therefore have no difficulty finding this element proved if you find that NOA committed the conduct alleged.

Summary

To summarise, before you can find NOA guilty of committing NOO as a course of conduct, the prosecution must prove to you beyond reasonable doubt:

- [*Insert elements of relevant offence*] and
- The incidents of the offending, taken together, amount to a course of conduct by the accused.

If you find that any of these elements has not been proved beyond reasonable doubt, then you must find NOA not guilty of committing [*insert relevant offence*] as a course of conduct.

Last updated: 18 November 2016

7.2 Homicide

7.2.1 Intentional or Reckless Murder

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Forms of Murder

1. There are three ways in which murder can be committed:

   i) The accused can cause the victim's death while intending to kill or cause really serious injury, or being reckless as to that result;[392]

   ii) The accused can unintentionally cause the victim's death in the course or furtherance of certain violent crimes; and

   iii) The accused can unintentionally cause the victim's death in order to escape arrest.

2. This topic addresses the first category of murder outlined above.

Overview of Elements

3. Murder is a crime at common law. It has the following four elements, each of which the prosecution must prove beyond reasonable doubt:

   i) The accused committed acts which caused the victim's death;

[392] This type of murder will simply be referred to as "murder".

ii) The accused committed those acts voluntarily;[393]

iii) The accused committed those acts while:

- *intending* to kill someone or cause them really serious injury; or
- [if reckless murder has been left to the jury] *knowing that it was probable* that death or really serious injury would result.

iv) The accused did not have a lawful justification or excuse for those acts (such as self-defence, provocation, duress or sudden or extraordinary emergency).

4. Each of these elements is addressed in turn below.

Acts which Caused the Victim's Death

5. The first element that the prosecution must prove is that the accused committed acts which caused the victim's death. There are three aspects to this element:

i) The accused must have committed the relevant acts;

ii) Those acts must have caused someone to die; and

iii) The victim must have been a human being.

Accused must have Committed the Relevant Acts

6. For the accused to be found guilty of murder, the prosecution must prove, beyond reasonable doubt, that s/he committed the act or acts which are alleged to have caused the victim's death.
7. In most cases it will be clear which act or acts were the cause of death, and so little time will need to be spent addressing this issue (other than directing the jury that before they can convict the accused, they must be satisfied that s/he committed the relevant act or acts) (*Ryan v R* (1967) 121 CLR 205).
8. Specific directions may be required where the death may have been caused by one or more acts in a series of acts. See 7.1.2 Causation.
9. Where additional directions are appropriate, the jury should be directed about the different ways the causal act can be identified, and instructed that it is for them to determine:
    - What acts caused the victim's death (see below); and
    - Whether the accused committed the relevant act or acts (*Ryan v R* (1967) 121 CLR 205).

Acts That Caused Someone to Die

10. The accused's acts must have caused the victim's death. That is, his/her acts must have "contributed significantly" to the death, or been a "substantial and operating cause" of it (*Royall v R* (1991) 172 CLR 378; *R v Rudebeck* [1999] VSCA 155).

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[393] Although this element is often said to require the accused's acts to be "conscious and voluntary", consciousness is simply one aspect of the broader voluntariness requirement (see, e.g. *Ryan v R* (1967) 121 CLR 205). This issue is addressed in more detail below.

11. The acts must be such that an ordinary person would hold them, as a matter of common sense, to be a cause of the death. The mere fact that the accused's conduct contributed causally to the death, or was a necessary cause of it, is not sufficient (*Royall v R* (1991) 172 CLR 378).
12. The accused's acts do not need to be the sole cause of the death. A person can be criminally liable for a death that has multiple causes, even if he or she is not responsible for all of those causes (*Royall v R* (1991) 172 CLR 378).
13. Previously, the law held that a delay of more than "a year and a day" between the accused's acts and the victim's death meant that the accused's acts could not be regarded as a cause of that death. That limitation has been abolished (*Crimes Act 1958* s 9AA), and now applies only to offences alleged to have been committed before 19 November 1991.
14. In many cases it will be unnecessary for the judge to do more than simply identify causation as an element of the offence. However, more detailed directions should be given if:
    - Causation was a live issue in the trial; or
    - An undirected jury might consider causation to be a live issue.
15. The cases where causation will be a live issue will include those where:
    - There were multiple possible causes of the death;
    - The death was delayed;
    - There were intervening acts between the accused's actions and the victim's death; or
    - The accused is alleged to have caused the death indirectly (*Royall v R* (1991) 172 CLR 378).
16. Causation is a question of fact for the jury and, where it is in issue, it is for the jury to determine what act or acts caused death. The judge must not impermissibly confine the jury's role in determining the act which caused death (*Koani v R* [2017] HCA 42, [39]).
17. See 7.1.2 Causation for further information about this issue.

Victim a Human Being

18. The accused must have caused the death of a "human being" (*R v Hutty* [1953] VLR 338).
19. "Death" is defined to mean the irreversible cessation of circulation of blood in the body, or the irreversible cessation of all function of the brain (*Human Tissue Act 1982* s 41).
20. An unborn child is not classified as a "human being" for the purposes of murder and manslaughter (*R v Hutty* [1953] VLR 338).
21. A child is treated as being "born" (and thus a "human being") when "he or she is fully born in a living state". This occurs when the child is "completely delivered from the body of its mother and it has a separate and independent existence in the sense that it does not derive its power of living from its mother" (*R v Hutty* [1953] VLR 338).
22. Any evidence of independent existence will be sufficient for a child to be classified as a "human being" for the purposes of the law (*R v Iby* (2005) 63 NSWLR 278).
23. The mere fact that a child is still attached by the umbilical cord does not mean it is to be regarded as unborn (*R v Hutty* [1953] VLR 338).
24. While killing an unborn child will not be murder or manslaughter, it may be child destruction (*Crimes Act 1958* s 10).

Voluntary Acts

25. The second element that the prosecution must prove is that the acts which caused the death were voluntary (*Ryan v R* (1967) 121 CLR 205).

26. The issue of "voluntariness" concerns, at least, the accused's conscious control of his or her bodily movements (*He Kaw Teh* v *R* (1985) 157 CLR 523).

27. The terms "deliberate" and "willed" are sometimes used to describe the voluntariness requirement (*Ryan v R* (1967) 121 CLR 205).

28. In murder trials it is orthodox to describe this element as requiring that the relevant acts be "conscious and voluntary", or "conscious, voluntary and deliberate". See *R v Schaeffer* (2005) 13 VR 337.

29. While a judge may use these terms to help explain the voluntariness requirement to the jury (*R v Schaeffer* (2005) 13 VR 337), they do not need to be used in every case. The use of such alternative terms, and the extent to which they need to be explored, will depend on the circumstances of the case.

30. If the term "conscious" is used care should be taken to ensure that it is not equated with voluntary action. The fact that an accused was conscious at the time of an act does not necessarily mean that act was committed voluntarily (see, e.g. *R v Edwards* [2005] VSCA 92).

31. Knowledge of the circumstances that give an offence its criminal character is generally a component of intention, not volition. Thus an act remains voluntary even if it is performed in ignorance of fundamental facts that will determine culpability (*R v O'Connor* (1979) 146 CLR 64).

32. While the jury should always be directed to consider this element, where voluntariness is not in issue it need not be examined in detail (*Ryan v R* (1967) 121 CLR 205).

33. Terms such as "accidental", "unintentional", "involuntary" and "unwilled" all possess a degree of ambiguity. They can be used to signify either that:

    - The accused acts were not voluntary (addressing the second element); or
    - That the accused lacked the requisite intention to commit the crime (addressing the third element) (*Ryan v R* (1967) 121 CLR 205).

    If such terms are used by counsel, the judge should take care to ascertain precisely which element is being addressed, and charge the jury accordingly.

Mental States: Intention and Recklessness

34. The third element that the prosecution must prove is that when the accused committed the acts that caused the victim's death, s/he either:

    - *Intended* to kill someone or cause them really serious injury ("intentional murder"); or
    - *Knew that it was probable* that death or really serious injury would result from those acts ("reckless murder") (*R v Crabbe* (1985) 156 CLR 464).

35. The accused does not need to have intended to kill or injure the person who actually died, or to have been reckless about killing or injuring that particular person. It is sufficient if they had the necessary level of intention or recklessness in respect of some person, whether or not that was the person who was ultimately killed (*La Fontaine v R* (1976) 136 CLR 62).[394]

[394] This is known as the doctrine of "transferred malice".

Reckless murder

36. It is not appropriate to direct a jury about reckless murder in every case. The jury should only be directed about "reckless murder" where the evidence can properly support a conclusion that the accused acted recklessly (*Pemble v The Queen* (1971) 124 CLR 107; *R v Barrett* (2007) 16 VR 240; *Aiton v The Queen* (1993) 68 A Crim R 578, 587–590).[395]

37. One of the risks that arise from leaving reckless murder to the jury is that the jury may inadvertently treat the mens rea requirement as involving an objective rather than subjective analysis. This risk is likely heightened when the case also raises issues of voluntariness, manslaughter or self-defence (*Herodotou v The Queen* [2018] VSCA 253, [136]–[138]).

38. In the context of murder, to commit an act "recklessly" is to commit that act knowing that someone will *probably* die or suffer really serious injury (*R v Crabbe* (1985) 156 CLR 464).

39. The word "probable" means "likely to happen". It can be contrasted with something that is merely "possible" (*R v Crabbe* (1985) 156 CLR 464).

40. To have acted recklessly, the accused must *actually have known* that death or really serious injury would probably result from his or her acts. It is not sufficient for that danger to have been obvious to the reasonable person, or to the members of the jury (*Pemble v The Queen* (1971) 124 CLR 107; *R v TY* (2006) 12 VR 557; *R v Barrett* (2007) 16 VR 240).

41. The jury may use the fact that a reasonable person would have appreciated the probability of death or really serious injury to infer that the accused had such an awareness (*Pemble v The Queen* (1971) 124 CLR 107).

42. However, where such reasoning is open the jury must be warned not to conclude that the accused foresaw the probability of death or really serious injury simply because a reasonable person would have appreciated that probability (*Pemble v The Queen* (1971) 124 CLR 107; *R v TY* (2006) 12 VR 557).

43. Use of the word "reckless" should be avoided when charging the jury in murder trials, as it is liable to be confusing (*La Fontaine v R* (1976) 136 CLR 62).

44. Similarly, the word "might" should not be used. Recklessness is not established when the accused knew that particular consequences "might occur". The accused must have known that those consequences "would probably occur" (*R v Crabbe* (1985) 156 CLR 464; *R v Campbell* [1997] 2 VR 585).

45. "Probable" is not a mathematical term. The accused does not need to have mathematically weighed the probability of death or really serious injury occurring, and the jury should not attempt to translate the accused's knowledge into terms of mathematical probability (*Boughey v The Queen* (1986) 161 CLR 10).

46. It will generally be sufficient if:

    (a) The jury is directed to consider whether the accused knew that death or really serious injury was the probable or likely consequence of his or her acts; and

    (b) Reference is made to the distinction between what is probable or likely on the one hand, and what is only possible on the other (R v Crabbe (1985) 156 CLR 464; Boughey v The Queen (1986) 161 CLR 10; R v Faure [1999] 2 VR 537).

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[395] See *R v Hegarty* [2011] VSC 111 for a detailed discussion about the types of situations in which a direction on reckless murder may be appropriate.

47. If a jury is to be directed on both reckless murder and involuntary manslaughter (whether by unlawful and dangerous act or by criminal negligence), it is vital that the directions draw an appropriate contrast between the mental states required for the two offences (*Pemble v The Queen* (1971) 124 CLR 107; *R v TY* (2006) 12 VR 557). See Manslaughter by Unlawful and Dangerous Act for further information.

48. Where recklessness is to be found by inference, the trial judge must identify the relevant evidence, and the inferences which can legitimately be drawn from that evidence (*Pemble v The Queen* (1971) 124 CLR 107; *R v TY* (2006) 12 VR 557).

49. The jury should be directed that the accused's circumstances are relevant to their determination of his or her state of mind. These circumstances may include age, educational and social background, emotional state and state of sobriety (*Pemble v The Queen* (1971) 124 CLR 107; *R v Barrett* (2007) 16 VR 240).

Really serious injury

50. For the third element to be satisfied, the accused does not need to have intended that someone *die*, or known that death would probably result from their actions. It is sufficient if s/he intended to cause someone serious non-fatal harm, or knew that such harm would probably result.

51. In Victoria, the degree of harm that must be intended is "really serious injury".

52. The phrase "*really* serious" should be used to properly indicate the gravity of the required intent (*Wilson v R* (1992) 174 CLR 313; *R* v *Perks* (1986) 41 SASR 335; *R v Schaeffer* (2005) 13 VR 337; *R v Barrett* (2007) 16 VR 240).

53. It appears to be necessary that the "really serious injury" intended or risked should be a *bodily* injury. This includes unconsciousness (*R v Rhodes* (1984) 14 A Crim R 124), but may not include purely psychological injuries.

54. The meaning of "really serious injury" is a matter for the jury to determine. It is unwise to elaborate on its meaning. The law gives only very general assistance to juries in this regard. While some injuries are manifestly too slight and some injuries clearly sufficient to answer the legal test, there remains an infinite variety of situations in which a jury might reasonably take either view (*R v Rhodes* (1984) 14 A Crim R 124).

55. There is no requirement that the harm intended be a life–threatening harm (*R v Cunningham* [1982] AC 566.)

Defences to murder

56. Conduct that would otherwise be murder can be excused or justified by a number of discrete defences, including self-defence, provocation (for homicides committed before 23 November 2005), intoxication, duress and sudden or extraordinary emergency. Each of these defences is examined in detail in Part 8: Victorian Defences.

57. The issue of intoxication may also be of relevance when considering the accused's mental state. See 8.7 Common Law Intoxication and 8.5 Statutory Intoxication (From 1/11/14) for further information.

Order of the Charge

58. In murder trials it is commonly necessary to direct juries about available alternative verdicts, such as manslaughter.[396] It may also be necessary to direct the jury about a number of different defences or excuses, such as self-defence and provocation. The interrelationship between these issues means that the order in which they are addressed can affect the clarity of the charge.

59. For offences alleged to have been committed prior to 23 November 2005,[397] it is recommended that judges approach these topics in the following order:

    - The elements of murder;
    - Self-defence (to murder);
    - Voluntary manslaughter (provocation);
    - The elements of involuntary manslaughter;
    - Self defence (to manslaughter).

60. For offences alleged to have been committed on or after 23 November 2005 and before 1 November 2014,[398] it is recommended that judges approach these topics in the following order:

    - The elements of murder;
    - Murder self-defence (s 9AC);
    - Defensive homicide (s 9AD);
    - The elements of manslaughter; and
    - Manslaughter self-defence (s 9AE).

61. For offences alleged to have been committed on or after 1 November 2014, it is recommended that judges approach these topics in the following order:

    - The elements of murder;
    - Self-defence (to murder) (s 322K);
    - The elements of manslaughter; and
    - Self-defence (to manslaughter) (s 322K).

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[396] See 3.10 Alternative Verdicts for guidance concerning the requirement to leave alternative verdicts to the jury.

[397] On 23 November 2005 the *Crimes (Homicide) Act 2005* came into effect, introducing two statutory self-defence provisions (*Crimes Act 1958* ss 9AC and 9AE) and a new offence of Defensive Homicide (s 9AD), as well as abolishing provocation. See 8.2 Statutory Self-defence (Pre-1/11/14) and Defensive Homicide for further information.

[398] On 1 November 2014 the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* came into effect, introducing a single statutory self-defence provision for all offences (*Crimes Act 1958* s 322K), and abolishing the previous statutory murder self-defence, manslaughter self-defence and the offence of Defensive Homicide. See 8.1 Statutory Self-defence (From 1/11/14) for further information.

Jurisdiction

62. If the victim dies in Victoria, the matter may be tried in a Victorian court, regardless of whether or not the causal acts occurred in Victoria (*Crimes Act 1958* s 9).

Last updated: 27 March 2019

7.2.1.1 Charge: Intentional Murder

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This charge should be used if reckless murder is not left to the jury.

The elements

I must now direct you about the crime of murder. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused caused the victim's death.

Two – the accused's acts[399] were conscious, voluntary and deliberate.

Three – that at the time the accused did the acts that caused the victim's death, s/he intended to kill or cause really serious injury

Four – the accused killed the victim without lawful justification or excuse.

I will now explain each of these elements in more detail.

Cause of death

The first element that the prosecution must prove is that the accused caused the victim's death.[400]

[*If this element is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*] and doing so caused NOV's death. You should therefore have no difficulty finding this element proven.

[*If this element is in issue, add the following shaded section and the relevant additional sections*.]

To determine if this element has been proven, you must first determine what acts NOA committed. You must then determine whether [any of] those acts caused NOV's death.[401]

[*If the cause of death is not disputed, but the accused denies committing the relevant acts, add the following shaded section*.]

In this case it is not disputed that [*insert relevant causal acts*] caused NOV's death. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

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[399] As most cases of murder involve a number of acts by the accused, the term "acts" is used throughout this charge. If there is only one relevant act, this will need to be changed.

[400] If alternative forms of accessorial liability are in issue, this section will have to be modified. See Part 5: Complicity for further information.

[401] In some cases the jury may also need to determine whether the victim was a living human being when the relevant acts were committed: see 7.2.1 Intentional or Reckless Murder.

[*If cause of death is in issue because of multiple possible causes (whether combined or competing), add the shaded section*.]

[*If the cause of death is disputed due to intervening acts, a failure to intervene, or the victim's own conduct, use the shaded sections below instead.*]

In this case you have heard evidence that NOV's death [resulted/may have resulted] from a number of [*describe basis of uncertainty, e.g. possible, competing, inconsistent etc.*] causes. [*Insert relevant evidence and causal explanations*.]

The law says that for NOA's acts to have caused NOV's death, they do not need to have been the only cause of that result, or the direct or immediate cause. You may find that his/her acts caused the death if they were a substantial or significant cause of that result.

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

[*If causation is an issue because of intervening acts, or a failure to intervene, add the following shaded section*.]

In this case you have heard evidence that NOV's death did not immediately follow the alleged acts of the accused, and that [*describe intervening acts*] [may have] occurred in between.

The law says that for NOA's acts to have caused NOV's death, they do not need to have been the only cause of that result, or the direct or immediate cause. You may find that his/her acts caused the death if they were a substantial or significant cause of that result.

In making this determination, you need to decide whether it was the accused's acts which caused the death, or whether those acts merely provided the setting for the later acts of [*insert intervening acts*], which were the true cause of death. If NOA's acts only provided the setting, then s/he did not cause the death, and you must find him/her not guilty of murder.

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

[*If the victim's own acts could have caused his or her own death, add the following shaded section.*]

This direction has been drafted for use in cases in which the victim could be seen to have caused his or her own death while attempting to escape the violence of the accused. While it could be adapted for use in other cases where the accused may have indirectly caused the death, care should be taken in doing so.

This charge should not be given where a simpler "intervention" direction can be given (see above). It should also not be given where NOA purposively compelled NOV to commit the causal act.

In this case you have heard evidence suggesting that NOV's death was only indirectly caused by the acts of the accused. [*Insert relevant evidence*.]

The law says that for an accused's acts to have caused the victim's death, they do not need to have been the direct or immediate cause of that result. This element can be met even if NOA indirectly caused NOV's death.

However, you can only find the accused responsible for the indirect results of his/her acts if the prosecution can prove two matters to you, beyond reasonable doubt.

First, the prosecution must prove that NOA's acts caused NOV's death. In this case, that means that the prosecution must prove that NOA's acts were a substantial or significant cause of [*identify immediate causal event, e.g.* "NOV fleeing NOA's violence"], which in turn caused NOV's death.

You should approach the question of whether NOA caused NOV's death in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

Secondly,[402] the prosecution must also prove that the victim acted out of a well-founded or reasonable fear of the accused, and that the victim's acts of self-preservation were a natural consequence of the accused's conduct.

Here, the evidence was [*describe evidence relevant to the reasonableness of NOV's response*]. It is for you to determine if NOV's reaction was reasonable and well-founded. If you find that NOV over-reacted to NOA's conduct, then this element will not be satisfied, and you must find NOA not guilty of murder.

Voluntariness

The second element that the prosecution must prove is that the accused's causal acts were conscious, voluntary and deliberate. These words each have a special meaning in law, which I will briefly explain.

The term "conscious" excludes the acts of an unconscious person, such as a sleepwalker, or a person rolling over in bed.

The term "voluntary" directs you to the requirement that the act which killed the deceased must be a "willed" act, that is, one resulting from the control by the accused of his/her own actions. This excludes the acts of a person operating in one of a number of rare mental states where the mind loses control of the body's actions.

The term "deliberate" excludes accidental acts, such as the consequences of falling over or fumbling an item.

[*If this element is not in issue, add the following shaded section*.]

In this case there is no issue that [if/when] NOA [*describe relevant causal acts*, *e.g.* "pointed and discharged the gun"] s/he did so consciously, voluntarily and deliberately, so you should have no difficulty finding this element proven.

[*If voluntariness is in issue, add the following shaded section*.]

In this case the defence argued[403] that the prosecution has failed to prove that the accused's causal acts were [*select term(s), e.g.* conscious, voluntary, deliberate].

The defence submitted that these acts were committed [*describe and discuss the relevant form of involuntary conduct raised as an issue in the trial*, *such as accident; reflex acts; physically compelled acts; acts performed in an automatic state*]. The prosecution denied that this was the case. [*Insert relevant prosecution arguments and/or evidence.*]

It is for the prosecution to prove, beyond reasonable doubt, that NOA was acting consciously, voluntarily and deliberately when s/he committed the acts that you find caused NOV's death. If you are not satisfied that this was the case, then you must find NOA not guilty of murder.

[*If the jury must determine voluntariness by reference to its findings on causation, add the shaded section.*]

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[402] This part of the direction will have to be substantially modified if used in cases not involving escape–based harm.

[403] If the defence did not raise the issue of voluntariness, but it arises on the evidence, this section will need to be modified accordingly.

I have instructed you that it is for you to determine which if any act(s) of the accused caused NOV's death. If you find that [*describe narrow view of causal acts*] was the common-sense cause of death, then it is the deliberateness[404] of that act that you must consider. If you find that [*describe broader view of causal acts*] was the common-sense cause of death, then it is the deliberateness of those acts that you must consider.

State of Mind of the Accused

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the victim's death, s/he intended to kill NOV or cause him/her really serious injury.[405]

When I say "really serious injury", I am not using a technical legal phrase. These are ordinary English words, and it is for you to determine what this phrase means to you as jurors.

In this case the prosecution submitted NOA acted with intent [*insert relevant intent and describe relevant evidence and/or arguments*]. The defence responded [*insert relevant evidence and/or arguments*].

It is for you to decide whether the prosecution has proven, beyond reasonable doubt, that the accused had this intention. If s/he did, then this third element will be met.

Timing

[*If the jury must consider different mental states associated with different causal acts, use this shaded section*.]

For this element to be satisfied, the accused must have intended to kill NOV or cause him/her really serious injury at the time that s/he committed the act or acts that you find caused NOV's death.

As I have mentioned, in this case the cause of NOV's death is disputed. The prosecution contends that [*insert relevant causal acts*] caused NOV's death, and that NOA had the necessary mental state when s/he committed those acts. However, the defence submits that [*insert relevant causal acts*] was the cause of NOV's death, and that at that point in time NOA did not have the necessary state of mind because [*insert relevant evidence and/or submissions*].

Before you can determine whether this third element has been satisfied, you must therefore first decide precisely which act or acts caused NOV's death. You must then determine whether NOA held a required mental state at the time that s/he committed that act or those acts.

Inferring states of mind

[*If proof of the accused's mental state depends on the drawing of inferences, add the following shaded section.*]

As I have stated, the prosecution contends that you should infer from the evidence that NOA had the appropriate state of mind at the relevant time.

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[404] This issue is most likely to arise where accident is the issue. If another form of involuntariness is in issue this charge should be adapted.

[405] This section of the charge has been drafted for use in cases where the accused's actions were directed towards the victim. If the jury could find that the accused intended to harm someone else references to the victim should be replaced with "some person", and the following paragraph should be added: *"The prosecution does not need to prove that the accused intended to kill or injure NOV him/herself. This element will be satisfied if NOA intended to kill or cause really serious injury to any person."*

A person's intention at the time s/he commits an offence may be inferred from what s/he said and did, and also from what s/he failed to say and do. You should look at all of NOA's proven actions before, at the time of, and after the alleged offence. All of these things may help you to determine what NOA's intention was when s/he committed the acts you have decided caused NOV's death.

In particular, the prosecution has asked you to consider [*describe evidence*]. The defence has asked you to consider [*describe evidence*].

You will remember what I told you about inferences earlier[406] In this context, those directions mean that you can only infer that NOA intended to kill NOV or cause him/her really serious injury if you are satisfied beyond reasonable doubt that it is the only inference open from the facts you have found. If any evidence causes you to have reservations about drawing such an inference, the benefit of your doubts should go to the accused.

Absence of Lawful Justification or Excuse

Even if the first three elements are proven, the law states that a person is not guilty of murder if the killing was done with a lawful justification or excuse, such as in self-defence or under duress.

[*If no such issue is raised on the evidence, add the following shaded section*.]

There is no question in this case of any such lawful justification or excuse, so that aspect can be disregarded.

[*If any defences are open on the evidence*, *insert directions from the relevant topics here* (see Part 8: Victorian Defences).]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, before you can find NOA guilty of murder the prosecution must prove to you beyond reasonable doubt:

One – that NOA committed acts which caused NOV's death; and

Two – that NOA's acts were conscious, voluntary and deliberate; and

Three – that NOA intended to kill NOV or cause him/her really serious injury; and

Four – that NOA had no lawful justification or excuse for killing NOV.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of murder.

Last updated: 3 December 2012

7.2.1.2 Checklist: Intentional Murder (without Self-Defence)

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[406] This charge is based on the assumption that the judge has already instructed the jury about inferences. It will need to be modified if that has not been done.

This checklist can be used if it is alleged that the accused committed murder, recklessness is not open on the evidence, manslaughter is not available as an alternative verdict, and no substantive defences are open on the evidence.

Murder

Before you can convict the accused of murder, there are four elements that the prosecution must prove beyond reasonable doubt:

1. The accused caused the victim's death; and
2. The accused's acts were conscious, voluntary and deliberate; and
3. The accused intended to kill or cause really serious injury; and
4. The accused killed the victim without lawful justification or excuse.

Cause of Death

1. Has the prosecution proved that the accused caused the victim's death?

Consider – ***Were the accused's actions a substantial or significant cause of the victim's death?***

If Yes then go to 2

If No, then the accused is not guilty of Murder

Conscious, Voluntary and Deliberate Acts

2. Has the prosecution proved that the accused's actions that caused the victim's death were conscious, voluntary and deliberate?

If Yes then go to 3

If No, then the accused is not guilty of Murder

Intention

3. Has the prosecution proved that at the time the accused did the acts that caused the victim's death, s/he intended to kill or to cause really serious injury?

If Yes then go to 4

If No, then the accused is not guilty of Murder

Defences

4. Has the prosecution proved that the accused acted with no lawful justification or excuse?

If Yes then the accused is guilty of Murder (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of Murder

Last updated: 1 November 2014

7.2.1.3 Charge: Intentional and Reckless Murder

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This charge should be used if both intentional and reckless murder are left to the jury. If only reckless murder is issue, adapt this charge accordingly.

The elements

I must now direct you about the crime of murder. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused caused the victim's death.

Two – the accused's acts were conscious, voluntary and deliberate.[407]

Three – that at the time the accused did the acts that caused the victim's death, s/he either:

- Intended to kill or cause really serious injury; or
- Knew that his/her acts would probably cause a death or really serious injury.

Four – that the accused killed the victim without lawful justification or excuse.

I will now explain each of these elements in more detail.

Cause of death

The first element that the prosecution must prove is that the accused caused the victim's death.[408]

[*If this element is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*] and doing so caused NOV's death. You should therefore have no difficulty finding this element proven.

[*If this element is in issue, add the following shaded section and the relevant additional sections*.]

To determine if this element has been proven, you must first determine what acts NOA committed. You must then determine whether [any of] those acts caused NOV's death.[409]

[*If the cause of death is not disputed, but the accused denies committing the relevant acts, add the following shaded section*.]

In this case it is not disputed that [*insert relevant causal acts*] caused NOV's death. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If cause of death is in issue because of multiple possible causes (whether combined or competing), add the shaded section*.]

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[407] As most cases of murder involve a number of acts by the accused, the term "acts" is used throughout this charge. If there is only one relevant act, this will need to be changed.

[408] If alternative forms of accessorial liability are in issue, this section will have to be modified. See Part 5: Complicity for further information.

[409] In some cases the jury may also need to determine whether the victim was a living human being when the relevant acts were committed: see 7.2.1 Intentional or Reckless Murder.

[*If the cause of death is disputed due to intervening acts, a failure to intervene, or the victim's own conduct, use the shaded sections below instead.*]

In this case you have heard evidence that NOV's death [resulted/may have resulted] from a number of [*describe basis of uncertainty, e.g. possible, competing, inconsistent etc.*] causes. [*Insert relevant evidence and causal explanations.*]

The law says that for NOA's acts to have caused NOV's death, they do not need to have been the only cause of that result, or the direct or immediate cause. You may find that his/her acts caused the death if they were a substantial or significant cause of that result.

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

[*If causation is an issue because of intervening acts, or a failure to intervene, add the following shaded section.*]

In this case you have heard evidence that NOV's death did not immediately follow the alleged acts of the accused, and that [*describe intervening acts*] [may have] occurred in between.

The law says that for NOA's acts to have caused NOV's death, they do not need to have been the only cause of that result, or the direct or immediate cause. You may find that his/her acts caused the death if they were a substantial or significant cause of that result.

In making this determination, you need to decide whether it was the accused's acts which caused the death, or whether those acts merely provided the setting for the later acts of [*insert intervening acts*], which were the true cause of death. If NOA's acts only provided the setting, then s/he did not cause the death, and you must find him/her not guilty of murder.

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

[*If the victim's own acts could have caused his or her own death, add the following shaded section.*]

This direction has been drafted for use in cases in which the victim could be seen to have caused his or her own death while *attempting to escape the violence of the accused*. While it could be adapted for use in other cases where the accused may have indirectly caused the death, care should be taken in doing so.

This charge should not be given where a simpler "intervention" direction can be given (see above). It should also not be given where NOA purposively compelled NOV to commit the causal act.

In this case you have heard evidence suggesting that NOV's death was only indirectly caused by the acts of the accused. [*Insert relevant evidence.*]

The law says that for an accused's acts to have caused the victim's death, they do not need to have been the direct or immediate cause of that result. This element can be met even if NOA indirectly caused NOV's death.

However, you can only find the accused responsible for the indirect results of his/her acts if the prosecution can prove two matters to you, beyond reasonable doubt.

First, the prosecution must prove that NOA's acts caused NOV's death. In this case, that means that the prosecution must prove that NOA's acts were a substantial or significant cause of [*identify immediate causal event, e.g.* "NOV fleeing NOA's violence"], which in turn caused NOV's death.

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

Secondly,[410] the prosecution must also prove that the victim acted out of a well-founded or reasonable fear of the accused, and that the victim's acts of self-preservation were a natural consequence of the accused's conduct.

Here, the evidence was [*describe evidence relevant to the reasonableness of NOV's response*]. It is for you to determine if NOV's reaction was reasonable and well-founded. If you find that NOV over-reacted to NOA's conduct, then this element will not be satisfied, and you must find NOA not guilty of murder.

Voluntariness

The second element that the prosecution must prove is that the accused's causal acts were conscious, voluntary and deliberate. These words each have a special meaning in law, which I will briefly explain.

The term "conscious" excludes the acts of an unconscious person, such as a sleepwalker, or a person rolling over in bed.

The term "voluntary" directs you to the requirement that the act which killed the deceased must be a "willed" act, that is, one resulting from the control by the accused of his/her own actions. This excludes the acts of a person operating in one of a number of rare mental states where the mind loses control of the body's actions.

The term "deliberate" excludes accidental acts, such as the consequences of falling over or fumbling an item.

[*If this element is not in issue, add the following shaded section*.]

In this case there is no issue that [if/when] NOA [*describe relevant causal acts, e.g.* "pointed and discharged the gun"] s/he did so consciously, voluntarily and deliberately, so you should have no difficulty finding this element proven.

[*If voluntariness is in issue, add the following shaded section*.]

In this case the defence argued[411] that the prosecution has failed to prove that the accused's causal acts were [*select term(s), e.g.* conscious, voluntary, deliberate].

The defence submitted that these acts were committed [*describe and discuss the relevant form of involuntary conduct raised as an issue in the trial, such as accident; reflex acts; physically compelled acts; acts performed in an automatic state.*] The prosecution denied that this was the case. [*Insert relevant prosecution arguments and/or evidence.*]

It is for the prosecution to prove, beyond reasonable doubt, that NOA was acting consciously, voluntarily and deliberately when s/he committed the acts that you find caused NOV's death. If you are not satisfied that this was the case, then you must find NOA not guilty of murder.

[*If the jury must determine voluntariness by reference to its findings on causation, add the shaded section*.]

I have instructed you that it is for you to determine which if any act(s) of the accused caused NOV's death. If you find that [*describe narrow view of causal acts*] was the common-sense cause of death, then it

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[410] This part of the direction will have to be substantially modified if used in cases not involving escape–based harm.

[411] If the defence did not raise the issue of voluntariness, but it arises on the evidence, this section will need to be modified accordingly.

is the deliberateness[412] of that act that you must consider. If you find that [*describe broader view of causal acts*] was the common-sense cause of death, then it is the deliberateness of those acts that you must consider.

State of Mind of the Accused

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that caused the victim's death, s/he either:

- Intended to kill NOV or cause him/her really serious injury; or
- Knew that as a result of his/her acts NOV would probably die or suffer really serious injury.[413]

When I say "really serious injury", I am not using a technical legal phrase. These are ordinary English words, and it is for you to determine what this phrase means to you as jurors.

The two mental states I just mentioned are alternatives. This element will be satisfied as long as the prosecution can prove one of them beyond reasonable doubt. I will now examine each in turn.

Intention to kill or cause really serious injury[414]

This element can be satisfied if the prosecution can prove that the accused intended to kill the victim, or to cause him/her really serious injury.

In this case the prosecution submitted that this was the case. [*Insert relevant evidence and/or arguments.*] The defence responded [*insert relevant evidence and/or arguments*].

It is for you to decide whether the prosecution has proven, beyond reasonable doubt, that the accused had this intention. If s/he did, then this third element will be met.

Knowledge of a probable result

A second way this element can be satisfied is by proof that the accused committed the relevant acts knowing that death or really serious injury would probably result. That is, NOA knew that death or really serious injury were likely to result from his/her acts.

It is not sufficient for NOA to have known that it was possible that death or really serious injury might result from his/her actions. S/he must have known that those consequences were probable.

---

[412] This issue is most likely to arise where accident is the issue. If another form of involuntariness is in issue this charge should be adapted.

[413] This section of the charge has been drafted for use in cases where the accused's actions were directed towards the victim. If the jury could find that the accused intended to harm someone else, or was reckless about harming someone else, references to the victim should be replaced with "some person", and the following paragraph should be added: *"The prosecution does not need to prove that the accused intended to kill or injure NOV him/herself, or knew that NOV would probably die or suffer really serious injury. This element will be satisfied if NOA intended to kill or cause really serious injury to any person, or knew that it was probable that somebody would be killed or really seriously injured by his or her acts."*

[414] If the prosecution only alleges reckless murder, without presenting intentional murder as an alternative basis, this charge will need to be modified.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the risk of death or really serious injury. It is not enough that you or a reasonable person would have recognised those risks in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*identify relevant evidence and the inferences to be drawn from that evidence*].

Timing

[*If the jury must consider different mental states associated with different causal acts, use this shaded section*.]

For this element to be satisfied, the accused must have intended to kill NOV or cause him/her really serious injury or known that NOV would probably die or suffer really serious injury at the time that s/he committed the act or acts that you find caused NOV's death.

As I have mentioned, in this case the cause of NOV's death is disputed. The prosecution contends that [*insert relevant causal acts*] caused NOV's death, and that NOA had the necessary mental state when s/he committed those acts. However, the defence submits that [*insert relevant causal acts*] was the cause of NOV's death, and that at that point in time NOA did not have the necessary state of mind because [*insert relevant evidence and/or submissions*].

Before you can determine whether this third element has been satisfied, you must therefore first decide precisely which act or acts caused NOV's death. You must then determine whether NOA held a required mental state at the time that s/he committed that act or those acts.

Inferring states of mind

[*If proof of the accused's mental state depends on the drawing of inferences, add the following shaded section.*]

As I have stated, the prosecution contends that you should infer from the evidence that NOA had the appropriate state of mind at the relevant time.

A person's intention at the time s/he commits an offence may be inferred from what s/he said and did, and also from what s/he failed to say and do. You should look at all of NOA's proven actions before, at the time of, and after the alleged offence. All of these things may help you to determine what NOA's intention was when s/he committed the acts you have decided caused NOV's death.

In particular, the prosecution has asked you to consider [*describe evidence*]. The defence has asked you to consider [*describe evidence*].

You will remember what I told you about inferences earlier[415] In this context, those directions mean that you can only infer that NOA intended to kill NOV or cause him/her really serious injury or infer that s/he knew that such harm was probable, if you are satisfied beyond reasonable doubt that it is the only inference open from the facts you have found. If any evidence causes you to have reservations about drawing such an inference, the benefit of your doubts should go to the accused.

[*If the jury might infer knowledge of risk relevant to recklessness by an objective test, add the shaded section*.]

In determining NOA's awareness of risk, you [can/have been asked to] draw inferences from the risk that [you/the reasonable person] would have foreseen in the accused's situation. I must warn you that although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat those factors as decisive of the issue. It is not enough that you or any other person

[415] This charge is based on the assumption that the judge has already instructed the jury about inferences. It will need to be modified if that has not been done.

would have recognised those risks in the circumstances. You must be satisfied that NOA him/herself actually knew of the risk of death or really serious injury.

Absence of Lawful Justification or Excuse

Even if the first three elements are proven, the law states that a person is not guilty of murder if the killing was done with a lawful justification or excuse, such as in self-defence or under duress.

[*If no such issue is raised on the evidence, add the following shaded section*.]

There is no question in this case of any such lawful justification or excuse, so that aspect can be disregarded.

[*If any defences are open on the evidence, insert directions from the relevant topics here* (see Part 8: Victorian Defences).]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, before you can find NOA guilty of murder the prosecution must prove to you beyond reasonable doubt:

One – that NOA committed acts which caused NOV's death; and

Two – that NOA's acts were conscious, voluntary and deliberate; and

Three – that NOA EITHER

- Intended to kill NOV or cause him/her really serious injury; or
- Acted knowing that it was probable that NOV would die or suffer really serious injury; and

Four – that NOA had no lawful justification or excuse for killing NOV.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of murder.

Last updated: 3 December 2012

7.2.1.4 Checklist: Intentional and Reckless Murder (without Self-Defence)

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This checklist can be used if it is alleged that the accused committed murder, recklessness is open on the evidence, manslaughter is not available as an alternative verdict; and no substantive defences are open on the evidence.

Murder

Before you can convict the accused of murder, there are four elements that the prosecution must prove beyond reasonable doubt:

1. The accused caused the victim's death; and
2. The accused's acts were conscious, voluntary and deliberate; and
3. The accused either:

    i) Intended to kill or cause really serious injury; or

ii) Knew that his/her acts would probably cause death or really serious injury; and

4. The accused killed the victim without lawful justification or excuse.

Cause of Death

1. Has the prosecution proved that the accused caused the victim's death?

*Consider – **Were the accused's actions a substantial or significant cause of the victim's death?***

If Yes then go to 2

If No, then the accused is not guilty of Murder

Conscious, Voluntary and Deliberate Acts

2. Has the prosecution proved that the accused's actions that caused the victim's death were conscious, voluntary and deliberate?

If Yes then go to 3.1

If No, then the accused is not guilty of Murder

State of Mind

3.1. Has the prosecution proved that at the time the accused did the acts that caused the victim's death, s/he intended to kill or to cause really serious injury?

If Yes then go to 4

If No then go to 3.2

3.2. Has the prosecution proved that at the time the accused did the acts that caused the victim's death, s/he knew that his/her acts would probably cause death or really serious injury?

Consider – Did the accused know that death or really serious injury were likely to result from his/her acts?

If Yes then go to 4

If No, then the accused is not guilty of Murder

Defences

4. Has the prosecution proved that the accused acted with no lawful justification or excuse?

If Yes then the accused is guilty of Murder (as long as you also answered Yes to Questions 1, 2 and either 3.1 or 3.2)

If No, then the accused is not guilty of Murder

Last updated: 1 November 2014

7.2.1A Statutory Murder

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5. Section 3A of the *Crimes Act 1958* states:

> (1) A person who unintentionally causes the death of another person by an act of violence done in the course or furtherance of a crime the necessary elements of which include violence for which a person upon first conviction may, under or by virtue of any enactment, be sentenced to level 1 imprisonment (life) or to imprisonment for a term of 10 years or more shall be liable to be convicted of murder as though he had killed that person intentionally.
>
> (2) The rule of law known as the felony-murder rule (whereby a person who unintentionally causes the death of another by an act of violence done in the course or furtherance of a felony of violence is liable to be convicted of murder as though he had killed that person intentionally) is hereby abrogated.

6. This is a deeming provision which creates a statutory fiction. It treats a person who commits the offence in the specified circumstances as though the person had killed the victim intentionally (*DPP v Perry* (2016) 50 VR 686, [35]–[36]).

7. The effect of s 3A is to provide a form of murder (often called statutory murder) which is most likely relevant where the accused cannot otherwise be convicted of murder due to an absence of intention.

8. Section 3A does not, however, create a discrete offence that may be distinguished from common law murder. Statutory murder is a legal alternative to murder. There is a single offence of murder, and s 3A provides an alternative means to prove that offence.[416] The implications of this rule for directing a jury which is asked to consider both common law murder and statutory murder is considered in Statutory murder and murder, below.

9. Statutory murder has four elements:

   i) The accused committed an act of violence;

   ii) That act of violence caused the death of a person;

   iii) The act of violence was committed in the course or furtherance of a serious crime the necessary elements of which include violence; and

   iv) The act of violence was conscious, voluntary and deliberate (see *R v Galas* (2007) 18 VR 205, [28]; *DPP v Perry* (2016) 50 VR 686, [8], [39]; *Zaim v R* [2011] VSCA 80, [43]).

10. It is currently unclear whether there is a further element that the prosecution must prove the death was unintentional. The approach currently adopted in this Charge Book is that it is not necessary to prove that the killing was unintentional, but there are conflicting decisions on the issue (see *DPP v Perry* (2016) 50 VR 686, [42] and compare *DPP v Hansen* [2020] VSCA 307, [67]; *Zaim v The Queen* [2011] VSCA 80, [3]; *R v Galas* (2007) 18 VR 205, 213 [28]. See also *Wilio v The King* [2023] VSCA 88, [35]–[44]).

An act of violence

11. The term "violence" is not limited to physical force. It also includes threats and menaces to induce fear or terror or to intimidate in order to remove resistance (*R v Butcher* [1986] VR 43; *R v Galas* (2007) 18 VR 205, [31]; *Rich v R* (2014) 43 VR 558, [258]).

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[416] *Duca v The Queen* [2020] VSCA 209, [41], [54], [74]; *Mitchell v The Queen* [2023] HCA 5, [36].

12. Whether an act is an "act of violence" is primarily a question of fact. However, in some cases there may be a question of law whether the act is capable of being considered an act of violence (*Arulthilakan v R* (2003) 203 ALR 259, [23]).

13. It is not necessary to show that the accused intended that the act be an act of violence (*R v CMM* [2001] SASC 21).

Causing death

14. The second element is that the accused's act of violence caused the death of a person.

15. For this purpose, the causal act is not limited to the final act of the accused which causally contributed to the deceased's death. There does not need to be a single cause of death. This principle is often important in cases of murder under s 3A because the final act may have been involuntary. For example, pointing a gun at a person during a robbery may be an act of violence that causes death, even if the person pulls the trigger involuntarily (see *Ryan v R* (1969) 121 CLR 205, 231 (Taylor and Owen JJ) and 233 (Menzies J); *R v Butcher* [1986] VR 43, 54–6; *R v Galas* (2007) 18 VR 205, [53]–[54]).

16. The person who is killed must be a different person from the person who committed the relevant causal act. Statutory murder does not apply to the case where an accused's accomplice kills him or herself (*IL v The Queen* (2017) 262 CLR 268).

17. However, this prohibition does not extend to the case where one co-offender dies at the hand of another. For example, where the accused has shot and, by accident, killed their co-offender during an armed robbery, the accused may be convicted of murder on the basis of s 3A (*Wilio v The King* [2023] VSCA 88, [46]–[66]).

18. The principles of causation are discussed in more detail in Causation and 7.2.1 Intentional or Reckless Murder.

Death caused in course or furtherance of serious crime of violence

19. The third element is that the act of violence was committed in the course or furtherance of a serious crime the necessary elements of which include violence.

20. This second crime is referred to as the 'foundational offence' (*DPP v Perry* (2016) 50 VR 686at [34]).

21. For the purpose of this element, a serious crime is one punishable, for a first offence, by level 1 imprisonment (life) or to imprisonment for a term of 10 years or more (*Crimes Act 1958* s 3A).

22. For the purpose of this commentary, the term "serious crime of violence" is used as shorthand for "a serious crime the necessary elements of which include violence".

23. Whether an offence qualifies as a serious crime of violence is a question of law for the trial judge (see *R v Galas* (2007) 18 VR 205, [23]–[28]).

24. Offences which have been found to be serious crimes of violence include:

    - Armed robbery (*R v Butcher* [1986] VR 43; *R v Galas* (2007) 18 VR 205, [26]; *R v JLE* [2011] VSC 669);
    - Robbery (*R v Butcher* [1986] VR 43; *DPP v MM* [2009] VSC 336; *Zaim v R* [2011] VSCA 80);
    - Reckless conduct endangering life (*R v Kelly* [2013] VSC 144, [19]);
    - Rape (*DPP v Beard* [1920] AC 479; *R v Butcher* [1986] VR 43).

25. It is an open question whether intentionally causing serious injury is a crime the necessary elements of which include violence (see *R v Armstrong & Ors* [2014] VSC 256, [10]; *Haver v DPP* [2013] VSC 622, [33]–[36]. See also *DPP v Hansen* [2020] VSCA 307, [13], where it was not disputed that intentionally causing injury could qualify as a foundational offence).

26. Under the common law "felony murder" rule, escaping from jail was considered to be a crime of violence (*R v Ryan & Walker* [1966] VR 553). Whether it is a crime of violence, the escape offence in *Crimes Act 1958* s 479C is not a serious offence for this purpose, as the maximum penalty is 5 years imprisonment.

27. To prove that the act was committed in the course or furtherance of the foundational offence, the prosecution must prove that the accused intended to commit the foundational offence. This includes having the mens rea necessary for the foundational offence (*R v R* (1995) 63 SASR 417 at 424–5 (Perry J)).

28. The foundational offence does not need to be complete at the time of the violent act. This means that acts of violence in the course of, for example, an armed robbery, may qualify for the purpose of this element, even if the armed robbery is aborted before it is complete (*R v Galas* (2007) 18 VR 205, [34]).

29. It is not necessary for the accused to be separately charged with the serious crime of violence which is relied upon for this element (*R v Galas* (2007) 18 VR 205, [34]).

Conscious, voluntary and deliberate act

30. The prosecution must prove that the relevant act of violence which caused the death was conscious, voluntary and deliberate (*R v Galas* (2007) 18 VR 205).

31. This will often be a different act to the act that would be relied upon to prove intentional murder.

32. In *R v Galas* (2007) 18 VR 205, the deceased was killed in the course of an armed robbery while the accused was restraining the decreased hands while holding a loaded firearm. The Court of Appeal held that there was insufficient evidence for the jury to find that the firing of the gun was a voluntary and deliberate act for the purpose of murder. However, the Court also noted that it remained open for the jury to find that the act of threatening the deceased with a loaded gun while attempting to restrain the deceased's hands was the relevant causal act for the purpose of statutory murder and was conscious, voluntary and deliberate (*R v Galas* (2007) 18 VR 205, [53]–[54]).

Unintentional

33. While *Crimes Act 1958* s 3A refers to a person who "unintentionally causes the death of another person", it is not necessary for the prosecution to prove that the killing was unintentional (*DPP v Perry* (2016) 50 VR 686, [42]; c.f. *DPP v Hansen* [2020] VSCA 307, [67]).

34. As a result, if the elements of the offence are proved the jury may find the accused guilty of statutory murder "irrespective of whether any conclusion can be drawn as to whether the killing was, or was not, intentional" (*DPP v Perry* (2016) 50 VR 686, [43]).

35. This has overridden earlier decisions which stated that it was an element of the offence that the killing was unintentional (c.f. *R v Galas* (2007) 18 VR 205; *Zaim v R* [2011] VSCA 80, [3]).

Statutory murder and complicity

36. The liability of a secondary party for statutory murder is mostly likely to require a court to apply the provisions of ss 323(1)(b) or (d), as subparagraphs (a) and (c) 'seem … to have no sensible application to statutory murder' (*DPP v Hansen* [2020] VSCA 307, [32]).

37. This means the prosecution will need to show that the accused either intentionally assisted, encouraged or directed the foundational offence, or entered into an agreement, arrangement or understanding with another person to commit the foundational offence, while being aware that it was probable that the secondary offence (statutory murder) would be committed in the course of carrying out the foundational offence (*DPP v Hansen* [2020] VSCA 307, [33], [39]; *Crimes Act 1958* ss 323(1)(b), (d)).

38. Proof that the accused was aware that it was probable that statutory murder would be committed requires the prosecution to show that the accused was aware that it was probable that:
    - An act of violence beyond the scope of the foundational crime would be committed; and
    - That act of violence would cause death (*DPP v Hansen* [2020] VSCA 307, [43], [46], [47]).
39. The need to prove these matters places a high burden on the prosecution (*DPP v Hansen* [2020] VSCA 307, [44]).

Statutory murder and murder

40. While statutory murder may loosely be termed an alternative to murder, the fact that they are two pathways to a single offence means that a judge may take a verdict on statutory murder even if the jury cannot agree on its verdict for common law murder (*Duca v The Queen* [2020] VSCA 209, [41]).
41. The practice in Victoria is that murder and statutory murder are both charged on the indictment, so that the court and the defence are on notice that the prosecution seeks to invoke s 3A (see *Duca v The Queen* [2020] VSCA 209, [42]–[53]; *R v Ng (No 2)* [2002] VSC 561, [13]; *DPP v Chounlamountry* [2016] VSC 509, [47]).
42. While it has not been expressly determined at an appellate level, it appears likely that a jury asked to consider both common law murder and statutory murder cannot return a verdict on either form of murder unless it is unanimous about that verdict for that form of murder (see *Duca v The Queen* [2020] VSCA 209, [1], [21], [23] and *R v Ng (No 2)* [2002] VSC 561, [13]. See also *R v Walsh* (2002) 131 A Crim R 299; *R v Leivers and Ballinger* [1997] 1 Qd R 649).

Statutory murder and manslaughter

43. There is no principle of law that prevents a judge leaving manslaughter to the jury as an alternative where the accused is charged with statutory murder (*R v Galas* (2007) 18 VR 205, [66]).
44. It is not necessary that an "unlawful and dangerous act" for the purpose of manslaughter is also a violent act (*R v Galas* (2007) 18 VR 205, [66]).

Last updated: 30 July 2023

7.2.1A.1 Charge: Statutory Murder

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This charge is designed for cases where murder under *Crimes Act 1958* s 3A is left as an alternative to intentional murder. For cases where statutory murder is left as the sole basis of liability, the charge must be adapted.

The elements

I must now direct you about the crime of murder.

The prosecution relies on two paths to prove the accused's guilt of murder. I will call the two paths "intentional murder" and "statutory murder".[417] I will first explain the path of "intentional murder" and then I will explain "statutory murder".

[417] If the prosecution has charged statutory murder as a separate charge on the indictment, the judge may add the following: "Intentional murder refers to charge 1 on the indictment, and statutory murder refers to charge 2 on the indictment".

[*Insert and adapt directions from Charge: Intentional Murder*.]

That is everything to say about "intentional murder". I will now move to "statutory murder".

To prove statutory murder, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – The accused committed an act of violence;

Two – The act of violence caused the victim's death.

Three – The act of violence was committed in the course or furtherance of a serious crime of violence.

Four – The act of violence was conscious, voluntary and deliberate.

I will now explain each of these elements in more detail.

Act of violence

The first element the prosecution must prove is that the accused committed an act of violence. There are two parts to this question.

First, the prosecution must prove that the accused [*identify relevant act of violence*].

Second, you must decide whether [*identify relevant act*] is an act of violence.

For this purpose, violence is not limited to physical force. It includes threats or conduct designed to put a person in fear, so that they do not resist some conduct or demand.

[*Identify how the prosecution and defence put their case on this issue*.]

You may only find this element proved if you are satisfied that NOA [*insert relevant act*] and that this was an act of violence.

Cause of death

The second element the prosecution must prove is that the accused's act of violence caused the victim's death.[418]

The law says you must approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for NOV's death.

The law also says that for NOA's acts to have caused NOV's death, they do not need to have been the only cause of that result, or the direct or immediate cause. You may find that his/her acts caused the death if they were a substantial or significant cause of that result.

The prosecution say that [*identify relevant act of violence*] caused NOV's death because [*identify relevant prosecution evidence and arguments*]. The defence dispute this, and say [*identify relevant defence evidence and arguments*].

[*If the relevant causal act differs between intentional and statutory murder, add the following shaded section*.]

You will have noticed that the prosecution relies on different conduct for intentional murder and statutory murder. For intentional murder, the accused's relevant conduct was [*refer to relevant causal act for intentional murder*]. In contrast, for statutory murder, the relevant conduct was [*refer to relevant causal act for statutory murder*]. During your deliberations you must keep these two acts separate.

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[418] If alternative forms of accessorial liability are in issue, this section will have to be modified. See Part 5: Complicity for further information.

You may only find this element proved if you are satisfied that [*insert relevant act*] caused NOV's death.

Serious crime of violence

The third element the prosecution must prove is that the act of violence was committed in the course or furtherance of a serious crime of violence.

In this case, the prosecution say that the act was committed as part of [*identify relevant foundational offence, e.g.* "an armed robbery"].

I direct you as a matter of law that [*identify relevant foundational offence*] is a serious crime of violence.

The question you must consider is whether the act of violence was committed in the course or furtherance of [*identify foundational offence*].

A person commits [*identify foundational offence*] when he or she [*insert and adapt directions on relevant foundational offence. Directions must explain any area of dispute in law or fact on whether the act was committed in the course or furtherance of that offence*].

[*Refer to how the prosecution and defence put their case on this element*.]

Voluntariness

The fourth element that the prosecution must prove is that the accused's act of violence was conscious, voluntary and deliberate. These words each have a special meaning in law, which I will briefly explain.

The term "conscious" excludes the acts of an unconscious person, such as a sleepwalker, or a person rolling over in bed.

The term "voluntary" directs you to the requirement that the act which killed the deceased must be a "willed" act, that is, one resulting from the control by the accused of his/her own actions. This excludes the acts of a person operating in one of a number of rare mental states where the mind loses control of the body's actions.

The term "deliberate" excludes accidental acts, such as the consequences of falling over or fumbling an item.

[*If this element is not in issue, add the following shaded section*.]

In this case there is no issue that [if/when] NOA [*describe relevant act of violence, e.g.* "pointed the gun to threaten NOV"] s/he did so consciously, voluntarily and deliberately, so you should have no difficulty finding this element proven.

[*If voluntariness is in issue, add the following shaded section*.]

In this case the defence argued that the prosecution has failed to prove that the accused's causal acts were [*select term(s), e.g.* conscious, voluntary, deliberate].

The defence submitted that these acts were committed [*describe and discuss the relevant form of involuntary conduct raised as an issue in the trial, such as accident; reflex acts; physically compelled acts; acts performed in an automatic state*.] The prosecution denied that this was the case. [*Insert relevant prosecution arguments and/or evidence*.]

It is for the prosecution to prove, beyond reasonable doubt, that NOA was acting consciously, voluntarily and deliberately when s/he committed the acts that you find caused NOV's death. If you are not satisfied that this was the case, then you must find NOA not guilty of murder.

[*If the relevant causal act differs between intentional and statutory murder, add the shaded section*.]

Remember, the prosecution relies on different conduct for intentional murder and statutory murder. For intentional murder, the accused's relevant conduct was [*refer to relevant causal act for intentional murder*]. In contrast, for statutory murder, the relevant conduct was [*refer to relevant causal act for*

statutory murder]. When you are deliberating you must keep these two acts separate. You might find that one act was [*select relevant term:* unconscious, involuntary, not deliberate] and find that the other act was conscious, voluntary and deliberate.

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of statutory murder the prosecution must prove to you beyond reasonable doubt:

One – The accused committed an act of violence;

Two – The act of violence caused the victim's death.

Three – The act of violence was committed in the course or furtherance of a serious crime of violence.

Four – The act of violence was conscious, voluntary and deliberate.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of statutory murder.

Taking verdicts

[*The following direction should be given if the prosecution relies on both common law murder and statutory murder.*]

In this case there is but one offence of murder alleged. In the indictment it is expressed in two ways:

(1) Murder at common law; and

(2) Statutory murder.

When you are asked for your verdict on the offence of murder you will be asked:

Do you find the accused guilty or not guilty of murder?

If your answer to that question is 'guilty', you will then be asked:

Is your verdict of guilty to murder pursuant to common law or statute?

You will then be asked:

And is that the verdict of you all?

This last question reflects the imperative that, if your verdict is 'guilty of murder', it must be a unanimous verdict of either murder at common law or statutory murder.

Last updated: 14 May 2021

7.2.2 Manslaughter by Unlawful and Dangerous Act

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Scope

1. This topic only addresses manslaughter by unlawful and dangerous act. For information concerning other forms of manslaughter, see:

    - 7.2.3 Negligent Manslaughter;
    - 8.12 Provocation;[419] and
    - 8.13 Suicide Pact.

The Elements

2. Manslaughter is a common law offence. One of its forms is manslaughter by an unlawful and dangerous act causing death. This form of manslaughter has the following four elements, each of which the prosecution must prove beyond reasonable doubt:

    i) That the accused committed an act that caused the death of another person;

    ii) That the relevant act was committed consciously, voluntarily and deliberately;

    iii) That the relevant act was "unlawful"; and

    iv) That the relevant act was "dangerous".

The act caused the victim's death

3. The first element that the prosecution must prove is that the accused committed an act that caused the victim's death (*R v Stein* (2007) 18 VR 376; *R v Summers* [1990] 1 Qd R 92; *Aidid v R* (2010) 25 VR 593).

4. For offences committed on or after 1 November 2014, the *Crimes Act 1958* s 4A provides that:

    (4) A single punch or strike may be the cause of a person's death even if the injury from which the person dies is not the injury that the punch or strike itself caused to the person's head or neck but another injury resulting from an impact to the person's head or neck, or to another part of the person's body, caused by the punch or strike.

    Example

    If a person punches another person to the head, and that other person falls, hits their head on the road, and dies from the injury resulting from their head hitting the road, the punch may be the cause of their death.

5. *Crimes Act 1958* s 4A(4) is not a deeming provision, but recognises that the cause of death, for the purpose of manslaughter, may include injuries sustained as a consequence of the accused's punch or strike. This does not change existing principles of causation.

6. For information concerning causation, see 7.1.2 Causation and 7.2.1 Intentional or Reckless Murder.

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[419] While provocation has been abolished as a partial defence to murder (*Crimes Act 1958* s 3B), it remains available as a partial defence for offences alleged to have been committed prior to 23 November 2005.

The act was conscious, voluntary and deliberate

7. The second element that the prosecution must prove is that the relevant act was committed consciously, voluntarily and deliberately (*Ryan v R* (1967) 121 CLR 205; *R v Haywood* [1971] VR 755; *R v Winter* [2006] VSCA 144; *R v Williamson* (1996) 67 SASR 428).
8. While the prosecution must prove that the accused acted voluntarily, they do not need to prove that the accused intended to cause death or really serious injury (*R v Haywood* [1971] VR 755; *R v Vollmer* [1996] 1 VR 95).
9. For information on this element, see 7.2.1 Intentional or Reckless Murder.

The act was unlawful

10. The third element the prosecution must prove is that the relevant act was 'unlawful'.
11. To be unlawful, the act must have involved a breach of the criminal law (*Wilson v R* (1992) 174 CLR 313; *Pemble v R* (1971) 124 CLR 107).
12. However, it seems that not all breaches of the criminal law are classified as "unlawful" for the purpose of this element. Although not clear,[420] it appears that only offences requiring proof of *mens rea* fall within that category (*R v Nguyen(Ruling No 2)* [2010] VSC 442).
13. Offences dependent on negligence or gross negligence therefore may not qualify as "unlawful". Deaths resulting from such offences may need to be determined under the principles of Negligent Manslaughter instead (see *Boughey v R* (1986) 161 CLR 10; *Andrews v DPP* [1937] AC 576. See also *R v Powell* [2002] 1 NZLR 666).
14. As acts that give rise to civil liability are not a breach of the criminal law, they are not unlawful for the purpose of this element (*R v Lamb* [1967] 2 QB 981).
15. While the offence most commonly relied upon to prove unlawfulness is assault, other offences that have been relied upon include attempted assault, attempted robbery, burglary, unlawful administration of drugs and discharging a firearm in a public place (see *Withers v R (No 2)* [2010] VSCA 151).

Defences

16. An act will not be "unlawful" if the accused had a defence to the relevant offence. The jury will therefore need to consider any relevant defences, such as consent, duress or self-defence (*Boughey v R* (1986) 161 CLR 10; *R v Lamb* [1967] 2 QB 981).
17. It should be noted that while consent may ordinarily be available as a defence to the relevant offence (e.g. assault), it may *not* be available where death occurs. For example, consent is not available as a defence when death occurs during sado-masochistic sexual activities (*R v Stein* (2007) 18 VR 376; *R v Emmett* 18/6/1999 Vic CA; *R v McIntosh* [1999] VSC 358). See 7.4.8 Common Law Assault for further information.
18. Consent will not be available as a defence to a fight that takes place in a public place, if that fight constitutes an affray (see *Aidid v R* (2010) 25 VR 593).

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[420] The outer limits of what is classified as an "unlawful act" are uncertain. In *R v Pullman* (1991) 25 NSWLR 89, Hunt CJ (Campbell and Newman JJ concurring) held that a breach of a statutory or regulatory prohibition alone is not sufficient to constitute an unlawful act, and the act must be unlawful for some reason other than the breach. However, in *R v Borkowski* [2009] NSWCCA 102, Simpson J (McClelland CJ at CL and Howie J not deciding) expressed reservations about that distinction, given the need for the act to be both unlawful *and* dangerous.

19. The fact that consent may not be relevant to a charge of unlawful and dangerous act manslaughter does *not* mean that it will be irrelevant to a charge of negligent manslaughter (*R v Cato* [1976] 1 WLR 110).

20. For general information on defences, such as self-defence and duress, see Part 8: Victorian Defences.

Charging the Jury About Unlawfulness

21. In charging the jury about this element, the judge must:

    - Identify the alleged unlawful act; and
    - Instruct the jury on the findings of fact it must make before it may find that act to have been "unlawful" (*Pemble v R* (1971) 124 CLR 107; *Wilson v R* (1992) 174 CLR 313).[421]

22. The prosecution must prove all of the elements of the offence that they allege made the accused's act unlawful (e.g. assault). As that includes proving that the accused had the mental state required for that offence (e.g. an intention to apply force), the test for manslaughter is not wholly objective (*R v Lamb* [1967] 2 QB 981; *R v Haywood* [1971] VR 755. See also *R v Stein* (2007) 18 VR 376).

23. The prosecution does not need to prove that the unlawful act was directed against the victim (*R v Mitchell* [1983] QB 741).

The act was dangerous

24. The fourth element the prosecution must prove is that the relevant act was "dangerous".

25. The test for "dangerousness" is objective. It requires the jury to find that a reasonable person in the position of the accused, performing that act, would have realised that he or she was exposing the deceased to an appreciable risk of serious injury (*Wilson v R* (1992) 174 CLR 313; *R v Holzer* [1968] VR 481. See also *R v Klamo* (2008) 18 VR 644).

26. The test of an appreciable risk of serious injury describes the minimum proof required to establish manslaughter. Proof that the act created a greater risk, such as an appreciable risk of death, does not preclude a finding that the act was dangerous (*R v Fragomeli* [2008] SASC 96).

27. It is not sufficient for the jury to find that the reasonable person would have realised that the unlawful act *was likely to expose* the deceased to an appreciable risk of serious injury. They must find that the reasonable person would have realised that he or she *was exposing* the deceased to such a risk (*R v Gould* [2009] VSCA 130).

28. The jury does not need to find that the reasonable person would have thought that serious injury was "certain" or "probable". They only need to find that the reasonable person would have realised there was an "appreciable risk" of such injury (*R v Holzer* [1968] VR 481).

29. For offences committed on or after 1 December 2014, *Crimes Act 1958* s 4A contains a deeming provision in relation to certain forms of dangerous conduct. See 'Single punch or strike as dangerous act' below.

"Serious injury"

30. The reasonable person in the position of the accused must have realised that he or she was exposing the deceased to an appreciable risk of "serious injury" (*Wilson v R* (1992) 174 CLR 313; *R v Schaffer* (2005) 13 VR 337; *R v McCullagh (No 3)* [2007] VSCA 293).

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[421] As an act will not be "unlawful" if the accused had a defence to the relevant offence, this includes charging the jury about any available defences.

31. "Serious injury" is an ordinary English term. It is for the jury to determine, as a question of fact, whether there was an appreciable risk of "serious" injury, rather than any lesser degree of injury (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186).

32. The statutory definition of serious injury[422] does not apply to manslaughter, which is a common law offence (*R v Vollmer* [1996] 1 VR 95).

33. The jury should assess the meaning of the term "serious injury", and the question of whether the accused realised that he or she was exposing the deceased to an appreciable risk of such injury, using logic, common sense and experience (*Aidid v R* (2010) 25 VR 593).

34. While serious injury may include physical injury caused by shock in response to a frightening experience, an emotional disturbance is not sufficient to constitute a serious injury (*R v Dawson* (1985) 81 Cr App R 150).

35. As the phrase "serious injury" differs from (but is very similar to) the phrase "death or really serious injury", which is used in the murder context, it is especially important to distinguish between the two phrases when murder and manslaughter are both left to the jury (*Wilson v R* (1992) 174 CLR 313; *R v Schaffer* (2005) 13 VR 337; *R v McCullagh (No 3)* [2007] VSCA 293; *DPP v Singleton* (2010) 29 VR 351).[423]

36. For further information on the meaning of serious injury, see 7.4.2 Intentionally Causing Serious Injury.

The accused's mental state is not relevant

37. As the test for dangerousness is objective, the prosecution does not need to prove that the accused realised that his or her act was dangerous (*R v Holzer* [1968] VR 481; *Nydam v R* [1977] VR 430; *R v Stein* (2007) 18 VR 376; *R v Vollmer* [1996] 1 VR 95).

38. In assessing whether the act was dangerous, the jury must not consider the accused's mental state, or any matters that may have affected the accused's reasoning or judgment (*R v Wills* [1983] 2 VR 201; *R v Lavender* (2005) 222 CLR 67).[424]

39. This means that the jury must *not* consider matters such as the accused's emotional state, whether he or she was under the influence of drugs or alcohol at the relevant time, or the accused's subjective, mistaken belief that an action was safe (*R v Wills* [1983] 2 VR 201; *R v Ball* [1989] Crim LR 730).

The "reasonable person in the position of the accused"

40. The test for dangerousness requires the jury to consider what risk the reasonable person *in the position of the accused* would have realised he or she was creating. They must determine how the reasonable person would have assessed the situation as perceived by the accused (*R v Cornelissen* [2004] NSWCCA 449).

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[422] See *Crimes Act 1958* s 15.

[423] While the need to avoid the phrase "really serious injury" arises due to the risk of confusion between the tests for murder and manslaughter, the meaning of dangerousness does not vary depending on whether or not manslaughter is left as an alternative to murder. References in *R v Lavender* (2005) 222 CLR 67 to the test being a risk of "really serious injury" were not intended to change the law from *Wilson v R* (1992) 174 CLR 313 (*DPP v Singleton* (2010) 29 VR 351; [2010] VSC 428).

[424] The accused's state of mind may, however, be relevant for certain defences, such as self-defence and emergency (see *R v Edwards* [2009] SASC 233).

41. In making this determination, the reasonable person should be considered to be the same age as the accused, and to have any specialised knowledge and experience that the accused had (e.g. knowledge of the recommended dosage for medication) (*R v Edwards* [2008] SASC 303; *R v Taylor* (1983) 9 A Crim R 358).

42. However, the reasonable person does not share the accused's gender and should not be considered to be suffering from any injuries that affected the accused at the relevant time, such as concussion (*Stingel v R* (1990) 171 CLR 312; *R v Edwards* [2008] SASC 303).

43. The reasonable person should not be endowed with greater knowledge of the peculiarities or weaknesses of the victim (e.g. coronary artery disease) than that possessed by the accused at the time of committing the unlawful act, or that the accused acquired in the course of the criminal enterprise (*R v Dawson* (1985) 81 Cr App R 150; *R v Stein* (2007) 18 VR 376; *R v Watson* [1989] 1 WLR 684).

Explaining the meaning of dangerousness to the jury

44. The judge must ordinarily explain the meaning of the term "dangerous" to the jury. Without such an explanation there is a risk that the jury may consider that conduct is dangerous if it creates an appreciable risk of *injury*, rather than *serious injury* (*Wilson v R* (1992) 174 CLR 313).

45. However, there is no need to explain the meaning of "dangerous" if this element is not in dispute (e.g. if the dispute only relates to the identity of the person who performed clearly dangerous acts) (See *R v Panozzo* [2007] VSCA 245).

46. The judge must make it clear that the purpose of considering whether a reasonable person would have realised that the conduct would create an appreciable risk of serious injury is so that the jury can determine whether the conduct was "dangerous" (*R v Zikovic* (1985) 17 A Crim R 396).

Single punch or strike as dangerous act

47. *Crimes Act 1958* section 4A was introduced by the Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014, which commenced operation on 1 November 2014.

48. The section states:

> (1) This section applies to a single punch or strike that–
>
> (a) is delivered to any part of a person's head or neck; and
>
> (b) by itself causes an injury to the head or neck.
>
> (2) A single punch or strike is to be taken to be a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act.
>
> (3) For the purposes of subsection (2), it is irrelevant that the single punch or strike is one of a series of punches or strikes.
>
> ...
>
> (5) Nothing in this section limits the circumstances in which a punch or strike may be an unlawful and dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act.
>
> (6) In this section-
>
> injury has the same meaning as in Subdivision (4);
>
> strike means a strike delivered with any part of the body.

49. The effect of this provision is that, as a matter of law, a single punch or strike to a person's head or neck and which, by itself, causes injury to the head or neck, is deemed to be a dangerous act.

50. Under subsection (3), the single punch or strike may be one of a series of punches or strikes. Where the prosecution wishes to rely on the deeming provision in subsection (2), it will need to identify a single punch or strike, delivered in the course of the confrontation, which it relies on as the dangerous act. It cannot rely on the cumulative effect of multiple punches or strikes for this purpose.

51. Depending on the issues in the case, the judge may need to leave the question of dangerousness on two bases:

    - If the jury are satisfied beyond reasonable doubt that the accused's conduct included a punch or strike to the victim's head or neck which caused injury to the head or neck, then that punch or strike is deemed as a matter of law to be a dangerous act;
    - Otherwise, the jury must assess the whole of the accused's conduct to decide whether it is satisfied that the conduct was dangerous.

The Judge Must Identify the Relevant Acts

52. The judge must not leave the jury at large to decide whether the accused committed some unlawful and dangerous act that caused the victim's death. The judge must identify the act[s] the prosecution relies upon to prove the offence (*R v Stein* (2007) 18 VR 376).

Explain the Difference Between Reckless Murder and Manslaughter

53. Where manslaughter by unlawful and dangerous act is left as an alternative to reckless murder, the judge must clearly explain the difference between:

    - The subjective test for reckless murder, which requires the jury to find that *the accused knew* that it was probable that death or really serious injury would result from his or her acts; and
    - The objective "dangerousness" test for manslaughter, which requires the jury to find that *a reasonable person would have realised* that he or she was exposing the deceased to an appreciable risk of serious injury (*R v TY* (2006) 12 VR 557; *R v Barrett* (2007) 16 VR 240; *Pemble v R* (1971) 124 CLR 107 (Barwick CJ)).

54. Failing to provide a clear explanation of the difference may create a risk that the jury will substitute the dangerousness direction for the meaning of recklessness (*R v TY* (2006) 12 VR 557; *R v Barrett* (2007) 16 VR 240; *Pemble v R* (1971) 124 CLR 107 (Barwick CJ)).[425]

55. The judge should warn the jury not to reason that the *accused* must have been aware that his or her actions would cause death or really serious injury because a *reasonable person* in the situation of the accused would have appreciated that risk (*R v TY* (2006) 12 VR 557; *R v Barrett* (2007) 16 VR 240; *Pemble v R* (1971) 124 CLR 107 (Barwick CJ)).

Accessorial Liability

56. The ordinary principles of accessorial liability are capable of applying to manslaughter (*Giorgianni v R* (1985) 156 CLR 473; *R v Chai* (2002) 187 ALR 436; *Markby v R* (1978) 140 CLR 108).

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[425] The risk of confusion between recklessness and dangerousness is particularly acute where the directions on the two topics are separated by intervening matters, such as evidentiary directions and adjournments (*R v TY* (2006) 12 VR 557).

57. Where the prosecution relies on the principles of joint criminal enterprise or on a person entering into an agreement, arrangement or understanding contrary to *Crimes Act 1958* s 323 to establish unlawful and dangerous act manslaughter, the unlawful and dangerous act must be within the scope of the agreement or understanding. (*R v Hartwick, Hartwick& Clayton* (2005) 14 VR 125; *Gillard v R* (2003) 219 CLR 1; *R v Chai* (2002) 187 ALR 436; *R v Andreevski* [2010] VSC 568). For more information on the application of these doctrines see Statutory Complicity and Joint Criminal Enterprise.

58. If the prosecution relies on the doctrine of extended common purpose based on the existence of an agreement to commit a lesser offence that is not dangerous, the prosecution must prove that the accused foresaw the possibility that a co-offender would commit the relevant unlawful and dangerous act (*R v Hartwick, Hartwick& Clayton* (2005) 14 VR 125; *R v PDJ* (2002) 7 VR 612). For more information on the application of this doctrine, see Extended Common Purpose.[426] For offences committed on or after 1 November 2014, the doctrine of extended common purpose is abolished. The prosecution must instead prove that the accused foresaw the probability that a co-offender would commit the relevant unlawful and dangerous act. See Statutory Complicity.

59. It is possible for a co-offender to be convicted of murder as a principal offender, and the accused to be convicted of manslaughter as an accessory. This will be the case, for example, where:

    - There was an agreement to pursue a criminal enterprise;
    - The unlawful and dangerous act committed by the principal offender (which caused the victim's death) was within the scope of the agreement;
    - The agreement did *not* comprehend that the unlawful and dangerous act would be committed with an intention to cause death or really serious injury;
    - The principal offender nevertheless committed the act with the intention to cause death or really serious injury; and
    - The accused did not foresee that the principal offender would act with such an intention (*R v Nguyen* (2010) 242 CLR 491; *Gillard v R* (2003) 219 CLR 1; *R v Makin* (2004) 8 VR 262; *Woolley v R* (1989) 42 A Crim R 418; *R v Andreevski* [2010] VSC 568).

60. In such cases, the judge must not direct the jury that they may only convict the accused of manslaughter as an accessory if they find the principal offender guilty of manslaughter. The judge must direct the jury that they may convict the principal offender of murder and convict the accused of manslaughter, and explain how this is possible (*R v Nguyen* (2010) 242 CLR 491).

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[426] It was once thought that there was an additional form of manslaughter by concert ("*Markby* manslaughter"), which applied where a party to an agreement caused the death of the victim by acts which a reasonable person would have realised were a possible consequence of an agreement. It is now understood that this is not an available form of accessorial liability, and that liability for acts that are outside the scope of the agreement depends on the principles of extended common purpose (*R v PDJ* (2002) 7 VR 612; *R v Hartwick, Hartwick & Clayton* (2005) 14 VR 125).

Alternative Verdicts

Intentional or reckless murder

61. At common law, a judge must leave manslaughter as an alternative verdict to intentional or reckless murder if there is a "viable" case available on the evidence. Under Part 3 of the *Jury Directions Act 2015*, this obligation is reduced and the judge must consider whether the parties asked the judge to leave the alternative offence and, if the parties did not ask for the alternative, whether there are substantial and compelling reasons to leave the verdict. See 3.10 Alternative Verdicts.

62. The jury may only return a verdict on manslaughter as an alternative to murder if the jury unanimously agrees that the accused is not guilty of murder. In the event of a disagreement on the verdict for murder, the jury cannot return a verdict of "at least manslaughter" (*Stanton v R* (2003) 198 ALR 41; *Gammage v R* (1969) 122 CLR 444; *R v McCready* [1967] VR 325).

Constructive murder

63. A person commits constructive murder if he or she unintentionally causes the victim's death through an act of violence, in the course or furtherance of a crime the necessary elements of which include violence (*Crimes Act 1958* s 3A). See 7.2.1A – Statutory murder.

64. Manslaughter by unlawful and dangerous act may or may not be available as a alternative to constructive murder, depending on the facts of the case (see *R v Galas* (2007) 18 VR 205; *R v Butcher* [1986] VR 43).

Negligent manslaughter

65. The prosecution does not need to specify a particular form of manslaughter in a charge. That is a matter for particulars. A single charge of manslaughter may encompass both unlawful and dangerous act manslaughter and negligent manslaughter without raising duplicity issues (see, e.g. *R v Cramp* (1999) 110 A Crim R 198; *R v Isaacs* (1997) 47 NSWLR 374).

66. The judge should not direct the jury on both unlawful and dangerous act manslaughter and negligent manslaughter if the issues are relevantly identical and there is a risk that the directions would confuse the jury. Such confusion is particularly likely when the judge leaves manslaughter as an alternative to reckless murder. The judge should generally resolve this situation by directing on one form of manslaughter the jury can understand and apply (*R v Windsor* [1982] VR 89; *R v Edwards* [2009] SASC 233).

67. In determining which form(s) of manslaughter to leave to the jury, the judge should consider whether there is a practical prospect of the jury reaching different conclusions on the two forms of manslaughter, and whether omitting a form of manslaughter may prejudice the prosecution or the accused (*R v Windsor* [1982] VR 89).

Manslaughter as an accessory

68. The obligation to leave a viable case of manslaughter to a jury as an alternative to a charge of murder includes an obligation to instruct the jury on appropriate forms of accessorial liability for manslaughter (*R v Makin* (2004) 8 VR 262. See also *R v Panozzo* [2007] VSCA 245; *R v Nguyen* (2010) 242 CLR 491).

69. Judges must be careful to only leave appropriate forms of accessorial liability to the jury. Leaving an inappropriate form of accessorial liability may deprive the accused of an opportunity of being acquitted of murder and convicted on a form of manslaughter that is reasonably open on the evidence (*R v Makin* (2004) 8 VR 262. See also *R v Panozzo* [2007] VSCA 245). See Part 5: Complicity for information concerning the different forms of accessorial liability.

Manslaughter and Unanimity

70. In some cases it may be necessary to direct the jury that they must be unanimous about a particular matter (in addition to being unanimous about whether or not the accused is guilty of manslaughter).

71. In addressing this issue, a distinction is drawn between three types of cases:

    i) Those in which alternative *legal bases* of liability are proposed by the prosecution;

    ii) Those in which alternative *factual bases* of liability are proposed by the prosecution; and

    iii) Those in which one offence is charged, but *a number of discrete acts* are relied upon as proof, any of which would entitle the jury to convict (*R v Walsh* (2002) 131 A Crim R 299; *R v Klamo* (2008) 18 VR 644; *R v Cramp* (1999) 110 A Crim R 198).

72. While a specific unanimity direction will not be required in the first type of case, such a direction will be necessary in the second and third types. For more information on this topic and sample charges, see Unanimous and Majority Verdicts.

Murder, Manslaughter and Self-defence

73. Where manslaughter is left as an alternative to murder and the issue of self-defence arises, the jury may need to consider self-defence separately for each offence. The fact that the jury excludes self-defence as a defence to murder does not invariably mean that they must also exclude it as a defence to manslaughter (*R v Bednikov* (2000) 95 A Crim R 200; *R v Fragomeli* [2008] SASC 96).

74. The judge may therefore need to address the issues concerning self-defence that arise in relation to murder and manslaughter separately. In doing so, the judge should bear in mind that:

    - The act which is alleged to have been committed in self-defence may be differently identified depending on whether the charge is murder or manslaughter (e.g. intentionally shooting the victim vs threatening with a weapon).
    - The question of whether the elements of self-defence are met may differ depending on the nature of the relevant act. For example, at common law, a person may have reasonable grounds to believe it is necessary to threaten a person with a weapon, without having reasonable grounds to believe it is necessary to use the weapon (*R v Bednikov* (2000) 95 A Crim R 200; *R v Fragomeli* [2008] SASC 96).
    - Similarly, under the current statutory test for self-defence (applicable to offences alleged to have been committed on or after 1 November 2014), threatening a person with a weapon may be a reasonable response to a perceived threat, while using that weapon may not be.
    - Additionally, if the offence is alleged to have been committed on or after 23 November 2005 and before 1 November 2014, the self-defence test itself will be different for a charge of murder compared to a charge of manslaughter (*Crimes Act 1958* ss 9AC, 9AE). See 8.2 Statutory Self-defence (Pre-1/11/14) and Defensive Homicide for more information.
    - If the offence is alleged to have been committed on or after 1 November 2014, a single statutory self-defence provision applies. However, under this provision, self-defence in relation to murder contains an additional element (compared to manslaughter self-defence) that the accused believed that the conduct was necessary to defend against death or really serious injury. See 8.1 Statutory Self-defence (From 1/11/14) for more information;
    - If the offence is alleged to have been committed before 23 November 2005, the common law on self-defence applies. See 8.3 Common Law Self-defence for further information.

Last updated: 29 June 2015

7.2.2.1 Charge: Manslaughter by Unlawful and Dangerous Act (Principal Offence)

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This charge should be used if the accused is charged with manslaughter by an unlawful and dangerous act as a principal offender.

The charge will need to be adapted if the charge is based on principles of accessorial liability, or the jury must consider multiple bases of manslaughter.

The Elements

I must now direct you about the crime of manslaughter. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused committed an act that caused the victim's death.

Two –this act was committed consciously, voluntarily and deliberately.

Three – this act was unlawful.

Four – this act was dangerous.

I will now explain each of these elements in more detail.[427]

Cause of Death

The first element that the prosecution must prove is that the accused committed an act that caused the victim's death.

[*If this element is not in issue, add the following shaded section.*]

In this case it is not disputed that NOA [*identify unlawful act*], and that doing so caused NOV's death. You should therefore have no difficulty finding this element proven.

[*If this element is in issue, add the following shaded section and the relevant additional sections.*]

To determine if this element has been proven, you must first determine whether NOA [*identify unlawful act*]. You must then determine whether that act caused NOV's death.

[*If the cause of death is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

In this case it is not disputed that [*identify unlawful act*] caused NOV's death. However, the defence contends that NOA did not commit that act. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*identify unlawful act*].

[*Summarise relevant evidence and arguments.*]

[*If cause of death is in issue because of multiple possible causes (whether combined or competing), add the following shaded section.*]

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[427] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

In this case you have heard evidence that NOV's death [resulted/may have resulted] from a number of [*describe basis of uncertainty, e.g. possible, competing, inconsistent etc.*] causes. [*Insert relevant evidence and causal explanations*.]

The law says that for NOA's acts to have caused NOV's death, they do not need to have been the only cause of that result, or the direct or immediate cause. You may find that his/her acts caused the death if they were a substantial or significant cause of that result.

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

[*If this element is in issue for another reason (e.g. there may have been an intervening act or the victim's own acts could have caused his or her own death) insert appropriately adapted sections from 7.2.1.1 Charge: Intentional Murder here.*]

Voluntariness

The second element that the prosecution must prove is that the accused committed the relevant act consciously, voluntarily and deliberately. These words each have a special meaning in law, which I will briefly explain.

The requirement that the relevant act was committed "consciously" means that this element will not be satisfied if that act was done by an unconscious person, such as a sleepwalker, or a person rolling over in bed.

The requirement that the act was committed "voluntarily" means that this element will not be satisfied if the act was not "willed". For this element to be met, the act must have resulted from the accused's control of his/her own actions. This element will therefore not be satisfied if the accused acted while operating in one of a number of rare mental states where the mind loses control of the body's actions.

The requirement that the act was committed "deliberately" means that this element will not be satisfied if the act was accidental. For example, an act which results from falling over or fumbling an item is not "deliberate".

[*If this element is not in issue, add the following shaded section.*]

In this case there is no issue that [if/when] NOA [*describe alleged unlawful act, e.g.* "punched NOV"] s/he did so consciously, voluntarily and deliberately, so you should have no difficulty finding this element proven.

[*If voluntariness is in issue, add the following shaded section.*]

In this case the defence argued[428] that the prosecution has failed to prove that [*identify alleged unlawful act*] was [*select term(s), e.g.* conscious, voluntary, deliberate].

The defence submitted that that act was committed [*describe and discuss the relevant form of involuntary conduct raised as an issue in the trial, such as accident; reflex acts; physically compelled acts; acts performed in an automatic state*]. The prosecution denied that this was the case. [*Summarise relevant prosecution arguments and/or evidence.*]

It is for the prosecution to prove, beyond reasonable doubt, that NOA was acting consciously, voluntarily and deliberately when s/he committed the relevant act. If you are not satisfied that that

[428] If the defence did not raise the issue of voluntariness, but it arises on the evidence, this section will need to be modified accordingly.

was the case, then you must find NOA not guilty of manslaughter.

Unlawful Act

The third element the prosecution must prove is that the relevant act was unlawful. That is, the prosecution must prove that NOA's act that caused NOV's death breached the criminal law and was committed without lawful excuse.

[*If this element is not in issue, add the following shaded section.*]

In this case, the relevant act is [*identify relevant act, e.g.* "punching NOV"]. It is not disputed that such an act is unlawful. That means that, if you find that NOA [*describe relevant act, e.g.* "punched NOV"], you should have no difficulty finding this element proven.

[*If this element is in issue, add the following shaded section.*]

In this case, the relevant act is [*identify relevant act, e.g.* "punching NOV"].[429] The prosecution alleged that by doing so, NOA committed the crime of [*identify alleged crime, e.g.* "assault"].

To prove that NOA committed the crime of [*identify alleged crime*] – and so to prove that NOA committed an "unlawful" act – the prosecution must prove [*instruct jury on all elements of the relevant offence,[430] including the mental elements*].

[*If any defences are in issue, insert any relevant directions here.*]

[*Summarise prosecution and defence evidence and arguments.*]

Dangerousness

The fourth element the prosecution must prove is that the alleged unlawful act was dangerous.

[*If the prosecution relies on the conduct being deemed dangerous under Crimes Act 1958 s 4A, add the following shaded section.*]

I direct you that, if you are satisfied that NOA's relevant act was a single punch or strike to the head or neck which, by itself, caused injury to the head or neck, then as a matter of law, that act is dangerous and this fourth element is proved.

For this purpose, the law defines an injury to the head or neck as a physical injury or harm to mental health, whether temporary or permanent[431]

[*If the prosecution relies on the conduct being dangerous at common law, add the following shaded section.*]

[*If the prosecution relies on both deemed dangerousness and common law dangerousness, add the following shaded*

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[429] If there are multiple acts of the accused that may have caused the victim's death, this element must be modified to require the jury to consider the unlawfulness of the act they found to be a cause of the victim's death.

[430] Although not clear, it seems that only *mens rea* offences can fulfil the 'unlawfulness' criteria. See 7.2.2 Manslaughter by Unlawful and Dangerous Act for further information.

[431] In cases where the meaning of injury and its operation in the case is not in issue, the judge will need to consider whether to give this definition of injury.

section.]

If you are not satisfied that NOA's relevant act was a single punch or strike which, by itself, caused injury to NOV's head or neck, then you must determine whether his/her conduct was dangerous in accordance with the following directions.

The word "dangerous" has a technical legal meaning. An act is dangerous if a reasonable person, in the position of the accused, would have realised that s/he was exposing the victim to an appreciable risk of serious injury.

This is an objective test. That means that the prosecution does not need to establish that NOA realised that what s/he was doing was dangerous. What matters is what a reasonable person of ordinary strength of mind in his/her situation would have realised.[432] If a reasonable person in that situation would have realised that s/he was exposing the victim to an appreciable risk of serious injury, then this element will be satisfied.

[*In cases where the degree of injury was unexpected, add the following shaded section.*]

It is not sufficient for you to find that the reasonable person in the position of the accused would have realised s/he was exposing the victim to an appreciable risk of injury. In this context, there are two levels of harm known to the law: "injury" and "serious injury". There are no other classes such as "very serious injury" or "minor injury" or anything else.

You may consider that there is a spectrum of injuries. At one end are trivial injuries like a paper cut or a grazed knee. At the other end of the spectrum are life–threatening injuries or permanent brain damage and the like.

The phrase "serious injury" is not a technical legal phrase. These are ordinary English words, and it is for you to determine what this phrase means to you as jurors. It is for you to determine, using your common sense and experience, whether the reasonable person in the position of the accused would have realised that [*describe act*] exposed NOV to an appreciable risk of serious injury. An appreciable risk of injury is not sufficient.

The prosecution argued that this element is satisfied because [*summarise relevant prosecution evidence and arguments*]. In response, the defence say [*summarise relevant defence evidence and arguments*]. It is for you to determine whether the prosecution has proven, beyond reasonable doubt, that the accused's acts were dangerous, in the way that I have described. If they have, then this fourth element will be met.

Relate Law to the Evidence

[*If not previously done, summarise the evidence and relate the law to the evidence.*]

Summary

To summarise, before you can find NOA guilty of manslaughter the prosecution must prove to you beyond reasonable doubt:

One – that NOA committed an act that caused NOV's death; and

Two – that this act was committed consciously, voluntarily and deliberately; and

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[432] If the reasonable person must be imbued with particular knowledge or characteristics of the accused, add "In this case, the reasonable person is [*describe relevant facts or attributes which apply to the reasonable person*]."

Three – that this act was unlawful; and

Four – that this act was dangerous.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of manslaughter.

Last updated: 17 November 2014

7.2.2.2 Charge: Manslaughter by Unlawful and Dangerous Act (Alternative to Murder)

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This charge should be used if manslaughter by unlawful and dangerous act is left as an alternative to murder, and the accused is alleged to be the principal offender.

The charge will need to be adapted if the charge is based on principles of accessorial liability, or the jury must consider multiple bases of manslaughter.

Manslaughter

I must also direct you about the alternative offence of manslaughter. This is an alternative to the offence of murder. That means that you will only be asked to return a verdict on this offence if you are not satisfied that the prosecution has proved the offence of murder beyond reasonable doubt. If you decide that NOA is guilty of murder, then you do not need to deliver a verdict on this alternative.

To prove the offence of manslaughter, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused committed an act that caused the victim's death.

Two –this act was committed consciously, voluntarily and deliberately.

Three – this act was unlawful.

Four – this act was dangerous.

I will now explain each of these elements in more detail.[433]

Cause of Death

The first element that the prosecution must prove is that the accused committed an act that caused the victim's death. This is the same as the first element for murder.

[*If this element is not in issue, add the following shaded section.*]

In this case it is not disputed that NOA [*identify unlawful act*], and that doing so caused NOV's death. You should therefore have no difficulty finding this element proven.

[*If this element is in issue, add the following shaded section and the relevant additional section.*]

To determine if this element has been proven, you must first determine whether NOA [*identify unlawful act*]. You must then determine whether that act caused NOV's death.

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[433] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[*If the cause of death is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

In this case it is not disputed that [*identify unlawful act*] caused NOV's death. However, the defence contends that NOA did not commit that act. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*identify unlawful act*].

[*Summarise relevant evidence and arguments.*]

[*If cause of death is in issue because of multiple possible causes (whether combined or competing), add the following shaded section.*]

In this case you have heard evidence that NOV's death [resulted/may have resulted] from a number of [*describe basis of uncertainty, e.g. possible, competing, inconsistent etc.*] causes. [*Insert relevant evidence and causal explanations*.]

The law says that for NOA's acts to have caused NOV's death, they do not need to have been the only cause of that result, or the direct or immediate cause. You may find that his/her acts caused the death if they were a substantial or significant cause of that result.

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

[*If this element is in issue for another reason (e.g. there may have been an intervening act or the victim's own acts could have caused his or her own death) insert appropriately adapted sections from 7.2.1.1 Charge: Intentional Murder here.*]

Voluntariness

The second element that the prosecution must prove is that the accused committed the relevant act consciously, voluntarily and deliberately. This is the same as the second element for murder. I have already explained the legal meaning of these terms.

[*If this element is not in issue, add the following shaded section.*]

In this case there is no issue that [if/when] NOA [*describe alleged unlawful act, e.g.* "punched NOV"] s/he did so consciously, voluntarily and deliberately, so you should have no difficulty finding this element proven.

[*If voluntariness is in issue, add the following shaded section.*]

In this case the defence argued[434] that the prosecution has failed to prove that [*identify alleged unlawful act*] was [*select term(s), e.g.* conscious, voluntary, deliberate].

The defence submitted that that act was committed [*describe and discuss the relevant form of involuntary conduct raised as an issue in the trial, such as accident; reflex acts; physically compelled acts; acts performed in an automatic state*]. The prosecution denied that this was the case. [*Summarise relevant prosecution arguments and/or evidence.*]

[*If the act on which the jury must focus differs from that in relation to murder, add the following shaded section.*]

While this element is the same as the second element of murder, the act you must examine is different. For murder, the prosecution argued that [*describe relevant act for murder*] was conscious,

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[434] If the defence did not raise the issue of voluntariness, but it arises on the evidence, this section will need to be modified accordingly.

voluntary and deliberate. In contrast, for the offence of manslaughter, you must determine whether [*describe relevant act for manslaughter*] was conscious, voluntary and deliberate. That is a different act and therefore your findings on this element may be different.

It is for the prosecution to prove, beyond reasonable doubt, that NOA was acting consciously, voluntarily and deliberately when s/he committed the relevant act. If you are not satisfied that that was the case, then you must find NOA not guilty of manslaughter.

Unlawful Act

The third element the prosecution must prove is that the relevant act was unlawful. That is, the prosecution must prove that NOA's act that caused NOV's death breached the criminal law and was committed without lawful excuse.

[*If this element is not in issue, add the following shaded section.*]

In this case, the relevant act is [*identify relevant act, e.g.* "punching NOV"]. It is not disputed that such an act is unlawful. That means that, if you find that NOA [*describe relevant act*, e.g. "punched NOV"], you should have no difficulty finding this element proven.

[*If this element is in issue, add the following shaded section.*]

In this case, the relevant act is [*identify relevant act, e.g.* "punching NOV"].[435] The prosecution alleged that by doing so, NOA committed the crime of [*identify alleged crime, e.g.* "assault"].

To prove that NOA committed the crime of [*identify alleged crime*] – and so to prove that NOA committed an "unlawful" act – the prosecution must prove [*instruct jury on all elements of the relevant offence,[436] including the mental elements*].

[*If any defences are in issue, insert any relevant directions here and explain any differences between the defences for murder and manslaughter.*]

[*Summarise prosecution and defence evidence and arguments.*]

Dangerousness

The fourth element the prosecution must prove is that the alleged unlawful act was dangerous.

[*If the prosecution relies on the conduct being deemed dangerous under Crimes Act 1958 s 4A, add the following shaded section.*]

I direct you that, if you are satisfied that NOA's relevant act was a single punch or strike to the head or neck which, by itself, caused injury to the head or neck, then as a matter of law, that act is dangerous and this fourth element is proved.

For this purpose, the law defines an injury to the head or neck as a physical injury or harm to mental

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[435] If there are multiple acts of the accused that may have caused the victim's death, this element must be modified to require the jury to consider the unlawfulness of the act they found to be a cause of the victim's death.

[436] Although not clear, it seems that only *mens rea* offences can fulfil the 'unlawfulness' criteria. See 7.2.2 Manslaughter by Unlawful and Dangerous Act for further information.

health, whether temporary or permanent.[437]

[*If the prosecution relies on the conduct being dangerous at common law, add the following shaded section*.]

[*If the prosecution relies on both deemed dangerousness and common law dangerousness, add the following shaded section.*]

If you are not satisfied that NOA's relevant act was a single punch or strike which, by itself, caused injury to NOV's head or neck, then you must determine whether his/her conduct was dangerous in accordance with the following directions.

The word "dangerous" has a technical legal meaning. An act is dangerous if a reasonable person, in the position of the accused, would have realised that s/he was exposing the victim to an appreciable risk of serious injury.

This is an objective test. That means that the prosecution does not need to establish that NOA realised that what s/he was doing was dangerous. What matters is what a reasonable person of ordinary strength of mind in his/her situation would have realised.[438] If a reasonable person in that situation would have realised that s/he was exposing the victim to an appreciable risk of serious injury, then this element will be satisfied.

[*If the jury have been directed on* reckless murder, *explain the difference between recklessness and dangerousness*]

When I say "serious injury", I am not using a technical legal phrase. These are ordinary English words, and it is for you to determine what this phrase means to you as jurors. I note, however, that it is a lower level of harm than is required for the third element of murder, where the prosecution must establish that the accused intended to cause death or really serious injury.[439]

[*If there is an issue about the difference between injury and serious injury, adapt the direction on the meaning of "serious injury" from 7.4.2.1 Charge: Intentionally Causing Serious Injury (From 1/7/13).*]

The prosecution argued that this element is satisfied because [*summarise relevant prosecution evidence and arguments*]. In response, the defence say [*summarise relevant defence evidence and arguments*].

It is for you to determine whether the prosecution has proven, beyond reasonable doubt, that the accused's acts were dangerous, in the way that I have described. If they have, then this fourth element will be met.

Relate Law to the Evidence

[*If not previously done, summarise the evidence and relate the law to the evidence.*]

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[437] In cases where the meaning of injury and its operation in the case is not in issue, the judge will need to consider whether to give this definition of injury.

[438] If the reasonable person must be imbued with particular knowledge or characteristics of the accused, add "In this case, the reasonable person is [*describe relevant facts or attributes which apply to the reasonable person*]."

[439] If reckless murder has been left to the jury, add "or knew that his/her acts would probably cause such harm".

Summary

To summarise, if you unanimously agree that NOA is not guilty of murder, then you will be asked to return a verdict on the offence of manslaughter. Before you can find NOA guilty of manslaughter the prosecution must prove to you beyond reasonable doubt:

One – that NOA committed an act that caused NOV's death; and

Two – that that act was committed consciously, voluntarily and deliberately; and

Three – that that act was unlawful; and

Four – that that act was dangerous.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of manslaughter.

Last updated: 17 November 2014

7.2.2.3 Checklist: Manslaughter by Unlawful and Dangerous Act

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused committed an act that caused the victim's death ('the relevant act'); and
2. The accused committed the relevant act consciously, voluntarily and deliberately; and
3. The relevant act was unlawful; and
4. The relevant act was dangerous.

Causation

1. Did the accused commit the act that caused the victim's death?

*Consider – **Was the accused's act a substantial or significant cause of the victim's death?***

If Yes, then go to 2.

If No, then the Accused is not guilty of Manslaughter

Conscious, Voluntary and Deliberate

2. Did the accused commit the relevant act consciously, voluntarily and deliberately?

If Yes, then go to 3.

If No, then the Accused is not guilty of Manslaughter

Unlawful Act

3. Was the relevant act unlawful?

Consider – Has the prosecution proved all the elements of [*insert offence*]*?*

If Yes, then go to 4.

If No, then the Accused is not guilty of Manslaughter

Dangerous

4. Was the relevant act dangerous?

Consider – "Dangerous" means that a reasonable person in the position of the accused, performing that act, would have realised that he or she was exposing the victim to an appreciable risk of serious injury.

If Yes, then the accused is guilty of Manslaughter (as long as you have also answered Yes to questions 1, 2 and 3).

If No, then the Accused is not guilty of Manslaughter

Last updated: 14 December 2010

7.2.3 Negligent Manslaughter

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Scope

1. This topic only addresses negligent manslaughter. For information concerning other forms of manslaughter, see:
    - 7.2.2 Manslaughter by Unlawful and Dangerous Act;
    - 8.12 Provocation;[440]
    - 8.13 Suicide Pact.

The Elements

2. Manslaughter is a common law offence. One form of manslaughter is by criminal negligence. This form of manslaughter has the following four elements, each of which the prosecution must prove beyond reasonable doubt:
    i) The accused owed the victim a duty of care;
    ii) The accused breached that duty by criminal negligence;
    iii) The act which breached the duty of care was committed consciously and voluntarily;
    iv) The accused's breach of the duty caused the victim's death (*R v Sood (Ruling No 3)* [2006] NSWSC 762).
3. The prosecution does not need to establish any element of malice to prove negligent manslaughter (*R v Lavender* (2005) 222 CLR 67).

[440] While provocation has been abolished as a partial defence to murder (*Crimes Act 1958* s 3B), it remains available as a partial defence for offences alleged to have been committed prior to 23 November 2005.

4. The prosecution does not need to establish that the accused's actions were unlawful. This is one of the differences between negligent manslaughter and unlawful and dangerous act manslaughter (*Wilson v R* (1992) 174 CLR 313).

The accused owed a duty of care

5. The first element the prosecution must prove is that the accused owed the victim a duty of care (*Nydam v R* [1977] VR 430).
6. Only a legal duty of care can give rise to liability for manslaughter. Moral duties, such as the obligation to help a stranger in distress or inform emergency services about a fire, are not relevant for this offence (*R v Taktak* (1988) 14 NSWLR 226).

When Does the Accused Owe a Duty of Care?

Duty to Avoid Harming Others

7. The common law imposes a general duty on all people who are doing a dangerous act, or who have charge of anything dangerous, to take ordinary precautions to avoid harming other people (see *R v Doherty* (1887) 16 Cox CC 306; *Callaghan v R* (1952) 87 CLR 115).

Duty to Act (Omissions)

8. While the accused has a duty to take care to avoid committing harmful actions, he or she will generally not have a legal duty to act in a particular manner. For example, he or she would usually not be legally required to rescue a stranger who is in danger (*R v Rao* [1999] ACTSC 132).
9. However, there are a number of broad reasons why the accused may have a duty to act in a certain way:

    i) Due to his or her relationship with the victim (including any contractual relationship);[441]

    ii) Due to a statutory obligation;

    iii) Due to the accused voluntarily assuming a duty to act; or

    iv) Due to the accused wrongfully placing a person in danger (*Jones v United States of America* 308 F 2d 307 (1962); *R v Taktak* (1988) 14 NSWLR 226; *R v Reid* (2010) 29 VR 446).[442]

Relationship duties

10. The accused may have a duty to act in a certain way due to his or her relationship with the victim. For example:

    - A person standing *in loco parentis* of an infant or child owes a duty to protect the infant or child and provide adequate food, shelter, warmth and medical care. This includes a duty to intervene to stop acts of violence against the infant or child (*R v Clarke & Wilton* [1959] VR 645; *R v Taktak* (1988) 14 NSWLR 226; *R v Nicholls* (1874) 13 Cox CC 75; *H Ltd v J* (2010) 107 SASR 352; *Reynolds & Melville v R* [2008] NTSC 30; *R v Russell* (1933) VLR 59).

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[441] Where the relationship arises out of a contract, see *Cittadini v R* [2009] NSWCCA 302; *R v Instan* [1893] 1 QB 450; *R v Marriott* (1838) 8 C & P 425.

[442] In some cases, failure to comply with a duty to act may found liability for murder (e.g. where the accused intended, by his or her failure, to kill or really seriously injure the victim) (see *R v Taber* (2002) 56 NSWLR 443; *R v Phillips* (1971) 45 ALJR 467; *R v Gibbons & Proctor* (1918) 13 Cr App R 134).

- Those who live together as domestic partners (including husbands, wives and de facto partners) owe each other a duty to provide care if the other person is left helpless or unable to care for himself or herself due to injury or illness (*R v Reid* (2010) 29 VR 446).
- Where there is a relationship of protector and protected, and the protector knows that the protected person is in peril, the protector must take steps to rescue the protected person. However, the protector does not need to jeopardise his or her own life (*People v Beardsley* (1907) 113 NW 1128, quoted in *R v Taktak* (1988) 14 NSWLR 226).
- A person who has imprisoned or otherwise rendered a person helpless (e.g. a prison warden) is under a duty of care towards that person (*R v Shepherd* (1862) Le & Ca 147).

Statutory duties

11. Parliament may create a duty of care to take certain acts or avoid specified omissions. The range of possible statutory duties is beyond the scope of this topic.

Voluntarily assumed duties

12. The accused may voluntarily assume a duty to care for a person who is helpless or otherwise unable to care for himself or herself due to age or infirmity. In such circumstances the accused must provide competent care (*R v Stone & Dobinson* [1977] QB 354; *R v Taktak* (1988) 14 NSWLR 226; *R v Hall* [1999] NSWSC 738; *H Ltd v J* (2010) 107 SASR 352).
13. Before a voluntarily assumed duty of care will arise, the prosecution must prove that the accused isolated the victim in such a way that others could not render assistance. It is not necessary, however, to prove that the victim was isolated for the purpose of preventing others from assisting (see *R v Stone & Dobinson* [1977] QB 354; *R v Taktak* (1988) 14 NSWLR 226; *R v Rao* [1999] ACTSC 132. But c.f. *R v Hall* [1999] NSWSC 738; *R v Burns* [2009] NSWDC 232).
14. A duty may be assumed by making some efforts to care for the person, such as providing meals, or making ineffectual attempts to obtain medical assistance (see *R v Stone & Dobinson* [1977] QB 354).

Wrongful Creation of Danger

15. If the accused deliberately commits a wrongful act that places another person in danger, he or she owes that person a duty to take reasonable steps to render assistance and redress the danger (*R v Reid* (2010) 29 VR 446; *R v Lawford* (1993) 61 SASR 542; *R v Taber* (2002) 56 NSWLR 443; *R v Phillips* (1971) 45 ALJR 467).

Content of the Duty of Care

16. It can be seen from the sections above that the content of the duty of care is defined by the circumstances. For example:
    - The duty a parent owes a child is to protect him or her, and to provide adequate food, shelter and warmth;
    - The duty owed by a person who creates a danger is to take reasonable steps to redress the danger.
17. Where the accused is a member of a profession requiring particular skill or knowledge (such as a doctor), he or she owes a duty to exercise the skill of a reasonably competent member of that profession. He or she is not required to perform at the level expected of the most skilled member of that profession (*R v Bateman* (1925) 19 Cr App R 8; *R v Adomako* [1995] 1 AC 171).

The accused breached the duty by criminal negligence

18. The second element the prosecution must prove is that the accused breached the duty of care by criminal negligence (*Nydam v R* [1977] VR 430; *R v Osip* (2000) 2 VR 595; *Wilson v R* (1992) 174 CLR 313).

19. This requires the accused's act or omission to have fallen so far below the standard of care a reasonable person would have exercised, and to have involved such a high risk of death or really serious injury, that the act or omission merits criminal punishment (*R v Lavender* (2005) 222 CLR 67; *Wilson v R* (1992) 174 CLR 313; *Andrews v DPP* [1937] AC 576; *R v Bateman* (1925) 19 Cr App R 8; *R v A C Hatrick Chemicals* (1995) 152 A Crim R 384; *R v Richards & Gregory* [1998] 2 VR 1).

20. This is the same degree of negligence required to establish negligently causing serious injury (*R v Shields* [1981] VR 717; *R v De'Zilwa* (2002) 5 VR 408). For the offence of culpable driving by gross negligence to be committed, a jury does not need to consider whether an accused's act or omission merits criminal punishment (*Bouch v R* [2017] VSCA 86).

21. Whether this means that the degree of negligence required to establish that offence differs from that required to establish the offence of manslaughter by criminal negligence or negligently causing serious injury is not clear. Where relevant, judges should seek submissions from parties as to whether the degree of negligence required for each of these offences differs.

22. The test for criminal negligence imports a community standard, which determines whether the breach was sufficiently severe to warrant criminal punishment (*R v Mitchell* [2005] VSCA 304).

23. Negligence that would support civil liability (i.e., that the accused fell short of the standard of care that would have been taken by a reasonable person in the circumstances) is not sufficient to establish criminal negligence. The prosecution must establish such a high degree of negligence, involving disregard for the life and safety of others, as to amount to a crime and be deserving of punishment (*Nydam v R* [1977] VR 430; *Andrews v DPP* [1937] AC 576; *R v Bateman* (1925) 19 Cr App R 8; *Cittadini v R* [2009] NSWCCA 302; *R v Wright* [1999] 3 VR 355).

24. A "significant departure" from the standard of care required is not sufficient. Judges should ensure that their directions do not lower the degree of negligence required (see *R v De'Zilwa* (2002) 5 VR 408).

25. While a test of liability that requires proof that the act or omission merits criminal punishment involves a degree of circularity, the question is one of degree that cannot be defined more precisely (*R v Adomako* [1995] 1 AC 171).

26. The nature of the duty of care may be relevant when determining the seriousness of any breach. For example, where the duty arises because of the accused's deliberate wrongful conduct (e.g. where the accused injured the victim), the accused's obligation to remedy the danger created may be quite strict (e.g. he or she may be required to secure medical attention, even if the victim initially refuses). A failure to act accordingly may be viewed as a serious breach (see *R v Reid* (2010) 29 VR 446).

27. In directing the jury on the degree of negligence required, a comparison between civil and criminal negligence is often helpful (*R v Shields* [1981] VR 717).

Objective nature of criminal negligence

28. The test for criminal negligence is objective. The jury must compare the acts or omissions of the accused against the behaviour expected of a hypothetical reasonable person in the situation of the accused (*R v Richards & Gregory* [1998] 2 VR 1; *R v Lavender* (2005) 222 CLR 67; *R v Sam* [2009] NSWSC 803).

29. The element will only be met if a reasonable person would have realised that the accused's acts or omissions created a high risk of death or really serious injury (*R v Richards & Gregory* [1998] 2 VR 1; *R v Lavender* (2005) 222 CLR 67; *R v Sam* [2009] NSWSC 803).

30. As the test for negligence is objective, the prosecution does not need to prove that the accused intended to cause death or really serious injury, or that the accused knew that his or her conduct would likely cause death or really serious injury. Those states of mind would establish murder (*R v Lavender* (2005) 222 CLR 67; *Nydam v R* [1977] VR 430; *R v Sam* [2009] NSWSC 803).

31. The accused's belief or opinion about whether he or she was in breach of the duty of care is not relevant. The jury must make its own assessment of whether the acts or omissions were negligent, based on the information available to a reasonable person in the position of the accused at the time of the events in question (*R v Lavender* (2005) 222 CLR 67; *R v Reid* (2010) 29 VR 446; *R v Taylor* (1983) 9 A Crim R 358).[443]

32. It does not matter whether or not the accused was capable of meeting the relevant standard. Matters such as the accused's inability to meet the standard, or deficiencies in the accused's reasoning processes, are relevant only to sentencing (*R v Richards & Gregory* [1998] 2 VR 1).

33. In some cases, common practice within a field may be relevant to determining whether the accused breached the standard of care by acting in the way that he or she did. However, there are occasions when common industrial practice is negligent (see *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317; *Cittadini v R* [2009] NSWCCA 302).

The reasonable person in the position of the accused

34. The test for criminal negligence requires the jury to determine how the reasonable person of ordinary fortitude and strength of mind, *in the position of the accused,* would have acted in the circumstances. In making this determination, the reasonable person should be considered to be the same age as the accused, and to have any specialised knowledge and experience that the accused had (*R v Edwards* [2008] SASC 303; *R v Taylor* (1983) 9 A Crim R 358; *R v Sam* [2009] NSWSC 803; *R v Lavender* (2005) 222 CLR 67).

35. However, the reasonable person should not be considered to have any of the accused's deficiencies in reasoning capabilities, or to have been suffering from any injuries that affected the accused's reasoning processes at the relevant time, such as concussion (*R v Edwards* [2008] SASC 303).

36. The reasonable person also does not share the accused's beliefs, values or attitudes (*R v Sam* [2009] NSWSC 803).

Guard against risks of hindsight

37. The mere fact that a person to whom the accused owed a duty of care died does not mean the accused must have been criminally negligent. A duty of care to avoid a particular risk is not a duty to ensure that the risk does not eventuate (*Cittadini v R* [2009] NSWCCA 302; *Gordon v Ross* [2006] NSWCA 157; *R v Smith* [2006] VSCA 92).

38. It is therefore important to ensure that the jury does not reason that the accused must have been criminally negligent because otherwise the event in question would not have occurred. The jury should take care not to use the benefits of hindsight when determining the degree of negligence (see *Cittadini v R* [2009] NSWCCA 302; *Gordon v Ross* [2006] NSWCA 157; *R v Smith* [2006] VSCA 92).

Negligence and recklessness

39. The difference between negligent manslaughter and reckless murder lies in the state of mind of the accused and the degree of foresight regarding the consequences of his or her actions, rather than in the degree of carelessness (*Pemble v R* (1971) 124 CLR 107 (Menzies J)).

40. While, in ordinary language, the type of behaviour necessary to meet the test of criminal negligence might be described as "reckless", judges should avoid using that term because of the risk of confusion that arises from the meaning of recklessness in the law (*R v Adomako* [1995] 1 AC 171; *La Fontaine v R* (1976) 136 CLR 62 (Gibbs J)).

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[443] However, the accused's subjective beliefs may be relevant for certain defences, such as self-defence and emergency (see *R v Edwards* [2009] SASC 233).

The relevant act was voluntary

41. The third element that the prosecution must prove is that the act which breached the duty of care was committed consciously, voluntarily and deliberately (*Ryan v R* (1967) 121 CLR 205; *R v Haywood* [1971] VR 755; *R v Winter* [2006] VSCA 144; *R v Williamson* (1996) 67 SASR 428).

42. While the prosecution does not need to prove that the accused intended to cause death, they must still prove that the relevant act was committed consciously and voluntarily (*R v Haywood* [1971] VR 755; *R v Vollmer* [1996] 1 VR 95).

43. While the law predominantly focuses on the need for an *act* to be voluntary, there may be cases where the defence argues that an omission is involuntary. In such cases, the judge may need to direct the jury on the need to prove that the omission was conscious, voluntary and deliberate. Alternatively, the judge may identify an act within the omission and may instruct the jury to consider whether the accused committed that act consciously, voluntarily and deliberately.

44. For further information on voluntariness, see 7.2.1 Intentional or Reckless Murder.

The breach of the duty of care caused the victim's death

45. The fourth element that the prosecution must prove is that the breach of the duty of care caused the victim's death (*R v Adomako* [1995] 1 AC 171; *Cittadini v R* [2009] NSWCCA 302).

46. As the prosecution must prove that it was the accused's *criminal breach of the duty of care* that caused the death, it is important that the judge precisely identify the act or omission alleged to have caused the victim's death (*Cittadini v R* [2009] NSWCCA 302; *Justins v R* (2010) 79 NSWLR 544).

47. Where the evidence reveals more than one possible breach of duty, the judge must decide, based on the factual circumstances, whether the separate breaches may be aggregated into a single breach for the purposes of causation (*R v Pace & Conduit (Ruling No 2)* [2008] VSC 308).

48. For further information about causation, see 7.1.2 Causation and 7.2.1 Intentional or Reckless Murder.

Defences

49. The prosecution must disprove any relevant defences, including self-defence, duress and emergency (*R v Edwards* [2009] SASC 233. See also *Crimes Act 1958* ss 9AE, 9AG, 9AI).

50. Civil law principles relating to contributory negligence, consent and voluntary assumption of risk do not provide a defence to a charge of negligent manslaughter. The jury may, however, take the victim's conduct into account when determining whether the second element has been met (i.e., whether the accused acted with criminal negligence) (*R v Cato* [1976] 1 WLR 110; *R v Edwards* [2008] SASC 303. But c.f. *R v Fleeting* [*No 1*] [1977] 1 NZLR 343; *R v Storey* [1931] NZLR 417; *R v Jones* [1870] 11 Cox CC 544).

51. In some cases the accused will allege that he or she had an honest and reasonable belief in a set of facts which, if true, would have rendered the conduct innocent. In such cases, the prosecution does *not* need to disprove this allegation. The issue of an accused's honest and reasonable mistake of fact should be considered as part of the second element (i.e., as part of the jury's determination of whether the accused's acts or omissions were criminally negligent) (*R v Osip* (2000) 2 VR 595; *R v Lavender* (2005) 222 CLR 67).

52. Where manslaughter is left as an alternative to murder and the issue of self-defence arises, the jury may need to consider self-defence separately for each offence. The fact that the jury excludes self-defence as a defence to murder does not invariably mean that they must also exclude it as a defence to manslaughter.

53. The judge may therefore need to address the issues concerning self-defence that arise in relation to murder and manslaughter separately. See 8.1 Statutory Self-defence (From 1/11/14), 8.2 Statutory Self-defence (Pre-1/11/14) and Defensive Homicide and 8.3 Common Law Self-defence for further information.

Accessorial Liability

54. The ordinary principles of accessorial liability are capable of applying to manslaughter (*Giorgianni v R* (1985) 156 CLR 473; *R v Chai* (2002) 187 ALR 436; *Markby v R* (1978) 140 CLR 108). See Part 5: Complicity for information concerning these principles.

Alternative Verdicts

Intentional or reckless murder

55. A judge must leave manslaughter as an alternative verdict to intentional or reckless murder if there is a "viable" case available on the evidence. See 3.10 Alternative Verdicts.

56. The jury may only return a verdict on manslaughter as an alternative to murder if it unanimously agrees that the accused is not guilty of murder. In the event of a disagreement on the verdict for murder, the jury cannot return a verdict of "at least manslaughter" (*Stanton v R* (2003) 198 ALR 41; *Gammage v R* (1969) 122 CLR 444; *R v McCready* [1967] VR 325).

Unlawful and dangerous act manslaughter

57. The prosecution does not need to specify a particular form of manslaughter in a charge. That is a matter for particulars. A single charge of manslaughter may encompass both unlawful and dangerous act manslaughter and negligent manslaughter without raising duplicity issues (see, e.g. *R v Cramp* (1999) 110 A Crim R 198; *R v Isaacs* (1997) 47 NSWLR 374).

58. The judge should not direct the jury on both unlawful and dangerous act manslaughter and negligent manslaughter if the issues are relevantly identical and there is a risk that the directions would confuse the jury. Such confusion is particularly likely when the judge leaves manslaughter as an alternative to reckless murder. The judge should generally resolve this situation by directing on one form of manslaughter the jury can understand and apply (*R v Windsor* [1982] VR 89; *R v Edwards* [2009] SASC 233).

59. In determining which form(s) of manslaughter to leave to the jury, the judge should consider whether there is a practical prospect of the jury reaching different conclusions on the two forms of manslaughter, and whether omitting a form of manslaughter may prejudice the prosecution or the accused (*R v Windsor* [1982] VR 89).

Manslaughter as an accessory

60. The obligation to leave a viable case of manslaughter to a jury as an alternative to a charge of murder includes an obligation to instruct the jury on appropriate forms of accessorial liability for manslaughter (*R v Makin* (2004) 8 VR 262. See also *R v Panozzo* [2007] VSCA 245; *R v Nguyen* (2010) 242 CLR 491).

61. Judges must be careful to only leave appropriate forms of accessorial liability to the jury. Leaving an inappropriate form of accessorial liability may deprive the accused of an opportunity of being acquitted of murder and convicted on a form of manslaughter that is reasonably open on the evidence (*R v Makin* (2004) 8 VR 262. See also *R v Panozzo* [2007] VSCA 245). See Part 5: Complicity for information concerning the different forms of accessorial liability.

Manslaughter and Unanimity

62. In some cases it may be necessary to direct the jury that they must be unanimous about a particular matter (in addition to being unanimous about whether or not the accused is guilty of manslaughter).

63. In addressing this issue, a distinction is drawn between three types of cases:

    i) Those in which alternative *legal bases* of liability are proposed by the prosecution;

    ii) Those in which alternative *factual bases* of liability are proposed by the prosecution; and

    iii) Those in which one offence is charged, but *a number of discrete acts* are relied upon as proof, any of which would entitle the jury to convict (*R v Walsh* (2002) 131 A Crim R 299; *R v Klamo* (2008) 18 VR 644; *R v Cramp* (1999) 110 A Crim R 198).

64. While a specific unanimity direction will not be required in the first type of case, such a direction will be necessary in the second and third types. For more information on this topic and sample charges, see Unanimous and Majority Verdicts.

Last updated: 7 June 2017

7.2.3.1 Charge: Negligent Manslaughter

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This charge should be used if the accused is charged with negligent manslaughter by a positive act.

The charge will need to be adapted if the charge is based on principles of accessorial liability, the jury must consider multiple bases of manslaughter, the charge is left as an alternative to murder or the charge is based on a negligent omission.

I must now direct you about the crime of manslaughter. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – that the accused owed the victim a duty of care.

Two – that the accused breached that duty by being criminally negligent.

Three – that the act which breached the duty of care was committed consciously, voluntarily and deliberately.

Four, that the breach of duty caused the victim's death.

I will now explain each of these elements in more detail.[444]

Duty of Care

The first element that the prosecution must prove is that the accused owed the victim a duty of care.

[444] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

The law imposes a duty [*describe class of persons covered by the duty and the content of the duty*,[445] *e.g.* "on a parent to provide for the welfare of his/her child" or "on a person who is doing a dangerous act to take ordinary precautions to avoid harming others"].

[*If this element is not in issue, add the following shaded section.*]

It is not disputed that NOA owed a duty of care to NOV because [*describe basis for the duty, e.g.* "s/he was his/her parent"]. You should therefore have no difficulty finding this element proven.

[*If this element is in issue, add the following shaded section.*]

The prosecution argued that NOA owed NOV a duty because [*describe basis for the duty and summarise prosecution evidence and/or arguments*]. In response, the defence argued that [*summarise relevant defence evidence and/or arguments*].

I direct you as a matter of law that if you are satisfied beyond reasonable doubt that [*describe findings of fact required to establish the duty*], then NOA owed NOV a duty to [*describe content of the duty*]. If you are not satisfied that this was the case, then you must find NOA not guilty of manslaughter.

Criminal Negligence

The second element that the prosecution must prove is that the accused breached the duty of care by being criminally negligent.

A person acts with "criminal negligence" if his/her acts fell so far short of the standard of care a reasonable person would have exercised, and involved such a high risk of death or really serious injury, that it deserves criminal punishment.

This requires you to compare NOA's conduct with the "standard of care" that a reasonable person would have exercised in the circumstances. Precisely what that standard would have been is for you to decide, taking into account all of the circumstances, such as [*describe relevant factors*].

This is an objective test. That means that the prosecution does not need to establish that NOA intended to cause death or really serious injury or that s/he realised that his/her conduct was negligent. What matters is what a reasonable person in his/her situation would have known and done.

For this element to be met, you must find that the reasonable person in the accused's situation would have realised that his/her conduct created a high risk of death or really serious injury. You must also find that, when compared against the standard of care that a reasonable person would have exercised in the circumstances, NOA's conduct fell so far short that it deserves criminal punishment.

In making your determination, you should consider the reasonable person to be the same age as the accused, to have any specialised knowledge and experience the accused had, and to be of ordinary strength of mind. In particular, [*describe characteristics of the accused that are relevant to the reasonable person, including training and experience*].

[*If there are qualities of the accused that are not relevant, add the shaded section below.*]

However, the reasonable person is not [*describe any adverse traits of the accused that are irrelevant, such as intoxication, concussion or carelessness*].

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[445] See 7.2.3 Negligent Manslaughter for information concerning the people to whom the accused owes a duty of care and the content of the duty.

In considering this question, remember that people do not always act perfectly. Even the most careful person can occasionally lose attention for a moment, or make minor mistakes. This offence is not concerned with minor breaches of the expected standard of care, even if they result in someone being hurt. While that might establish negligence in a civil case, it is not sufficient to establish guilt in a criminal case. For a person to be guilty of negligently causing serious injury, more is required – NOA's conduct must have been "criminally negligent".

[*Summarise relevant evidence and/or arguments.*]

Voluntariness

The third element that the prosecution must prove is that the accused's act which breached the duty of care was committed consciously, voluntarily and deliberately. These words each have a special meaning in law, which I will briefly explain.

The term "conscious" excludes the acts of an unconscious person, such as a sleepwalker, or a person rolling over in bed.

The term "voluntary" directs you to the requirement that the act which killed the deceased must be a "willed" act, that is, one resulting from the control by the accused of his/her own actions. This excludes the acts of a person operating in one of a number of rare mental states where the mind loses control of the body's actions.

The term "deliberate" excludes accidental acts, such as the consequences of falling over or fumbling an item.

[*If the case involves an accident and the element is not in issue, add the following shaded section.*]

In this case, you have heard [counsel/witnesses] describe the [*describe relevant event, e.g.* 'death of NOV'] as an accident. For the purpose of this third element, you must look at [*describe relevant voluntary act*, *e.g.* 'whether the accused took proper safety precautions'], rather than [*describe relevant accident, e.g.* 'whether NOV falling through the roof *was* an accident']. There is no issue that [if/when] NOA [*describe alleged breach of the duty of care*] s/he did so consciously, voluntarily and deliberately, so you should have no difficulty finding this element proven.

[*If this element is not in issue, add the following shaded section.*]

There is no issue that [if/when] NOA [*describe alleged breach of the duty of care*] s/he did so consciously, voluntarily and deliberately, so you should have no difficulty finding this element proven.

[*If voluntariness is in issue, add the following shaded section.*]

The defence argued[446] that the prosecution has failed to prove that [*describe alleged breach of the duty of care*] was [*select term(s), e.g.* conscious, voluntary, deliberate].

The defence submitted that this breach was committed [*describe and discuss the relevant form of involuntary conduct raised as an issue in the trial, such as reflex acts; physically compelled acts; acts performed in an automatic state*]. The prosecution denied that this was the case. [*Summarise relevant prosecution arguments and/or evidence.*]

It is for the prosecution to prove, beyond reasonable doubt, that the act which breached the duty of care was committed consciously, voluntarily and deliberately. If you are not satisfied that this was the case, then you must find NOA not guilty of manslaughter.

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[446] If the defence did not raise the issue of voluntariness, but it arises on the evidence, this section will need to be modified accordingly.

Cause of death

The fourth element that the prosecution must prove is that the accused's breach of the duty of care caused the victim's death.

For this element to be met, you must determine whether any criminal negligence you found for the purpose of the second element was a substantial or significant cause of NOV's death. It does not need to be the only cause, or the direct or immediate cause.

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

[*Summarise relevant evidence and/or arguments*.]

Summary

To summarise, before you can find NOA guilty of manslaughter the prosecution must prove to you beyond reasonable doubt:

One – that NOA owed NOV a duty of care; and

Two – that NOA breached that duty of care by being criminally negligent; and

Three – that the act which breached the duty of care was committed consciously, voluntarily and deliberately; and

Four – that NOA's breach of the duty caused NOV's death.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of manslaughter.

Last updated: 3 December 2012

7.2.3.2 Checklist: Negligent Manslaughter

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused owed the victim a duty of care; and
2. The accused breached the duty of care by being criminally negligent; and
3. The act which breached the duty of care was committed consciously, voluntarily and deliberately; and
4. The accused's breach of the duty of care caused the victim's death.

Duty of Care

1. Did the accused owe the victim a duty of care?

If Yes, then go to 2.

If No, then the Accused is not guilty of Manslaughter

Criminal Negligence

2. Did the accused breach the duty of care by being criminally negligent?

*Consider – **Did the accused's conduct fall so far short of the standard of care a reasonable person would have exercised, and hold such a high risk of death or really serious injury, that it deserves criminal punishment?***

If Yes, then go to 3.

If No, then the Accused is not guilty of Manslaughter

Conscious and Voluntary

3. Was the accused's act which breached the duty of care committed consciously, voluntarily and deliberately?

If Yes, then go to 4.

If No, then the Accused is not guilty of Manslaughter

Causation

4. Was the accused's criminal negligence a substantial or significant cause of the victim's death?

If Yes, then the accused is guilty of Manslaughter (as long as you have also answered Yes to questions 1, 2 and 3).

If No, then the Accused is not guilty of Manslaughter

Last updated: 4 March 2011

7.2.4 Defensive Homicide

Defensive Homicide is an offence contrary to s 9AD (now repealed) of the *Crimes Act 1958*, which applies to offences alleged to have been committed on or after 23 November 2005 and before 1 November 2014.

Defensive Homicide is effectively an offence of murder committed in self defence, where the accused had no reasonable grounds for believing it was necessary to kill in self defence.

In theory Defensive Homicide could be charged as a primary offence upon a trial presentment. However in practice it will generally only be raised before juries as an alternative to murder. As a result, Defensive Homicide is not considered separately in this charge book.

Instead, for the elements of Murder see:

- 7.2.1 Intentional or Reckless Murder

For Charges, Checklists and commentary on Defensive Homicide see:

- 8.2 Statutory Self-defence (Pre-1/11/14) and Defensive Homicide

7.2.5 Culpable Driving Causing Death

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Overview

1. The offence of culpable driving causing death is created by *Crimes Act 1958* s 318(1).

2. The offence has the following three elements,[447] each of which the prosecution must prove beyond reasonable doubt:

   (a) The accused was driving a motor vehicle;

   (b) The driving was culpable; and

   (c) The culpable driving caused the death of another person.

   These elements are addressed in turn below.

Driving a Motor Vehicle

3. For the first element to be met, the jury must be satisfied that:

   - The accused was *driving*; and
   - The vehicle the accused was driving was a *motor vehicle*.

"Driving"

4. "Drive" is an ordinary English word. There is no exhaustive legal definition of when a person "drives" a motor vehicle (*Tink v Francis* [1983] 2 VR 17).

5. However, before a person can be considered to be driving, he or she must at least be in a position to control the movement and direction of the vehicle (*Tink v Francis* [1983] 2 VR 17).

6. To be "driving", a person must also, generally, have control over the propulsion of the vehicle (*Tink v Francis* [1983] 2 VR 17; *Davies v Waldron* [1989] VR 449).

7. In most cases it will be clear whether or not the accused was "driving". However, issues may arise where:

   - The vehicle was not fully operational at the relevant time (e.g. the engine, steering or brakes were not working);
   - The vehicle was not being propelled by its own motor force (e.g. the car was being towed or was coasting downhill); or
   - The vehicle was stationary at the relevant time (e.g. the vehicle was stopped at traffic lights).

8. In each of these cases the accused may or may not have been driving, depending on the degree of control the accused had over the propulsion, movement and direction of the vehicle. See *Tink v Francis* [1983] 2 VR 17 for a detailed analysis of this issue.

9. Whether or not the accused was "driving" a motor vehicle in such circumstances will be a question of fact for the jury to determine, taking into account all of the surrounding circumstances (*Pullin v Insurance Commissioner* [1971] VR 263).

"Motor Vehicle"

10. A "motor vehicle" is a vehicle that is used, or intended to be used, on a highway, and that is built to be propelled by a motor that forms part of the vehicle but does not include:

    - A vehicle intended to be used on a railway or tramway; or

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[447] In some cases the prosecution will also have to prove that the accused's conduct was voluntary – see below.

- A motorised wheel-chair capable of a speed of not more than 10 kilometres per hour which is used solely for the conveyance of an injured or disabled person; or
- A vehicle that is not a motor vehicle by virtue of a declaration (*Road Safety Act 1986* s 3; *Crimes Act 1958* s 2A).

11. This definition requires the vehicle to be one that is *normally* used on a highway. It is not enough that the vehicle, at the time in question, was in use on a highway (*Smith v Transport Accident Commission* (2005) 12 VR 277; *Transport Accident Commission v Serbec* (1993) 6 VAR 151; *Elizabeth Valley Pty Ltd v Fordham* (1970) 16 FLR 459).

Culpable Driving

12. The accused's driving must have been "culpable". This term is defined to mean driving:
    - Recklessly (s 318(2)(a));
    - Negligently (s 318(2)(b));
    - Whilst so affected by alcohol as to be incapable of having proper control of the motor vehicle (s 318(2)(c)); or
    - Whilst so affected by drugs as to be incapable of having proper control of the motor vehicle (s 318(2)(d)).
13. The presentment must specify which of these bases of culpability is alleged against the accused (*Crimes Act 1958* s 318(3)). The presentment may specify more than one basis of culpability (*R v Horvath* [1972] VR 533).
14. These bases of culpability do not create separate offences. While the conduct of the accused may satisfy more than one category, a person who causes the death of another by driving culpably commits only one offence of culpable driving (*R v Beach* (1994) 75 A Crim R 447).
15. Each of these forms of culpability is examined in turn below.

Recklessness

16. A person drives "recklessly" for the purpose of this offence if s/he "consciously and unjustifiably disregards a substantial risk that death of another person or the infliction of grievous bodily harm upon another person may result from his [or her] driving" (*Crimes Act 1958* s 318(2)(a)).
17. This definition of "recklessness" requires the prosecution to prove beyond reasonable doubt that:
    - The accused was aware of a risk that death or grievous bodily harm may result from his or her driving;
    - That risk was substantial rather than remote;
    - The accused consciously disregarded that risk; and
    - The decision to disregard that risk was unjustifiable.
18. If the accused disregarded the risk of harm in order to avoid greater harm, his or her actions may have been "justifiable", and thus not reckless (*R v Lucas* [1973] VR 693).
19. In the law of murder the phrase "really serious injury" has replaced the phrase "grievous bodily harm". While the latter terminology is preserved in *Crimes Act 1958* s 318(2)(a), if used it will commonly be necessary to explain it by reference to the modern phrase. As a result, it should not be a misdirection to simply direct the jury by reference to the risk of causing "really serious injury".

Negligence

20. A person drives "negligently" for the purpose of this offence if s/he "fails unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in all the circumstances of the case" (*Crimes Act 1958* s 318(2)(b)).

21. Historically, deviating from the standard of care to a "gross" degree meant driving in a way that fell so short of the standard of care required, and held such a high risk of death or serious injury, that it merited criminal punishment (*R v De'Zilwa* (2002) 5 VR 408).

22. However, in *King v R* (2012) 245 CLR 588, the High Court questioned whether it was appropriate to ask jurors to consider whether the driving "merits criminal punishment" as part of culpable driving directions (see *King v R*, [45], [49], [68], [69], [83]). The minority (Heydon and Bell JJ) stated that if a judge used this expression in culpable driving directions and omitted it from dangerous driving directions, then juries would erroneously think that dangerous driving is a minor offence. This may affect their assessment of whether the accused was guilty of culpable driving.

23. Subsequently, in *Bouch v R* [2017] VSCA 86, the Court of Appeal expressly stated that directions for culpable driving by gross negligence should not ask jurors to consider whether an accused's driving "merits criminal punishment".

24. The level of negligence required must be of a "high order". It must involve a great falling short of the standard of care that a reasonable person would have exercised in the circumstances and involves a high risk of death or serious injury resulting from the relevant conduct (*Bouch v R* [2017] VSCA 86).

25. As the negligence required must be of a high order and must involve a high risk of death or serious injury, negligence in the form of momentary inattention or a minor lapse of judgment, or negligence that might be the basis for a simple civil claim for monetary compensation, would generally not be enough to support a finding of gross negligence (*Bouch v R* [2017] VSCA 86).

26. While the test for negligence for the purposes of culpable driving by gross negligence is expressed in different terms to the tests for negligence for the offences of manslaughter by criminal negligence (*R v Franks* [1999] 1 VR 518; *R v Shields* [1981] VR 717; *R v De'Zilwa* (2002) 5 VR 408) and negligently causing serious injury (*R v Mitchell* [2005] VSCA 304), this does not mean that the test for each offence is different in substance.

27. It is not certain that the tests for these offences differ in terms of the degree of negligence required for the respective offences to be committed. Given this, where an accused is charged with culpable driving by gross negligence, along with one of these other offences, which expresses the test for negligence in different terms, a judge should seek submissions from counsel as to how to explain the tests to the jury.

28. The test for negligence for the purposes of culpable driving by gross negligence is more serious than the degree of negligence that is required to found liability at civil law (*R v Wright* [1999] 3 VR 355)

29. This is an objective test (*R v Gane* 17/12/1993 Vic CCA). The jury should use their own knowledge and experiences when determining whether the driving was grossly negligent (*R v Stephenson* [1976] VR 376).

30. In making this determination, the jury must consider the driving in light of "all the circumstances of the case". The conditions of the road, and the size and speed of the driver's vehicle, may all be relevant to assessing whether the conduct of the accused was negligent *(R v Rudebeck* [1999] VSCA 155).

31. While adherence to the speed limit (or disregard of that limit) will be relevant, it will not be determinative:

    - Gross negligence is not proven merely by establishing that the accused drove in excess of the speed limit (*R v Dickinson* [2007] VSCA 111);

- The accused may have been grossly negligent even if s/he was driving under the speed limit (*R v Rudebeck* [1999] VSCA 155; *R v Smith* [2006] VSCA 92).

32. The jury does not only need to consider the accused's physical control of the vehicle when determining if the accused was driving negligently. They may also consider the question of whether the accused should have been driving at all in the circumstances. In making this determination, they can take into account factors such as the condition of the vehicle, the time of driving, lighting conditions, heating and ventilation of the vehicle (*Jiminez v R* (1992) 173 CLR 572).

33. The accused may have been grossly negligent if s/he was so fatigued that s/he knew, or ought to have known, that there was an appreciable risk of falling asleep or losing control of the vehicle while driving (*Crimes Act 1958* s 318(2A)). See "Voluntariness" below for a detailed discussion of this issue.

34. Evidence of intoxication may be relevant to the jury's assessment of the accused's negligence. The use of such evidence is not limited to a charge of culpable driving under s 318(2)(c) (*R v Wright* [1999] 3 VR 355).

35. The existence of an external threat may be taken into account in determining the extent of the accused's negligence. An act which may be grossly negligent in the absence of such a threat may be considered to be reasonable (or only marginally negligent) if committed in order to avoid another danger (*R v Lucas* [1973] VR 693; *R v Gane* 17/12/1993 Vic CCA).

36. Not every fatal collision that is attributable to negligent driving involves the degree of negligence required for culpable driving. The law does not require drivers to act with perfect hindsight, or assume that for every accident there must be a remedy (*R v Smith* [2006] VSCA 92).

37. An error of judgment in a situation of sudden crisis, or a failure to successfully take evasive action, does not constitute gross negligence (*R v Mitchell* [2005] VSCA 304; *R v Jiminez* (1992) 173 CLR 572).

38. The requirement that the accused "unjustifiably" failed to observe the relevant standard of care does not create a separate step in the reasoning process. The presence or lack of justification for the accused's acts will simply be one factor to take into account in determining if s/he had acted with gross negligence in the circumstances (*R v Shields* [1981] VR 717; *R v Lucas* [1973] VR 693).

39. The defence of honest and reasonable mistake of fact is not relevant to this form of culpable driving. The jury should not be directed on this matter, as it is likely to result in confusion (*R v Franks* [1999] 1 VR 518).

Accused's Mental State is of Limited Relevance

40. The test for "gross negligence" is an objective one, to be determined by comparing the accused's actions with the standard of care expected of the reasonable person. The accused's state of mind (whether established by admissions or inference from post-offence conduct) will therefore only be relevant insofar as it provides evidence concerning the *circumstances* of the offence. It cannot establish that the accused knew s/he had deviated from the standard of care to the requisite extent, as that is a jury issue (see *R v Dickinson* [2007] VSCA 111).

41. Evidence that the accused was aware that s/he was taking a risk by driving in the circumstances, but chose to disregard that risk (i.e. s/he acted "recklessly"), may be of assistance in proving that the accused acted negligently. However, such behaviour is not a requirement of culpable driving by gross negligence (*R v Horvath* [1972] VR 533).

Charging the Jury about Gross Negligence

42. A trial judge, in directing a jury, should confine him or herself to the language of the statute. The judge should direct a jury in such terms. Thus, a jury should be directed that a person drives "negligently" for the purpose of the offence of culpable driving causing death if that person fails unjustifiably and to a gross degree to observe the standard of care that a reasonable person would have observed in all of the circumstances (*Bouch v R* [2017] VSCA 86).

43. As to the meaning of the word "gross", juries should be told that "gross" is an ordinary English word that should be given its ordinary meaning (*R v De'Zilwa* (2002) 5 VR 408; *Bouch v R* [2017] VSCA 86).

44. The jury may be invited to compare the standard required for gross negligence with the civil standard of negligence (which only requires that the accused fall short of the standard of care that would be taken by a reasonable person in the circumstances of the accused) (*Bouch v R* [2017] VSCA 86; *R v Lucas* [1973] VR 693; *R v De'Zilwa* (2002) 5 VR 408; *R v Gane* 17/12/1993 Vic CCA).

45. While attempts to further explain the meaning of "gross" are not forbidden, they may be unwise. Synonyms like "glaring", "flagrant" or "monstrous" should be avoided (*Bouch v R* [2017] VSCA 86).

46. Because "gross" is not a commonly used word in contemporary society, except in a vernacular and imprecise sense, juries often ask for an explanation of its meaning (*Bouch v R* [2017] VSCA 86).

47. The required negligence must be of a high order, involving a great falling short of the standard of care that a reasonable person would have exercised in all the circumstances and involving a high risk that death or serious injury would follow from the relevant conduct. The kind of negligence that might comprise momentary inattention or a minor error of judgment, or which might be the basis for a simple civil claim for monetary compensation, would usually not be enough to support a finding of gross negligence (*Bouch v R* [2017] VSCA 86).

48. The matters which might constitute negligence of the high order that is needed for conviction should be pointed out to the jury (*Bouch v R* [2017] VSCA 86).

49. A "significant departure" from the standard of care required is not sufficient. Judges should be careful that the language of their direction does not deviate from the degree of negligence stipulated by the Act (*R v De'Zilwa* (2002) 5 VR 408).

50. When charging the jury, the circumstances alleged to have given rise to the negligence (e.g. speed, visibility, tiredness) should be clearly identified (*R v Poduska* [2008] VSCA 147; *R v Franks* [1999] 1 VR 518; *R v Leusenkamp* [2003] VSCA 193).

Intoxication and Drugs

51. The accused will have driven culpably if s/he drove whilst so affected by alcohol (s 318(2)(c)) or drugs (s 318(2)(d)) as to be incapable of having proper control of the motor vehicle.

52. While sections 318(2)(c) and (d) are independent, these two forms of culpability are fundamentally similar. They require the prosecution to prove that, at the time of driving:

    - The accused was under the influence of alcohol/drugs; and
    - The extent to which the accused was affected by alcohol/drugs was so great as to render him/her incapable of exercising proper control over the vehicle (*R v Ciantar* (2006) 16 VR 26).

53. It is not necessary to show that the accused was incapable of exercising proper control *at the time of the accident*. It is sufficient if, at any point during the drive preceding the accident, the accused was incapable of exercising proper control over the vehicle (*R v Burnside* [1962] VR 96).

54. When charging the jury, the judge should clearly identify the matters relied upon by the prosecution to establish that the accused did not have proper control of the vehicle (*R v Poduska* [2008] VSCA 147).

55. To determine whether the accused was incapable of exercising proper control, the jury should compare the capacity of the accused to control the vehicle against the capacity of a reasonably competent driver. The specifics of the standard are a matter for the jury (*R v Ciantar* (2006) 16 VR 26).

56. It is not sufficient to establish merely that the accused was affected by drugs or alcohol. It is necessary to show that s/he was influenced to the required extent (*R v Hawkes* (1931) 22 Cr App R 172).

57. Evidence of the percentage of alcohol in the accused's blood may be used by the jury in assessing the extent to which s/he was influenced by alcohol (*R v Cheer* [1979] VR 541).

58. It will not, however, be sufficient simply to show that the accused had a proscribed blood alcohol concentration. Such statutory standards cannot establish the inability of the accused to properly control the vehicle (see, e.g. *R v Lucas* [1973] VR 693).

59. Everybody's driving capacity is detrimentally affected by alcohol. The extent of this effect is a matter for the jury. They are not required to assume that an experienced or expert driver is less affected by alcohol than an inexperienced driver (*R v Ciantar* (2006) 16 VR 26).

60. It is not necessary to show that the accused was "drunk" in the popular sense (*R v Burnside* [1962] VR 96).

The Culpable Driving "Caused" the Death

61. The third element that the prosecution must prove is that the culpable driving of the accused caused the death of another person.

62. There are two aspects to this element:

    - The culpable driving must have *caused* the victim's death; and
    - The victim must have been a "person".

    Each of these issues is addressed in turn below.

Causation

63. For the accused's culpable driving to have caused the victim's death, it must have "contributed significantly" to the death, or been a "substantial and operating cause" of it (*Royall v R* (1991) 172 CLR 378; *R v Rudebeck* [1999] VSCA 155).

64. Precisely which act of the accused must have caused the death differs depending on whether the accused has been charged with driving recklessly or negligently (ss 318(2)(a) or (b)), or driving under the influence of alcohol or drugs (ss 318(2)(c) or (d)).

65. When the accused is charged with driving recklessly or negligently, the *alleged reckless or negligent act* must have been the substantial and operating cause of the events leading to the death of the deceased (*R v Ciantar* (2006) 16 VR 26; *R v Heron* [2003] VSCA 76).

66. In the case of recklessness, this means that the risk that was realised and disregarded by the accused must be the risk that ultimately eventuated and caused the victim's death. It is not sufficient if the accused chose to accept one risk, but the death was caused by a different unforeseen risk (*R v Burnside* [1962] VR 96).

67. By contrast, when the accused is charged with driving under the influence of alcohol or drugs, the prosecution only needs to prove that the victim's death was caused by the *driving of the accused*. While the accused must have been so influenced by drugs or alcohol as to be incapable of having proper control of the vehicle (see above), it is not necessary to show that his or her inability to control the vehicle caused the death of the deceased (*R v Feketa* (1982) 10 A Crim R 287; *R v Ciantar* (2006) 16 VR 26).

68. This imposes what may be akin to absolute liability on people who drive while under the influence of drugs or alcohol (*R v Feketa* (1982) 10 A Crim R 287).

69. The relevant acts of the accused must have been such that an ordinary person would hold them, as a matter of common sense, to be a cause of the death. The mere fact that they contributed causally to the death, or were a necessary cause of it, is not sufficient (*Royall v R* (1991) 172 CLR 378).

70. The accused's acts do not need to be the sole cause of the death. A person can be criminally liable for a death that has multiple causes, even if he or she is not responsible for all of those causes (*Royall v R* (1991) 172 CLR 378; *R v Lee* (2005) 12 VR 249).

71. So even if another driver's mistakes contributed to the collision, the accused's culpable driving will have caused the death if the jury finds it was a substantial and operating cause of the collision (*R v Lee* (2005) 12 VR 249; *R v Dickinson* [2007] VSCA 111; *R v Guthridge* (2010) 27 VR 452).

72. However, where there are other possible causes of the death that are inconsistent with the death having been caused by the accused's culpable driving, these must be excluded beyond reasonable doubt (*R v Rudebeck* [1999] VSCA 155).

73. In many cases it will be unnecessary for the judge to do more than simply identify causation as an element of the offence. However, more detailed directions should be given if:

    - Causation was a live issue in the trial; or
    - An undirected jury might consider causation to be a live issue.

74. Some cases in which causation will be a live issue include where:

    - There were multiple possible causes of the death;
    - The death was delayed;
    - There were intervening acts between the accused's actions and the victim's death; or
    - The accused is alleged to have caused the death indirectly (*Royall v R* (1991) 172 CLR 378).

75. If the accused is charged with multiple forms of culpability (e.g. culpable driving by gross negligence and/or intoxication) the judge must clearly explain the differences in causation outlined above (*R v Ciantar* (2006) 16 VR 26).

76. See 7.1.2 Causation for further information about this issue.

Death of another Person

77. To be found guilty of this offence, the accused must have caused the death of another person.

78. An unborn child is not classified as a "person" for the purposes of this offence (see, e.g. *R v F* (1996) 40 NSWLR 245; *Attorney-General's Reference (No 3 of 1994)* [1996] QB 581).

79. A child is treated as being "born" (and thus a "person") when "he or she is fully born in a living state". This occurs when the child is "completely delivered from the body of its mother and it has a separate and independent existence in the sense that it does not derive its power of living from its mother" (*R v Hutty* [1953] VLR 338).

80. It is not necessary that the victim be a person at the time of the collision. If an unborn child is injured in utero, is born alive, but dies as a result of injuries caused by the culpable driving, the culpable driving will have caused the death of another person (*R v F* (1996) 40 NSWLR 245).

Voluntariness

81. In the ordinary run of cases the voluntary quality of the accused's acts will not be in question (*Ryan v R* (1967) 121 CLR 205). It will therefore not be necessary to direct the jury about voluntariness (*R v Chang* (2003) 7 VR 236; see also *R v Le Broc* (2000) 2 VR 43).

82. However, there is no presumption that any act of the accused is voluntary. Where voluntariness is in issue, the jury must be directed that the prosecution must prove, beyond reasonable doubt, that the act of culpable driving was the voluntary or willed act of the accused (*Jiminez v R* (1992) 173 CLR 572; *R v Frazer* [2001] VSCA 101).

83. For voluntariness to be put in issue, there will need to be evidence that displaces the common experience that a person's will ordinarily accompanies his or her actions. While not a true evidentiary burden, this evidence needs to be sufficient to at least raise a doubt that the accused's acts occurred independently of the exercise of his or her will (*R v Falconer* (1990) 171 CLR 30).

84. In the case of culpable driving, the issue of voluntariness may arise if the collision occurred because the accused fell asleep.[448] The accused cannot be held responsible for any actions which take place when s/he is asleep, because such actions are not voluntary (*Jiminez v R* (1992) 173 CLR 572; *R v Frazer* [2001] VSCA 101).

85. This does not mean that the accused cannot be found guilty of culpable driving if s/he was asleep at the time of the collision. If the jury find that the act of driving or continuing to drive *prior to falling asleep* was culpable (e.g. it was grossly negligent for the accused to drive given how tired s/he was), and that the act of driving in those circumstances caused the victim's death, the accused may be found guilty (*Jiminez v R* (1992) 173 CLR 572; *Kroon v R* (1990) 55 SASR 476).

86. To find the accused guilty in such circumstances, the period of wakefulness must have been sufficiently contemporaneous to the collision to be regarded as the cause of the harm inflicted while the accused was asleep (*Kroon v R* (1990) 55 SASR 476; *R v Franks* [1999] 1 VR 518).

87. Legislation addresses this issue in relation to culpable driving by gross negligence. *Crimes Act 1958* s 318(2A) states that a person will be grossly negligent if:

    - S/he drove when fatigued to such an extent that s/he knew or ought to have known that there was an appreciable risk of falling asleep or losing control of the vehicle; and
    - By driving the motor vehicle in such a condition, s/he failed unjustifiably and to a gross degree to observe the standard of care a reasonable person would have observed in the circumstances.

88. While there have not yet been any cases interpreting this provision, it appears to reflect the position at common law. At common law it was held that, when determining whether the accused was grossly negligent in such circumstances, the jury must consider his or her conduct prior to falling asleep. They must determine whether his or her decision to continue driving created a risk of losing control that was so fraught with danger to human life that it constituted a gross departure from the standard of care that a reasonable driver would have exercised in such circumstances (*R v Rudebeck* [1999] VSCA 155; *R v Franks* [1999] 1 VR 518; *Jiminez v R* (1992) 173 CLR 572).

89. When directing the jury about this issue, the judge must not suggest that tiredness or fatigue is sufficient. These are words of wide meaning, that do not necessarily entail an appreciable risk that the person would fall asleep or lose control of the vehicle (*R v Franks* [1999] 1 VR 518).

Agreement about Basis of Culpability

90. Where the jury are asked to consider more than one basis of culpability, they must agree on the mode of culpability before they can find the accused guilty. It is not just the ultimate question of guilt or innocence that the jury must agree upon, but the form of offence which has been committed (e.g. culpable driving *by recklessness*) (*R v Beach* (1994) 75 A Crim R 447; *R v Ciantar* (2006) 16 VR 26. See also *R v Clarke and Johnstone* [1986] VR 643).

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[448] A similar issue arises if the accused was unconscious or suffering from an epileptic seizure at the time of the collision (*Jiminez v R* (1992) 173 CLR 572; *R v Frazer* [2001] VSCA 101).

91. The jury will not, however, be required to identify the basis of their verdict. They will only be required to give a single verdict. The Act creates only one offence of culpable driving, and the different forms of culpability are not alternative counts (*R v Ciantar* (2006) 16 VR 26).

92. See Unanimous and Majority Verdicts for further information about this issue.

Complicity

93. Where the accused participates in a race on a public road in which another participant in the race directly causes the death of the victim, the jury may find that the parties were acting in concert or that the accused aided and abetted the other participant (*R v Guthridge* (2010) 27 VR 452; [2010] VSCA 132).

94. In such cases, it will generally be preferable for the prosecution to present the accused on the basis that he or she aided or abetted the principal offender. Such an approach avoids the artificiality of relying on an implied agreement or understanding, and will simplify jury directions (*R v Guthridge* (2010) 27 VR 452; [2010] VSCA 132).

95. However, where there is cogent evidence of an agreement or understanding between the parties, it will be appropriate for the prosecution to rely upon concert (*R v Guthridge* (2010) 27 VR 452; [2010] VSCA 132).

96. See Statutory Complicity, Joint Criminal Enterprise and Aiding, Abetting, Counselling or Procuring for information concerning these types of complicity.

Alternative Offence: Dangerous Driving Causing Death

97. *Crimes Act 1958* s 422A(1) provides that the jury may find the accused guilty of dangerous driving causing death (*Crimes Act* s 319(1)), if they are not satisfied that he or she is guilty of culpable driving causing death. See 7.2.6 Dangerous Driving Causing Death or Serious Injury for information about this alternative offence.

Last updated: 7 June 2017

7.2.5.1 Charge: Culpable Driving Causing Death: One Basis of Culpability

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This charge should be used if the accused is charged with culpable driving causing death, and only one basis of culpability is alleged.

The elements

I must now direct you about the crime of culpable driving causing death. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused was driving a motor vehicle.

Two – the accused's driving was culpable.

Three – the culpable driving caused the victim's death.

I will now explain each of these elements in more detail.

Driving

The first element that the prosecution must prove is that the accused was driving a motor vehicle.[449]

[*If this element is not in issue, add the following shaded section.*]

In this case it is not disputed that NOA was driving a motor vehicle when [*describe relevant incident*]. You should therefore have no difficulty finding this element proven.

[*If it is alleged that someone else was driving at the relevant time, add the following shaded section.*]

In this case, the prosecution submitted that it was NOA who was driving the [*describe vehicle*] when [*describe relevant incident and outline relevant prosecution evidence and/or arguments*]. The defence denied this, alleging that [*insert relevant defence evidence and/or arguments*].

It is for you to decide whether it was NOA who was driving at the relevant time. It is only if you are satisfied, beyond reasonable doubt, that s/he was, that this first element will be met.

[*If it is contended that the accused's acts did not constitute "driving", add the following shaded section.*]

In this case the prosecution submitted that NOA was "driving" the [*describe vehicle*] when [*describe relevant incident*]. The defence denies this, alleging that what NOA was doing was not "driving".

"Driving" is an ordinary English word. It does not have a technical legal definition. It is for you to determine, using your common sense and experience, whether what NOA was doing was "driving".

While there is no legal definition of "driving", before a person can be considered to be driving, s/he must at least be in a position to control the movement and direction of the vehicle. S/he should also, generally, have control over its propulsion. For this reason, conduct such as steering a towed or disabled vehicle will generally not be considered "driving".

In deciding whether this element has been met, you should therefore consider the degree of control which NOA had over the vehicle. You should look at factors such as whether s/he could control the vehicle's acceleration and steering.

In this case, the prosecution submitted that NOA's acts were driving, because [*insert prosecution evidence and/or arguments*]. The defence denied this, arguing that [*insert defence evidence and/or arguments*].

It is only if you are satisfied, beyond reasonable doubt, that what NOA was doing was "driving", that this first element will be met.

Culpable Driving

The second element that the prosecution must prove is that the accused's driving was culpable.

The law defines "culpable" in a number of different ways. In this case, it is alleged that NOA's drove "culpably" because s/he drove [recklessly/with gross negligence/ while so affected by alcohol/drugs as to be incapable of having proper control of the vehicle].

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[449] This charge assumes that the vehicle driven by the accused was clearly a "motor vehicle". If this is in issue, the charge will need to be modified. See 7.2.5 Culpable Driving Causing Death for guidance on the definition of a "motor vehicle".

Recklessness

[*If it is alleged that the accused was reckless, add the following shaded section.*]

The law says that a person drives "recklessly" if s/he consciously and unjustifiably disregards a substantial risk that his/her driving may cause another person to die or suffer really serious injury.

According to this definition, each of the following three matters must be proven beyond reasonable doubt for a person's driving to be considered "reckless":

First, the prosecution must prove that the accused was aware of a risk that death or really serious injury may result from his/her driving. When I say "really serious injury", I am not using a technical legal phrase. These are ordinary English words, and it is for you to determine what this phrase means to you as jurors.

The prosecution must prove that NOA himself/herself knew of the risk of death or really serious injury. It is not enough that you, or a reasonable person, would have recognised those risks in the circumstances.

Secondly, the prosecution must prove that the risk of death or really serious injury was "substantial". It is not sufficient for NOA to have known that there was some risk that death or really serious injury may be caused by his/her actions. The accused must have disregarded a substantial risk.

Thirdly, the prosecution must prove that the accused "consciously and unjustifiably" disregarded that risk. That is, knowing there was a substantial risk that driving in the circumstances may result in death or really serious injury, the accused consciously decided – without justification – to drive anyway.

[*If voluntariness is in issue, add the following darker shaded section.*]

In determining whether the accused's actions were reckless, you may only take into account his/her voluntary actions – actions which were committed consciously and deliberately. This is because the law says that a person cannot be held criminally responsible for actions which s/he committed involuntarily.[450]

In this case, the prosecution argued that each of these aspects of "recklessness" have been met. [*Insert prosecution arguments and/or evidence.*] The defence denied this, contending [*insert defence arguments and/or evidence*].

It is only if you are satisfied, beyond reasonable doubt, that NOA was aware of a substantial risk that death or really serious injury may result from his/her driving, and s/he consciously and unjustifiably disregarded that risk, that this second element will be met.

Gross Negligence

[*If it is alleged that the accused was grossly negligent, add the following shaded section.*]

A person drives with "gross negligence" if his/her driving falls greatly short of the standard of care a reasonable person would have exercised, and involved a high risk that death or serious injury would

[450] This section may need to be expanded, depending on the nature of the alleged involuntary action. See the section on falling asleep while driving under "gross negligence" below for an example.

result.[451]

This requires you to compare NOA's conduct with the "standard of care" that a reasonable person would have exercised in the circumstances. Precisely what that standard would have been is for you to decide, taking into account all of the circumstances in which NOA drove, such as [*describe relevant factors*, such as visibility, lighting, other cars and road markings].

This is an objective test. That means that the prosecution does not need to establish that NOA intended to cause death or serious injury or that s/he realised that his/her conduct was negligent. What matters is what a reasonable person in his/her situation would have known and done.

For this element to be met, you must find that the reasonable person in the accused's situation would have realised that his/her driving created a high risk of death or serious injury.

In making your determination, you should consider the reasonable person to be the same age as the accused, to have any specialised knowledge and experience the accused had, and to be of ordinary strength of mind. In particular, [*describe characteristics of the accused that are relevant to the reasonable person, including training and experience*].

[*If there are qualities of the accused that are not relevant, add the darker shaded section below.*]

However, the reasonable person is not [*describe any adverse traits of the accused that are irrelevant, such as intoxication, concussion or carelessness*].

In considering this question, remember that people do not always act perfectly. Even the most careful person can occasionally lose attention for a moment, or make minor mistakes. This offence is not concerned with minor breaches of the expected standard of care, even if they result in someone being hurt. While that might establish negligence in a civil case, it is not sufficient to establish guilt in a criminal case. For a person to be guilty of negligently causing serious injury, more is required – NOA's conduct must have involved a great falling short of the standard of care required and there must have been a high risk that death or serious injury would result. To emphasise the standard required, a substantial departure from the standard of care a reasonable person would exercise may not be enough. There must be a high degree of negligence, involving a great departure from the standard of care required, to constitute gross negligence.

[*If the driver's speed is in issue, add the following darker shaded section.*]

While the speed at which a person drives will be relevant to your decision, it will not be conclusive. It is just one factor to take into account. This is because it is possible for the accused to have driven above the speed limit, but not to have driven with gross negligence in the circumstances. Similarly, it is possible for the accused to have driven within the speed limit, but to have nevertheless driven with gross negligence.

[*If voluntariness is in issue, add the following darker shaded section.*]

In determining whether the accused's actions were grossly negligent, you may only take into account his/her voluntary actions. This is because the law says that a person cannot be held criminally responsible for actions which s/he committed involuntarily.

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[451] A "significant departure" from the standard of care required is not sufficient. Judges should be careful that the language of their direction does not deviate from the degree of negligence stipulated by the Act. See *R v De'Zilwa* (2002) 5 VR 408.

In this case, you have heard evidence that NOA fell asleep while driving, and that the collision occurred while s/he was sleeping.[452] Obviously, a person is not acting voluntarily when s/he is sleeping. You therefore cannot find that NOA was grossly negligent due to the way s/he drove whilst asleep.

However, that does not mean that you must acquit him/her if you find that s/he was asleep at the time of the collision. This second element will be satisfied if the prosecution can prove, beyond reasonable doubt, that the accused drove in a grossly negligent fashion before falling asleep, when his/her actions were voluntary.

For example, you may find that it was grossly negligent for the accused to drive at all, or to continue to drive, given the likelihood that s/he would fall asleep. The law says that the accused will have been grossly negligent if:

- S/he drove when fatigued to such an extent that s/he knew, or ought to have known, that there was an appreciable risk of falling asleep or losing control of the vehicle; and
- By driving in such a condition, s/he fell far short of the standard of care expected of a reasonable person, and created a high risk of death or serious injury.

To determine if this was the case, you must focus on the accused's driving prior to falling asleep. Consider factors such as any warning signs the accused may have had that s/he was likely to fall asleep. If you find that by driving, or continuing to drive, in such circumstances s/he was acting with gross negligence, this second element will be satisfied.

[*Summarise relevant evidence and/or arguments.*]

Alcohol and/or Drugs

[*If it is alleged that the accused was affected by alcohol and/or drugs, add the following shaded section.*]

The law says that a person drives "culpably" if s/he drives while affected by [alcohol/drugs] to such an extent that s/he is incapable of exercising proper control over the vehicle.

This is not a question of whether the person actually exercises proper control over the vehicle. It is about whether s/he is capable of exercising such control. For this second element to be met, the accused must have been unable to exercise proper control over the vehicle, because of the effects of [alcohol/drugs].

It is therefore not enough for you simply to determine that the accused had [drunk alcohol/taken drugs] before driving. You must find that the [alcohol/drugs] affected NOA's capacity to drive to the necessary extent.

To determine whether this was the case, you must compare the capacity of the accused to control the vehicle with the capacity of a reasonably competent driver. If, as a result of the effects of [alcohol/drugs], the accused was unable to drive to the same standard, this second element will be satisfied.

[*If evidence that the accused's blood alcohol concentration exceeded the statutory limit is given, add the following*

[452] This part of the charge has been drafted for use in cases where it is alleged that the accused fell asleep while driving. If it is alleged that the accused acted involuntarily for a different reason, it will need to be modified accordingly.

darker shaded section.[453]]

In this case you have heard evidence that, when s/he was tested by police, the accused had a blood alcohol concentration of [*insert blood alcohol concentration*], which is above the [0.00 or 0.05] statutory limit for driving. If you find this to be proven, you may take it into account in assessing the extent to which s/he was influenced by alcohol.

However, this is just one factor to consider. You do not need to conclude that NOA was incapable of exercising proper control over the vehicle simply because his/her blood alcohol concentration exceeded the legal limit. A person may be over the limit and still be capable of exercising proper control.

Whether or not the accused was affected to the necessary extent is a question of fact for you to determine, taking into account all of the evidence.

[*If evidence that the accused's blood alcohol concentration was within the statutory limit is given, add the following darker shaded section.*]

In this case you have heard evidence that, when s/he was tested by police, the accused had a blood alcohol concentration of [*insert blood alcohol concentration*], which is within the 0.05 statutory limit for driving. If you find this to be proven, you may take it into account in assessing the extent to which s/he was influenced by alcohol.

However, this is just one factor to consider. You do not need to conclude that NOA must have been capable of exercising proper control over the vehicle simply because his/her blood alcohol concentration was within the legal limit. A person can be under the limit, and yet be greatly affected by alcohol.

Whether or not the accused was affected to the necessary extent is a question of fact for you to determine, taking into account all of the evidence.

It is not necessary for you to find that the accused was unable to control the vehicle at the precise moment when the collision occurred. This element will be satisfied if you find that the accused was incapable of exercising proper control at any point in the drive leading up to the collision.

[*If voluntariness is in issue, add the following darker shaded section.*]

In determining whether the accused drove while affected by [alcohol/drugs] to such an extent that s/he was incapable of exercising proper control over the vehicle, you may only take into account his/her voluntary actions – actions which were committed consciously and deliberately. This is because the law says that a person cannot be held criminally responsible for actions which s/he committed involuntarily.[454]

In this case, the prosecution alleged that NOA was so affected by [alcohol/drugs] that s/he was incapable of exercising proper control over the vehicle. [*Insert prosecution arguments and/or evidence.*] The defence denied that NOA was affected by [alcohol/drugs] to the necessary extent, arguing [*insert*

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[453] If evidence is given of positive drug test results, this section could be adapted accordingly.

[454] This section may need to be expanded, depending on the nature of the alleged involuntary action. If it is alleged that the accused was so intoxicated that s/he was acting involuntarily, relevant parts of 8.7.1 Charge: Intoxication and Voluntariness should be inserted.

defence arguments and/or evidence].

It is only if you are satisfied, beyond reasonable doubt, that NOA was so affected by [alcohol/drugs] as to be incapable of exercising proper control over the vehicle, that this second element will be met.

Causation

The third element that the prosecution must prove is that NOA's culpable driving caused NOV's death.

Recklessness

[*If it is alleged that the accused was reckless, add the following shaded section.*]

It must have been the act of culpable driving that caused the death, not simply the act of driving. In this case, that means that the prosecution must prove that it was NOA's reckless driving that caused NOV to die. That is, his/her act of driving, despite knowing that there was a substantial risk of death or really serious injury, was the cause of death.

For this to be the case, you must find that NOV's death was caused by the occurrence of the risk that you found the accused was aware of, but chose to disregard. [*Insert relevant example from the evidence*.] It will not be sufficient for the death to have been caused by a different risk which the accused did not know about.

The accused's reckless driving does not need to have been the only cause of death, or the direct or immediate cause. You may find that his/her reckless driving caused the death if it was a substantial or significant cause of that result.

[*If it is alleged that the death was caused by intervening acts, add the following darker shaded section.*]

In making this determination, you need to decide whether it was the accused's acts which caused the death, or whether those acts merely provided the setting for the later acts of [*insert intervening acts*], which were the true cause of death. If NOA's acts only provided the setting, then s/he did not cause the death, and you must find him/her not guilty of culpable driving causing death.

You should approach this issue in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

In this case [*insert competing arguments and evidence relating to causation*].

Gross Negligence

[*If it is alleged that the accused was grossly negligent, add the following shaded section.*]

It must have been the act of culpable driving that caused the death, not simply the act of driving. In this case, that means that you must find that it was NOA's gross negligence that caused NOV to die. That is, the death resulted from NOA having driven in a way that fell far short of the standard of care expected of a reasonable person in the circumstances, and which held a high risk of death or serious injury.

For this to be the case, there must have been a relationship between the accused's negligence and the victim's death. It will not be sufficient if the collision simply happened to occur while NOA was driving negligently, but was not due to that negligence.

However, the accused's negligent driving does not need to have been the only cause of death, or the direct or immediate cause. You may find that his/her negligence caused the death if it was a substantial or significant cause of that result.

[*If voluntariness is in issue, add the following darker shaded section.*]

It must have been a voluntary act of the accused that caused the death. As I mentioned earlier, a person cannot be held responsible for acts s/he commits involuntarily.

This element will therefore not be satisfied if you decide that it was the acts of the accused whilst asleep that caused NOV's death.[455] For this element to be met, you must find that an act NOA committed before falling asleep – such as continuing to drive despite knowing that there was a high risk that s/he would fall asleep – was a substantial or significant cause of the death.

This will only be the case if that act was committed sufficiently close in time to the collision to be regarded as the cause of any harm inflicted while s/he was asleep.

[*If it is alleged that the death was caused by intervening acts, add the following darker shaded section.*]

In making this determination, you need to decide whether it was the accused's acts which caused the death, or whether those acts merely provided the setting for the later acts of [*insert intervening acts*], which were the true cause of death. If NOA's acts only provided the setting, then s/he did not cause the death, and you must find him/her not guilty of culpable driving causing death.

You should approach this issue in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

In this case [*insert competing arguments and evidence relating to causation*].

Alcohol and/or Drugs

[*If it is alleged that the accused was affected by alcohol and/or drugs, add the following shaded section.*]

For this element to be met, you only need to be satisfied that it was the accused's driving that caused the death. You do not need to find that the death was caused by the effects of the [alcohol/drugs] on NOA's ability to control the vehicle.

The accused's driving does not need to have been the only cause of death, or the direct or immediate cause. You may find that his/her driving caused the death if it was a substantial or significant cause of that result.

[*If it is alleged that the death was caused by intervening acts, add the following darker shaded section.*]

In making this determination, you need to decide whether it was the accused's driving which caused the death, or whether it merely provided the setting for the later acts of [*insert intervening acts*], which were the true cause of death. If NOA's driving only provided the setting, then s/he did not cause the death, and you must find him/her not guilty of culpable driving causing death.

You should approach this issue in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

In this case [*insert competing arguments and evidence relating to causation*].

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[455] This part of the charge has been drafted for use in cases where it is alleged that the accused fell asleep while driving. If it is alleged that the accused acted involuntarily for a different reason, it will need to be modified accordingly.

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, before you can find NOA guilty of culpable driving causing death, the prosecution must prove to you, beyond reasonable doubt:

One – That NOA was driving a motor vehicle; and

Two – That NOA's driving was culpable – that is, s/he drove [recklessly/with gross negligence/ while so affected by alcohol/drugs as to be incapable of having proper control of the vehicle]; and

Three – That NOA's culpable driving caused NOV's death.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of culpable driving causing death.

Dangerous Driving Causing Death

[In most cases it will be necessary to leave a dangerous driving offence as an alternative offence.[456] In such cases, a suitably modified version of the appropriate charge should be inserted here.[457]

When modifying the charge, the judge must carefully explain the differences between culpable and dangerous driving.[458] The content of the explanation will vary depending on the basis of culpability alleged in relation to the culpable driving offence. For example:

- Where it is alleged that the accused was reckless, the judge should explain that the culpable driving offence requires proof that the accused was aware that his/her driving created a substantial risk of death or serious injury, whereas the dangerous driving offence does not require proof that the accused was aware that his/her driving was dangerous.
- Where it is alleged that the accused was grossly negligent, the judge should explain that while dangerous driving is a serious offence, it is less serious than culpable driving. In addition, while culpable driving requires gross negligence, dangerous driving requires a serious breach of the proper management or control of a vehicle that creates a real risk that members of the public in the vicinity will be killed or seriously injured.
- Where it is alleged that the accused was affected by alcohol or drugs, the judge should explain that the dangerous driving offence requires proof that the dangerous driving caused the victim's death, whereas the culpable driving offence only requires proof that the driving (not the drugs or alcohol) caused the victim's death.]

Last updated: 23 October 2019

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456 *Crimes Act 1958* s 422A. Where the offence was alleged to have been committed between 13 October 2004 and 18 March 2008, "dangerous driving causing death or serious injury" should be left as an alternative. Where the offence was alleged to have been committed on or after 19 March 2008, "dangerous driving causing death" should be left as an alternative. See 7.2.6 Dangerous Driving Causing Death or Serious Injury for further information concerning the duty to leave dangerous driving as an alternative offence.

457 See 7.2.6.1 Charge: Dangerous Driving Causing Death or Serious Injury.

458 See 7.2.6 Dangerous Driving Causing Death or Serious Injury for information concerning the differences between the offences.

7.2.5.2 Charge: Culpable Driving Causing Death: Multiple Bases of Culpability

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This charge should be used if the accused is charged with culpable driving causing death, and multiple bases of culpability are alleged.

The elements

I must now direct you about the crime of culpable driving causing death. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused was driving a motor vehicle.

Two – the accused's driving was culpable.

Three – the culpable driving caused the victim's death.

I will now explain each of these elements in more detail.

Driving

The first element that the prosecution must prove is that the accused was driving a motor vehicle.[459]

[*If this element is not in issue, add the following shaded section.*]

In this case it is not disputed that NOA was driving a motor vehicle when [*describe relevant incident*]. You should therefore have no difficulty finding this element proven.

[*If it is alleged that someone else was driving at the relevant time, add the following shaded section.*]

In this case, the prosecution submitted that it was NOA who was driving the [*describe vehicle*] when [*describe relevant incident and outline relevant prosecution evidence and/or arguments*]. The defence denied this, alleging that [*insert relevant defence evidence and/or arguments*].

It is for you to decide whether it was NOA who was driving at the relevant time. It is only if you are satisfied, beyond reasonable doubt, that s/he was, that this first element will be met.

[*If it is contended that the accused's acts did not constitute "driving", add the following shaded section.*]

In this case the prosecution submitted that NOA was "driving" the [*describe vehicle*] when [*describe relevant incident*]. The defence denies this, alleging that what NOA was doing was not "driving".

"Driving" is an ordinary English word. It does not have a technical legal definition. It is for you to determine, using your common sense and experience, whether what NOA was doing was "driving".

While there is no legal definition of "driving", before a person can be considered to be driving, s/he must at least be in a position to control the movement and direction of the vehicle. S/he should also, generally, have control over its propulsion. For this reason, conduct such as steering a towed or disabled vehicle will generally not be considered "driving".

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[459] This charge assumes that the vehicle driven by the accused was clearly a "motor vehicle". If this is in issue, the charge will need to be modified. See 7.2.5 Culpable Driving Causing Death for guidance on the definition of a "motor vehicle".

In deciding whether this element has been met, you should therefore consider the degree of control which NOA had over the vehicle. You should look at factors such as whether s/he could control the vehicle's acceleration and steering.

In this case, the prosecution submitted that NOA's acts were driving, because [*insert prosecution evidence and/or arguments*]. The defence denied this, arguing that [*insert defence evidence and/or arguments*].

It is only if you are satisfied, beyond reasonable doubt, that what NOA was doing was "driving", that this first element will be met.

Culpable Driving

The second element that the prosecution must prove is that the accused's driving was culpable.

The law defines "culpable" in a number of different ways. this case, it is alleged that there are two different ways[460] in which NOA drove "culpably".

First, it is alleged that s/he drove culpably because s/he drove [recklessly/with gross negligence/ while so affected by alcohol/drugs as to be incapable of having proper control of the vehicle].

Secondly, it is alleged that s/he drove culpably because s/he drove [recklessly/with gross negligence/ while so affected by alcohol/drugs as to be incapable of having proper control of the vehicle].

For this second element to be satisfied, you do not need to find that the accused acted both [*insert basis one*] and [*insert basis two*]. It is sufficient if you find one of these forms of culpability proven beyond reasonable doubt.

However, all twelve of you must agree that the same type of culpability has been proven. For example, all of you must agree that NOA was culpable because [*insert basis one*]. Or all of you must agree that NOA was culpable because [*insert basis two*].

If some of you find NOA culpable due to [*insert basis one*], and others find him/her culpable due to [*insert basis two*], then you will not have reached a unanimous verdict, as you are required to do.[461]

I will now look at each of these types of culpability in turn.

Recklessness

[*If it is alleged that the accused was reckless, add the following shaded section.*]

The [first/next] type of "culpability" alleged by the prosecution is recklessness. The law says that a person drove "recklessly" if s/he consciously and unjustifiably disregarded a substantial risk that his/her driving may cause another person to die or suffer really serious injury.

According to this definition, each of the following three matters must be proven beyond reasonable doubt for a person's driving to be considered "reckless":

First, the prosecution must prove that the accused was aware of a risk that death or really serious injury may result from his/her driving. When I say "really serious injury", I am not using a technical legal phrase. These are ordinary English words, and it is for you to determine what this phrase means

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[460] It is possible that more than two different bases of culpability will have been alleged in the presentment. If so, this charge will need to be modified accordingly.

[461] This part of the charge assumes that the jury has been directed about the need for a unanimous verdict. If this has not occurred, the charge will need to be modified accordingly.

to you as jurors.

The prosecution must prove that NOA himself/herself knew of the risk of death or really serious injury. It is not enough that you, or a reasonable person, would have recognised those risks in the circumstances.

Secondly, the prosecution must prove that the risk of death or really serious injury was "substantial". It is not sufficient for NOA to have known that there was some risk that death or really serious injury may be caused by his/her actions. The accused must have disregarded a substantial risk.

Thirdly, the prosecution must prove that the accused "consciously and unjustifiably" disregarded that risk. That is, knowing there was a substantial risk that driving in the circumstances may result in death or really serious injury, the accused consciously decided – without justification – to drive anyway.

[*If voluntariness is in issue, add the following darker shaded section.*]

In determining whether the accused's actions were reckless, you may only take into account his/her voluntary actions – actions which were committed consciously and deliberately. This is because the law says that a person cannot be held criminally responsible for actions which s/he committed involuntarily.[462]

In this case, the prosecution argued that each of these aspects of "recklessness" have been met. [*Insert prosecution arguments and/or evidence.*] The defence denied this, contending [*insert defence arguments and/or evidence*].

It is only if you are satisfied, beyond reasonable doubt, that NOA was aware of a substantial risk that death or really serious injury may result from his/her driving, and s/he consciously and unjustifiably disregarded that risk, that s/he will have been culpable due to recklessness.

Gross Negligence

[*If it is alleged that the accused was grossly negligent, add the following shaded section.*]

The [first/next] type of "culpability" alleged by the prosecution is gross negligence. A person drives with "gross negligence" if his/her driving falls greatly short of the standard of care a reasonable person would have exercised, and involved a high risk that death or serious injury would result.[463]

This requires you to compare NOA's conduct with the "standard of care" that a reasonable person would have exercised in the circumstances. Precisely what that standard would have been is for you to decide, taking into account all of the circumstances in which NOA drove, such as [*describe relevant factors, such as visibility, lighting, other cars and road markings*].

This is an objective test. That means that the prosecution does not need to establish that NOA intended to cause death or serious injury or that s/he realised that his/her conduct was negligent.

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[462] This section may need to be expanded, depending on the nature of the alleged involuntary action. See the section on falling asleep while driving under "gross negligence" below for an example.

[463] A "significant departure" from the standard of care required is not sufficient. Judges should be careful that the language of their direction does not deviate from the degree of negligence stipulated by the Act. See *R v De'Zilwa* (2002) 5 VR 408.

What matters is what a reasonable person in his/her situation would have known and done.

For this element to be met, you must find that the reasonable person in the accused's situation would have realised that his/her driving created a high risk of death or serious injury.

In making your determination, you should consider the reasonable person to be the same age as the accused, to have any specialised knowledge and experience the accused had, and to be of ordinary strength of mind. In particular, [*describe characteristics of the accused that are relevant to the reasonable person, including training and experience*].

[*If there are qualities of the accused that are not relevant, add the shaded section below.*]

However, the reasonable person is not [*describe any adverse traits of the accused that are irrelevant*, such as intoxication, concussion or carelessness].

In considering this question, remember that people do not always act perfectly. Even the most careful person can occasionally lose attention for a moment, or make minor mistakes. This offence is not concerned with minor breaches of the expected standard of care, even if they result in someone being hurt. While that might establish negligence in a civil case, it is not sufficient to establish guilt in a criminal case. For a person to be guilty of negligently causing serious injury, more is required – NOA's conduct must have involved a great falling short of the standard of care required and there must have been a high risk that death or serious injury would result. To emphasise the standard required, a substantial departure from the standard of care a reasonable person would exercise may not be enough. There must be a high degree of negligence, involving a great departure from the standard of care required, to constitute gross negligence.

[*If the driver's speed is in issue, add the following shaded section.*]

While the speed at which a person drives will be relevant to your decision, it will not be conclusive. It is just one factor to take into account. This is because it is possible for the accused to have driven above the speed limit, but not to have driven with gross negligence in the circumstances. Similarly, it is possible for the accused to have driven within the speed limit, but to have nevertheless driven with gross negligence.

[*If voluntariness is in issue, add the following darker shaded section.*]

In determining whether the accused's actions were grossly negligent, you may only take into account his/her voluntary actions. This is because the law says that a person cannot be held criminally responsible for actions which s/he committed involuntarily.

In this case, you have heard evidence that NOA fell asleep while driving, and that the collision occurred while s/he was sleeping.[464] Obviously, a person is not acting voluntarily when s/he is sleeping. You therefore cannot find that NOA was grossly negligent due to the way s/he drove whilst asleep.

However, that does not mean that you must acquit him/her if you find that s/he was asleep at the time of the collision. This second element will be satisfied if the prosecution can prove, beyond reasonable doubt, that the accused drove in a grossly negligent fashion before falling asleep, when his/her actions were voluntary.

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[464] This part of the charge has been drafted for use in cases where it is alleged that the accused fell asleep while driving. If it is alleged that the accused acted involuntarily for a different reason, it will need to be modified accordingly.

For example, you may find that it was grossly negligent for the accused to drive at all, or to continue to drive, given the likelihood that s/he would fall asleep. The law says that the accused will have been grossly negligent if:

- S/he drove when fatigued to such an extent that s/he knew, or ought to have known, that there was an appreciable risk of falling asleep or losing control of the vehicle; and

By driving in such a condition, s/he fell far short of the standard of care expected of a reasonable person, and created a high risk of death or serious injury.

To determine if this was the case, you must focus on the accused's driving prior to falling asleep. Consider factors such as any warning signs the accused may have had that s/he was likely to fall asleep. If you find that by driving, or continuing to drive, in such circumstances s/he was acting with gross negligence, this second element will be satisfied.

[*Summarise relevant evidence and/or arguments.*]

Alcohol and/or Drugs

[*If it is alleged that the accused was affected by alcohol and/or drugs, add the following shaded section.*]

The [first/next] type of "culpability" alleged by the prosecution is driving under the influence of [alcohol/drugs].[465] The law says that a person drove "culpably" if s/he drove while affected by [alcohol/drugs] to such an extent that s/he was incapable of exercising proper control over the vehicle.

This is not a question of whether the person actually exercises proper control over the vehicle. It is about whether s/he is capable of exercising such control. For this second element to be met, the accused must have been unable to exercise proper control over the vehicle, because of the effects of [alcohol/drugs].

It is therefore not enough for you simply to determine that the accused had [drunk alcohol/taken drugs] before driving. You must find that the [alcohol/drugs] affected NOA's capacity to drive to the necessary extent.

To determine whether this was the case, you must compare the capacity of the accused to control the vehicle with the capacity of a reasonably competent driver. If, as a result of the effects of [alcohol/drugs], the accused was unable to drive to the same standard, this second element will be satisfied in this way.

[*If evidence that the accused's blood alcohol concentration exceeded the statutory limit is given, add the following darker shaded section.*[466]]

In this case you have heard evidence that, when s/he was tested by police, the accused had a blood alcohol concentration of [*insert blood alcohol concentration*], which is above the [0.00 or 0.05] statutory limit for driving. If you find this to be proven, you may take it into account in assessing the extent to which s/he was influenced by alcohol.

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[465] If it is alleged that the accused was affected by both alcohol and drugs, this section of the charge will need to be modified accordingly.

[466] If evidence is given of positive drug test results, this section could be adapted accordingly.

However, this is just one factor to consider. You do not need to conclude that NOA was incapable of exercising proper control over the vehicle simply because his/her blood alcohol concentration exceeded the legal limit. A person may be over the limit and still be capable of exercising proper control.

Whether or not the accused was affected to the necessary extent is a question of fact for you to determine, taking into account all of the evidence.

[*If evidence that the accused's blood alcohol concentration was within the statutory limit is given, add the following darker shaded section.*]

In this case you have heard evidence that, when s/he was tested by police, the accused had a blood alcohol concentration of [*insert blood alcohol concentration*], which is within the 0.05 statutory limit for driving. If you find this to be proven, you may take it into account in assessing the extent to which s/he was influenced by alcohol.

However, this is just one factor to consider. You do not need to conclude that NOA must have been capable of exercising proper control over the vehicle simply because his/her blood alcohol concentration was within the legal limit. A person can be under the limit, and yet be greatly affected by alcohol.

Whether or not the accused was affected to the necessary extent is a question of fact for you to determine, taking into account all of the evidence.

It is not necessary for you to find that the accused was unable to control the vehicle at the precise moment when the collision occurred. This element will be satisfied if you find that the accused was incapable of exercising proper control at any point in the drive leading up to the collision.

[*If voluntariness is in issue, add the following darker shaded section.*]

In determining whether the accused drove while affected by [alcohol/drugs] to such an extent that s/he was incapable of exercising proper control over the vehicle, you may only take into account his/her voluntary actions – actions which were committed consciously and deliberately. This is because the law says that a person cannot be held criminally responsible for actions which s/he committed involuntarily.[467]

In this case, the prosecution alleged that NOA was so affected by [alcohol/drugs] that s/he was incapable of exercising proper control over the vehicle. [*Insert prosecution arguments and/or evidence.*] The defence denied that NOA was affected by [alcohol/drugs] to the necessary extent, arguing [*insert defence arguments and/or evidence*].

It is only if you are satisfied, beyond reasonable doubt, that NOA was so affected by [alcohol/drugs] as to be incapable of exercising proper control over the vehicle, that s/he will have been culpable in this way.

[467] This section may need to be expanded, depending on the nature of the alleged involuntary action. If it is alleged that the accused was so intoxicated that s/he was acting involuntarily, relevant parts of 8.7.1 Charge: Intoxication and Voluntariness should be inserted.

Need for Unanimity

To summarise, for this second element to be met, you must be satisfied that the accused's driving was culpable. In this case, the prosecution has alleged that the accused was culpable in two different ways: by [*insert basis one*] and [*insert basis two*].

Remember, you do not need to find that the accused was culpable in both of these ways. It is sufficient if you find one of these forms of culpability proven beyond reasonable doubt.

However, I want to emphasise again that, in order to reach a unanimous verdict, you must all agree that the same type of culpability has been proven. It is not enough for some of you to find NOA culpable due to [*insert basis one*], and others to find him/her culpable due to [*insert basis two*].

Causation

The third element that the prosecution must prove is that NOA's culpable driving caused NOV's death.

The nature of this requirement differs depending upon the type of culpability proven. For example, if you find that NOA was culpable because [*insert basis one*], you need to find that [*insert basis one*] caused NOV's death. However, if you find that NOA was culpable because [*insert basis two*], for this element to be satisfied you must find that [*insert basis two*] was the cause of death.

So in determining whether this element has been satisfied, you need to focus on the type or types of culpability you unanimously agreed was proven when considering the second element, if any. You must decide whether any of the proven types of culpable driving were the cause of NOV's death.

I will now examine each of these types of culpability in turn.

Recklessness

[*If it is alleged that the accused was reckless, add the following shaded section.*]

I [first/next] want to look at recklessness. If you find that the accused was culpable due to recklessness, then for this third element to be satisfied you must find that it was NOA's reckless driving that caused NOV to die. That is, his/her act of driving, despite knowing that there was a substantial risk of death or really serious injury, was the cause of death.

For this to be the case, you must find that NOV's death was caused by the occurrence of the risk that you found the accused was aware of, but chose to disregard. [*Insert relevant example from the evidence.*] It will not be sufficient for the death to have been caused by a different risk which the accused did not know about.

The accused's reckless driving does not need to have been the only cause of death, or the direct or immediate cause. You may find that his/her reckless driving caused the death if it was a substantial or significant cause of that result.

[*If it is alleged that the death was caused by intervening acts, add the following darker shaded section.*]

In making this determination, you need to decide whether it was the accused's acts which caused the death, or whether those acts merely provided the setting for the later acts of [*insert intervening acts*], which were the true cause of death. If NOA's acts only provided the setting, then s/he did not cause the death, and you must find him/her not guilty of culpable driving causing death.

You should approach this issue in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

In this case [*insert competing arguments and evidence relating to causation*].

Gross Negligence

[*If it is alleged that the accused was grossly negligent, add the following shaded section.*]

I [first/next] want to look at gross negligence. If you find that the accused was culpable due to gross negligence, then for this third element to be satisfied you must find that it was NOA's gross negligence that caused NOV to die. That is, the death resulted from NOA having driven in a way that fell far short of the standard of care expected of a reasonable person in the circumstances, and which held a high risk of death or serious injury.

For this to be the case, there must have been a relationship between the accused's negligence and the victim's death. It will not be sufficient if the collision simply happened to occur while NOA was driving negligently, but was not due to that negligence.

However, the accused's negligent driving does not need to have been the only cause of death, or the direct or immediate cause. You may find that his/her negligence caused the death if it was a substantial or significant cause of that result.

[*If voluntariness is in issue, add the following darker shaded section.*]

It must have been a voluntary act of the accused that caused the death. As I mentioned earlier, a person cannot be held responsible for acts s/he commits involuntarily.

This element will therefore not be satisfied if you decide that it was the acts of the accused whilst asleep that caused NOV's death.[468] For this element to be met, you must find that an act NOA committed before falling asleep – such as continuing to drive despite knowing that there was a high risk that s/he would fall asleep – was a substantial or significant cause of the death.

This will only be the case if that act was committed sufficiently close in time to the collision to be regarded as the cause of any harm inflicted while s/he was asleep.

[*If it is alleged that the death was caused by intervening acts, add the following darker shaded section.*]

In making this determination, you need to decide whether it was the accused's acts which caused the death, or whether those acts merely provided the setting for the later acts of [*insert intervening acts*], which were the true cause of death. If NOA's acts only provided the setting, then s/he did not cause the death, and you must find him/her not guilty of culpable driving causing death.

You should approach this issue in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

In this case [*insert competing arguments and evidence relating to causation*].

Alcohol and/or Drugs

[*If it is alleged that the accused was affected by alcohol and/or drugs, add the following shaded section.*]

I [first/next] want to look at driving under the influence of [alcohol/drugs]. If you find that the accused was culpable due to driving while affected by [alcohol/drugs] to such an extent that s/he was incapable of exercising proper control over the vehicle, then for this third element to be satisfied you

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[468] This part of the charge has been drafted for use in cases where it is alleged that the accused fell asleep while driving. If it is alleged that the accused acted involuntarily for a different reason, it will need to be modified accordingly.

only need to find that the accused's driving caused NOV's death. You do not need to find that the death was caused by the effects of the [alcohol/drugs] on NOA's ability to control the vehicle.

[*If it is also alleged that the accused was culpable due to recklessness and/or gross negligence, add the following darker shaded section.*]

This is different from what must be proved if you find the accused to have been [reckless/grossly negligent]. In that case, you need to find that it was the accused's [recklessness/negligence] that caused the death, not just his/her driving. However, if you find the accused to be culpable due to the effects of [alcohol/drugs], you are only required to find that the accused's driving caused the death.

The accused's driving does not need to have been the only cause of death, or the direct or immediate cause. You may find that his/her driving caused the death if it was a substantial or significant cause of that result.

[*If it is alleged that the death was caused by intervening acts, add the following darker shaded section.*]

In making this determination, you need to decide whether it was the accused's driving which caused the death, or whether it merely provided the setting for the later acts of [*insert intervening acts*], which were the true cause of death. If NOA's driving only provided the setting, then s/he did not cause the death, and you must find him/her not guilty of culpable driving causing death.

You should approach this issue in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

In this case [*insert competing arguments and evidence relating to causation*].

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of culpable driving causing death, the prosecution must prove to you, beyond reasonable doubt:

One – That NOA was driving a motor vehicle; and

Two – That NOA's driving was culpable – that is, s/he drove [recklessly/with gross negligence/ while so affected by alcohol/drugs as to be incapable of having proper control of the vehicle]; and

Three – That NOA's culpable driving caused NOV's death.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of culpable driving causing death.

Dangerous Driving Causing Death

[In most cases it will be necessary to leave a dangerous driving offence as an alternative offence.[469] In such cases, a suitably modified version of the appropriate charge should be inserted here.[470]

When modifying the charge, the judge must carefully explain the differences between culpable and dangerous driving.[471] The content of the explanation will vary depending on the basis of culpability alleged in relation to the culpable driving offence. For example:

- Where it is alleged that the accused was reckless, the judge should explain that the culpable driving offence requires proof that the accused was aware that his/her driving created a substantial risk of death or serious injury, whereas the dangerous driving offence does not require proof that the accused was aware that his/her driving was dangerous.
- Where it is alleged that the accused was grossly negligent, the judge should explain that while dangerous driving is a serious offence, it is less serious than culpable driving. In addition, while culpable driving requires gross negligence, dangerous driving requires a serious breach of the proper management or control of a vehicle that creates a real risk that members of the public in the vicinity will be killed or seriously injured.
- Where it is alleged that the accused was affected by alcohol or drugs, the judge should explain that the dangerous driving offence requires proof that the dangerous driving caused the victim's death, whereas the culpable driving offence only requires proof that the driving (not the drugs or alcohol) caused the victim's death.]

Last updated: 23 October 2019

7.2.5.3 Checklist: Culpable Driving by Recklessness

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused was driving a motor vehicle; and
2. The accused's driving was culpable; and
3. The accused's culpable driving caused the victim's death.

Driving a Motor Vehicle

1. Was the accused driving a motor vehicle?

If Yes, then go to 2

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[469] *Crimes Act 1958* s 422A. Where the offence was alleged to have been committed between 13 October 2004 and 18 March 2008, "dangerous driving causing death or serious injury" should be left as an alternative. Where the offence was alleged to have been committed on or after 19 March 2008, "dangerous driving causing death" should be left as an alternative. See 7.2.6 Dangerous Driving Causing Death or Serious Injury for further information concerning the duty to leave dangerous driving as an alternative offence.

[470] See 7.2.6.1 Charge: Dangerous Driving Causing Death or Serious Injury.

[471] See 7.2.6 Dangerous Driving Causing Death or Serious Injury for information concerning the differences between the offences.

If No, then the accused is not guilty of Culpable Driving

Culpable Driving

2. Did the accused drive recklessly?

2.1 Was the accused aware of a risk that death or really serious injury may result from his/her driving?

If Yes, then go to 2.2

If No, then the accused is not guilty of Culpable Driving

2.2 Was the risk of death or really serious injury substantial?

If Yes, then go to 2.3

If No, then the accused is not guilty of Culpable Driving

2.3 Did the accused consciously and unjustifiably disregard that risk?

If Yes, then go to 3

If No, then the accused is not guilty of Culpable Driving

Causation

3. Was the accused's reckless driving a substantial or significant cause of the victim's death?

*Consider – **Was the victim's death caused by the occurrence of the risk that the accused was aware of, but chose to disregard?***

If Yes, then the accused is guilty of Culpable Driving(as long as you have also answered Yes to questions 1, 2.1, 2.2 and 2.3)

If No, then the accused is not guilty of Culpable Driving

Last updated: 2 July 2019

7.2.5.4 Checklist: Culpable Driving by Gross Negligence

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused was driving a motor vehicle; and
2. The accused's driving was culpable; and
3. The accused's culpable driving caused the victim's death.

Driving a Motor Vehicle

1. Was the accused driving a motor vehicle?

If Yes, then go to 2

If No, then the accused is not guilty of Culpable Driving

Culpable Driving

2. Did the accused drive in a way that was grossly negligent?

2.1 Did the accused grossly and unjustifiably fail to observe the standard of care that a reasonable person would have observed in the circumstances?

Consider – What were the circumstances in which the accused was driving?

If Yes, then go to 2.2

If No, then the accused is not guilty of Culpable Driving

2.2 Did the accused's conduct fall so far short of that standard of care, and hold such a high risk of death or serious injury, that it constitutes gross negligence?

If Yes, then go to 3

If No, then the accused is not guilty of Culpable Driving

Causation

3. Was the accused's grossly negligent driving a substantial or significant cause of the victim's death?

*Consider – **Did the victim's death result from the accused driving in a way that fell far short of the** standard of care expected of a reasonable person in the circumstances, and which involved a high risk of death or serious injury?*

If Yes, then the accused is guilty of Culpable Driving (as long as you have also answered Yes to questions 1, 2.1 and 2.2)

If No, then the accused is not guilty of Culpable Driving

Last updated: 31 October 2018

7.2.5.5 Checklist: Culpable Driving by Influence of Alcohol

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused was driving a motor vehicle; and
2. The accused's driving was culpable; and
3. The accused's driving caused the victim's death.

Driving a Motor Vehicle

1. Was the accused driving a motor vehicle?

If Yes, then go to 2

If No, then the accused is not guilty of Culpable Driving

Culpable Driving

2. Did the accused drive while affected by alcohol to such an extent as to be incapable of having proper control over the motor vehicle?

Consider – Was the accused unable to drive to the same standard as a reasonably competent driver?

If Yes, then go to 3

If No, then the accused is not guilty of Culpable Driving

Causation

3. Was the accused's driving a substantial or significant cause of the victim's death?

Consider – ***The victim's death does not need to have been caused by the effects of the alcohol on the accused's driving.***

If Yes, then the accused is guilty of Culpable Driving (as long as you have also answered Yes to questions 1 and 2)

If No, then the accused is not guilty of Culpable Driving

Last updated: 16 October 2007

7.2.5.6 Checklist: Culpable Driving by Influence of Drugs

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused was driving a motor vehicle; and
2. The accused's driving was culpable; and
3. The accused's driving caused the victim's death.

Driving a Motor Vehicle

1. Was the accused driving a motor vehicle?

If Yes, then go to 2

If No, then the accused is not guilty of Culpable Driving

Culpable Driving

2. Did the accused drive while affected by drugs to such an extent as to be incapable of having proper

control over the motor vehicle?

Consider – Was the accused unable to drive to the same standard as a reasonably competent driver?

If Yes, then go to 3

If No, then the accused is not guilty of Culpable Driving

Causation

3. Was the accused's driving a substantial or significant cause of the victim's death?

Consider – ***The victim's death does not need to have been caused by the effects of the drugs on the accused's driving.***

If Yes, then the accused is guilty of Culpable Driving (as long as you have also answered Yes to questions 1 and 2)

If No, then the accused is not guilty of Culpable Driving

Last updated: 16 October 2007

7.2.6 Dangerous Driving Causing Death or Serious Injury

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Commencement Information

1. Prior to 2004, there were two main serious driving offences in Victoria:
    - "Culpable driving causing death", carrying a maximum penalty of 20 years imprisonment and a minimum licence disqualification period of two years (*Crimes Act 1958* s 318); and
    - "Dangerous driving", carrying a maximum penalty of two years imprisonment and a minimum licence disqualification period of six months (*Road Safety Act 1986* s 64).
2. In 2004, the offence of "dangerous driving causing death or serious injury" was created, to fill a perceived gap in the seriousness between these two offences (Second Reading Speech, Hansard, Legislative Assembly, Mr Hulls, 3 June 2004, 1798). This offence, which commenced operation on 13 October 2004, carried a maximum penalty of five years imprisonment and a minimum licence disqualification period of 18 months (*Crimes Act 1958* s 319).
3. In 2008, the offence of "dangerous driving causing death or serious injury" was divided into separate offences of "dangerous driving causing death" and "dangerous driving causing serious injury". The new offences, which differ only in the degree of injury inflicted, carry a maximum penalty of 10 years' and 5 years' imprisonment respectively (*Crimes (Child Homicide) Act 2008* s 5).
4. This change only applies to offences committed on or after 19 March 2008. For offences occurring between 13 October 2004 and 18 March 2008, the offence of dangerous driving causing death or serious injury will continue to apply (*Crimes Act 1958* s 610).
5. References to "dangerous driving" encompass the three offences of:
    - Dangerous driving causing death or serious injury (available for offences committed between 13 October 2004 and 18 March 2008);
    - Dangerous driving causing death (available for offences committed from 19 March 2008); and
    - Dangerous driving causing serious injury (available for offences committed from 19 March 2008).

When to Leave Dangerous Driving as an Alternative Verdict

6. For offences occurring between 13 October 2004 and 18 March 2008, "dangerous driving causing death or serious injury" is available as an alternative verdict to the offences of "culpable driving causing death" and "negligently causing serious injury" (*Crimes Act 1958* s 422A).
7. For offences committed from 19 March 2008 onwards:
    - "Dangerous driving causing death" is available as an alternative verdict to the offence of "culpable driving causing death"; and
    - "Dangerous driving causing serious injury" is available as an alternative verdict to the offence of "negligently causing serious injury" (*Crimes Act 1958* s 422A).
8. The relevant dangerous driving offence should generally be left as an alternative in any trial involving a motor vehicle incident, where the driver is charged with culpable driving causing death or negligently causing serious injury (*R v Saad* (2005) 156 A Crim R 533; *R v DD* (2007) 19 VR 143; *R v Kane* (2001) 3 VR 542).
9. See 3.10 Alternative Verdicts for further information concerning the requirement to leave alternative offences to the jury.

Elements

10. Dangerous driving has the following three elements,[472] each of which the prosecution must prove beyond reasonable doubt:

    i) The accused was driving a motor vehicle;

    ii) The accused drove dangerously; and

    iii) The dangerous driving caused the death or serious injury of another person.

Driving a Motor Vehicle

11. For the first element to be met, the jury must be satisfied that:
    - The accused was *driving*; and
    - The vehicle the accused was driving was a *motor vehicle*.

"Driving"

12. "Drive" is an ordinary English word. There is no exhaustive legal definition of when a person "drives" a motor vehicle (*Tink v Francis* [1983] 2 VR 17).
13. However, before a person can be considered to be driving, he or she must at least be in a position to control the movement and direction of the vehicle (*Tink v Francis* [1983] 2 VR 17).
14. To be "driving", a person must also, generally, have control over the propulsion of the vehicle (*Tink v Francis* [1983] 2 VR 17; *Davies v Waldron* [1989] VR 449).

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[472] In some cases the prosecution will also have to prove that the accused's conduct was voluntary – see below.

15. In most cases it will be clear whether or not the accused was "driving". However, issues may arise where:

    - The vehicle was not fully operational at the relevant time (e.g. the engine, steering or brakes were not working);
    - The vehicle was not being propelled by its own motor force (e.g. the car was being towed or was coasting downhill);[473] or
    - The vehicle was stationary at the relevant time (e.g. the vehicle was stopped at traffic lights).

16. In each of these cases the accused may or may not have been driving, depending on the degree of control the accused had over the propulsion, movement and direction of the vehicle. See *Tink v Francis* [1983] 2 VR 17 for a detailed analysis of this issue.

17. Whether or not the accused was "driving" a motor vehicle in such circumstances will be a question of fact for the jury to determine, taking into account all of the surrounding circumstances (*Pullin v Insurance Commissioner* [1971] VR 263).

"Motor Vehicle"

18. A "motor vehicle" is a vehicle that is used, or intended to be used, on a highway, and that is built to be propelled by a motor that forms part of the vehicle but does not include:

    - A vehicle intended to be used on a railway or tramway; or
    - A motorised wheel-chair capable of a speed of not more than 10 kilometres per hour which is used solely for the conveyance of an injured or disabled person; or
    - A vehicle that is not a motor vehicle by virtue of a declaration (*Road Safety Act 1986* s 3; *Crimes Act 1958* s 2A).

19. This definition requires the vehicle to be one that is *normally* used on a highway. It is not enough that the vehicle, at the time in question, was in use on a highway (*Smith v Transport Accident Commission* (2005) 12 VR 277; *Transport Accident Commission v Serbec* (1993) 6 VAR 151; *Elizabeth Valley Pty Ltd v Fordham* (1970) 16 FLR 459).

Dangerous Driving

20. The second element requires the accused to have driven "at a speed or in a manner that is dangerous to the public having regard to all the circumstances of the case" (*Crimes Act 1958* s 319(1)).

21. Section 319 creates an offence which can be committed by either driving at a speed that is dangerous to the public or driving in a manner dangerous to the public (*Hedberg v Woodhall* (1913) 15 CLR 531; *R v Coventry* (1938) 59 CLR 633; *R v Burnside* [1962] VR 96).

22. All matters concerned with the control and management of the vehicle are part of the accused's "manner of driving". This includes speed, navigation and communication with other drivers (*R v Coventry* (1938) 59 CLR 633; *R v Burnside* [1962] VR 96).

23. There is no need to prove a course of conduct. "Manner of driving" covers all of the acts and omissions of a driver, including casual or transitory acts. A single dangerous act is sufficient (*R v Coventry* (1938) 59 CLR 633; *R v Burnside* [1962] VR 96).

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[473] *Road Safety Act 1986* s 3AB states that a person who is steering a towed vehicle is taken to be driving *for the purposes of that Act*. However, as this expanded definition of driving is not incorporated into the *Crimes Act 1958*, the matters discussed in *Tink v Francis* [1983] 2 VR 17 continue to apply to the offence of dangerous driving.

Serious Breach of the Management or Control of the Vehicle

24. The speed or manner in which the accused drove must have involved such a serious breach of the proper management or control of the vehicle (*R v De Montero* (2009) 25 VR 694; *McBride v The Queen* (1966) 115 CLR 44; *King v The Queen* (2012) 245 CLR 588).

25. This test will only be satisfied if the speed or manner in which the accused drove posed a real, and not just speculative, danger to other members of the public who may have been in the vicinity (*R v De Montero* (2009) 25 VR 694; *R v Guthridge* (2010) 27 VR 452; *McBride v The Queen* (1966) 115 CLR 44; *King v The Queen* (2012) 245 CLR 588).

26. It is not necessary to prove that the accused intended to drive dangerously, or was aware that his or her conduct was dangerous to the public. This test may be satisfied even if the accused was driving at his or her (incompetent) best (*R v Coventry* (1938) 59 CLR 633; *R v Goodman* NSWCCA 10/12/1991; *R v Evans* [1963] 1 QB 412).

27. The accused's state of mind (whether established by admissions or inference from post-offence conduct) will therefore only be relevant insofar as it provides evidence concerning the *circumstances* of the offence (see below) (see, e.g. *R v Dickinson* [2007] VSCA 111).

28. Any harm caused by the accused's driving may be used as evidence of the seriousness of the breach (*McBride v The Queen* (1966) 115 CLR 44).

29. However, the mere fact that a collision has occurred is not conclusive evidence of a serious breach. The law does not require drivers to act with perfect hindsight, or assume that for every accident there must be a remedy (*R v Smith* [2006] VSCA 92).

30. An error of judgment in a situation of sudden crisis, or a failure to successfully take evasive action, may not constitute a sufficiently serious breach (*R v Jiminez* (1992) 173 CLR 572, 578–579; *R v Coventry* (1938) 59 CLR 633, 638).

Circumstances of the Offence

31. The jury must consider the accused's driving in the circumstances of the alleged offence. The driving may be dangerous because:

    - It was intrinsically dangerous in *all circumstances*; or
    - It was dangerous in the *particular circumstances* surrounding the driving (*McBride v The Queen* (1952) 87 CLR 115; *King v The Queen* (2012) 245 CLR 588).

32. The conditions of the road, and the size and speed of the driver's vehicle, may all be relevant to the jury's determination (*R v Rudebeck* [1999] VSCA 155).

33. In addition to considering the accused's physical control of the vehicle, the jury may also consider the question of whether, in all the circumstances, the accused should have been driving at all. In making this determination, the jury can take into account factors such as the condition of the vehicle, the time of driving, lighting conditions, heating and the ventilation of the vehicle (*Jiminez v R* (1992) 173 CLR 572; *Giorgianni v The Queen* (1985) 156 CLR 473).

34. The accused may have driven dangerously if s/he was so fatigued that s/he knew, or ought to have known, that there was an appreciable risk of falling asleep or losing control of the vehicle while driving (*Jiminez v The Queen* (1992) 173 CLR 572; *R v Kroon* (1990) 55 SASR 476). See "Voluntariness" in 7.2.5 Culpable Driving Causing Death for a detailed discussion of this issue.

35. Whether driving is dangerous due to a lack of attention will depend on all the circumstances. Inattention may be dangerous where it prevents the driver from avoiding other hazards. However, the level of attention required for safe driving is not constant, and depends on the terrain, environment and traffic conditions (*Georgiou v The Queen* [2022] VSCA 172, [21]).

36. Driving a motor vehicle in a seriously defective condition may constitute a serious breach of the proper management and control of the vehicle, even if the defect does not manifest itself until such time as the vehicle is out of the control of the driver (*Jiminez v The Queen* (1992) 173 CLR 572).[474]

37. While adherence to the speed limit (or disregard of that limit) will be relevant to determining the seriousness of the breach, it will not be conclusive. There must be a connection between the speed alleged and the creation of danger (*R v De Montero* (2009) 25 VR 694; *Black v Goldman* [1919] VLR 689; *Buckley v Bowes* [1925] VLR 530).

38. It therefore seems likely that an accused can be convicted of dangerous driving causing death or serious injury even if s/he was travelling under the speed limit (see, e.g. *R v Rudebeck* [1999] VSCA 155; *R v De Montero* (2009) 25 VR 694).

Ordinary Risks of the Road

39. The accused's driving must have created risks that significantly exceeded the risks which are ordinarily associated with driving (which is an inherently risky activity). The accused's manner of driving must have created a risk of harm which is not a fair or necessary risk of the road (*R v De Montero* (2009) 25 VR 694; *R v Guthridge* (2010) 27 VR 452; *R v Duncan* SASC 08/05/1953; *Jiminez v The Queen* (1992) 173 CLR 572; *R v Mayne* (1975) 11 SASR 583; *King v The Queen* (2012) 245 CLR 588; [2012] HCA 24).

40. In assessing the extent of the risk, the jury must consider both the likelihood of a collision, and the seriousness of any likely injuries if a collision does occur (*Pope v Hall* (1982) 30 SASR 78).

41. It is not necessary for the prosecution to identify a particular person who was endangered by the driving. The public includes actual or potential road users (*R v Smith* [1969] Tas SR 159; *Wynwood v Williams* (2000) 111 A Crim R 435).

42. Members of the public include passengers travelling with the accused (*R v Burnside* [1962] VR 96).

The Dangerous Driving "Caused" Death or Serious Injury

43. The third element that the prosecution must prove is that the accused's dangerous driving *caused* the death or serious injury of another person.

44. There are two aspects to this element:

    - The dangerous driving must have *caused* the victim to die or to suffer serious injury; and
    - The victim must have been a "person".

Causation

45. The test for causation is the same as that found in culpable driving by recklessness or gross negligence. See 7.1.2 Causation and 7.2.5 Culpable Driving Causing Death for detailed information.

46. The prosecution must prove that it was the dangerous driving that caused the relevant death or serious injury. It is not sufficient to prove that the accused's driving caused the death. This is likely to be an issue where there is a reasonable possibility that the victim would have been killed or seriously injured even if the accused's driving was not dangerous (*Kennett v The King* [2022] VSCA 202, [26]–[34]).

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[474] In such circumstances, the accused may be able to rely on the defence of honest and reasonable mistake of fact (*Jiminez v The Queen* (1992) 173 CLR 572).

Death or Serious Injury

47. To be found guilty of this offence, the accused must have either caused a person to die, or to suffer serious injury (*Crimes Act 1958* s 319). This is the only difference (apart from penalty) between this offence and dangerous driving under s 64 of the *Road Safety Act* (*DPP v Oates* [2007] VSCA 59; *R v De Montero* (2009) 25 VR 694).

48. For information about causing death, see 7.2.1 Intentional or Reckless Murder and 7.2.5 Culpable Driving Causing Death For information about causing serious injury, see 7.4.2 Intentionally Causing Serious Injury.

Voluntariness

49. This issue of voluntariness in relation to dangerous driving is the same as for culpable driving causing death. See 7.2.5 Culpable Driving Causing Death for information on this issue.

Complicity

50. Where the accused participates in a race on a public road in which another participant in the race directly causes the death of the victim, the jury may find that the parties were acting in concert or that the accused aided and abetted the other participant (*R v Guthridge* (2010) 27 VR 452).

51. In such cases, it will generally be preferable for the prosecution to present the accused on the basis that he or she aided or abetted the principal offender. Such an approach avoids the artificiality of relying on an implied agreement or understanding, and will simplify jury directions (*R v Guthridge* (2010) 27 VR 452).

52. However, where there is cogent evidence of an agreement or understanding between the parties, it will be appropriate for the prosecution to rely upon concert (*R v Guthridge* (2010) 27 VR 452).

53. See 5.2 Statutory Complicity, 5.3 Joint Criminal Enterprise and 5.5 Aiding, Abetting, Counselling or Procuring for information concerning these types of complicity.

Dangerous, Culpable and Negligent Driving

54. Dangerous driving is an alternative offence to culpable driving causing death or negligently causing serious injury (*Crimes Act 1958* s 422A).

55. However, a majority of the High Court has held that dangerous driving is not a species of negligence (*King v The Queen* (2012) 245 CLR 588 (Bell J contra)). While Bell J has held that the difference between negligent culpable driving and dangerous driving is a difference of degree rather than kind, this was a dissenting view.

56. When dangerous driving is left to the jury as an alternative offence, the judge must clearly direct the jury about the differences between the two offences (*R v De Montero* (2009) 25 VR 694; *King v R* (2011) 32 VR 233; *R v Buttsworth* [1983] 1 NSWLR 658; *McBride v The Queen* (1966) 115 CLR 44; *Jiminez v The Queen* (1992) 173 CLR 572).

57. The judge should explain the following matters to the jury:

    - The offence of dangerous driving, though a serious offence, involves conduct that is less blameworthy than culpable driving;
    - While culpable driving may require proof of gross negligence, dangerous driving requires proof that the accused's driving involves a serious breach of the proper management or control of the vehicle that created a real risk that members of the public will be killed or seriously injured (*R v De Montero* (2009) 25 VR 694; *King v The Queen* (2012) 245 CLR 588).

Last updated: 14 May 2024

7.2.6.1 Charge: Dangerous Driving Causing Death or Serious Injury

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This charge may be given when the accused is charged with Dangerous driving causing death on or after 19/03/2008, Dangerous driving causing serious injury on or after 1/07/2013 or Dangerous driving causing death or serious injury between 13/10/2004 and 18/03/2008, where the conduct caused death.

The judge should adapt the charge to state the correct name of the offence and whether the prosecution allege that the accused's dangerous driving caused death or serious injury.

The elements

I must now direct you about the crime of dangerous driving causing [death/serious injury]. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – at the time of the offence, the accused was driving a motor vehicle.

Two – the accused was driving at a speed or in a manner that was dangerous to the public.

Three – the dangerous driving caused the victim to [die/be seriously injured].

I will now explain each of these elements in more detail.

Driving

The first element that the prosecution must prove is that the accused was driving a motor vehicle.

[*If this element is not in issue, add the following shaded section.*]

In this case it is not disputed that NOA was driving a motor vehicle when [*describe relevant incident*]. You should therefore have no difficulty finding this element proven.

[*If it is alleged that someone else was driving at the relevant time, add the following shaded section.*]

In this case, the prosecution submitted that it was NOA who was driving the [*describe vehicle*] when [*describe relevant incident and outline relevant prosecution evidence and/or arguments*]. The defence denied this, alleging that [*insert relevant defence evidence and/or arguments*].

It is for you to decide whether it was NOA who was driving at the relevant time. It is only if you are satisfied, beyond reasonable doubt, that s/he was, that this first element will be met.

[*Add directions about any other issues that have arisen in relation to the first element* (e.g. that the accused was not driving a "motor vehicle"; that the accused's acts did not constitute "driving"; that the accused's acts were not voluntary). *See* 7.2.5.1 Charge: Culpable Driving – One Basis of Culpability *for an example of directions on what it means to "drive" a motor vehicle, as well as on the issue of voluntariness*.]

Dangerous Driving

The second element the prosecution must prove is that the accused was driving at a speed or in a manner that was dangerous to the public. That is, his/her driving involved a serious breach of the proper management or control of a vehicle which created a real risk that members of the public in the vicinity would be killed or seriously injured.

In determining whether this was the case, remember that people do not always drive as they should. Even the best drivers occasionally lose attention for a moment, or make minor mistakes. For this element to be satisfied, the accused must have driven at a speed or in a manner that significantly increased the risk of serious injury or death, over and above the ordinary risks of the road. This could be because NOA's driving increased the likelihood of a collision, or because it made it more likely that any injuries suffered in a collision would be serious.

The accused's manner of driving includes all matters concerned with the management and control of the vehicle, such as the accused's technical driving skill. As part of this, you will consider the condition of his/her vehicle.

In determining whether NOA's driving was dangerous, you must consider all of the circumstances in which s/he was driving. In this case, that includes [*describe relevant circumstances, such as time of day, weather, lighting, condition of the driver, road conditions, traffic and vehicle condition*].

However, you must not assume that simply because there was a collision, NOA's driving must have been dangerous. Sometimes accidents happen, for which no one will be criminally responsible.

[*If the driver's speed is in issue, add the following shaded section.*]

While the speed at which a person drives will be relevant to your decision, it will not be conclusive. It is just one factor to take into account. This is because it is possible for the accused to have driven above the speed limit, but not to have driven dangerously in the circumstances. Similarly, it is possible for the accused to have driven within the speed limit, but to have nevertheless driven dangerously.

[*If voluntariness is in issue, add the following shaded section.*]

In determining whether the accused's driving was dangerous, you may only take into account his/her voluntary actions. This is because the law says that a person cannot be held criminally responsible for actions which s/he committed involuntarily.

In this case, you have heard evidence that NOA fell asleep while driving, and that the collision occurred while s/he was sleeping.[475] Obviously, a person is not acting voluntarily when s/he is sleeping. You therefore cannot find that NOA drove dangerously due to the way s/he drove whilst asleep.

However, that does not mean that you must acquit him/her if you find that s/he was asleep at the time of the collision. This second element will be satisfied if the prosecution can prove, beyond reasonable doubt, that the accused drove dangerously before falling asleep, when his/her actions were voluntary.

To determine if this was the case, you must focus on the accused's driving prior to falling asleep. Consider factors such as any warning signs the accused may have had that s/he was likely to fall asleep. If you find that by driving, or continuing to drive, in such circumstances s/he was creating a real risk of killing or seriously injuring others, this second element will be satisfied.

In this case, the prosecution alleged that NOA's manner of driving was dangerous because [*insert prosecution arguments and/or evidence, clearly identifying the facts alleged to have made it dangerous*]. The defence denied that NOA's driving was dangerous, arguing [*insert defence arguments and/or evidence*].

This second element will only be met if you are satisfied, beyond reasonable doubt, that his/her driving involved a serious breach of the proper management or control of a vehicle which created a real risk that members of the public in the vicinity would be killed or seriously injured.

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[475] This part of the charge has been drafted for use in cases where it is alleged that the accused fell asleep while driving. If it is alleged that the accused acted involuntarily for a different reason, it will need to be modified accordingly.

Causation

The third element that the prosecution must prove is that NOA's dangerous driving caused NOV to [die/be seriously injured]. That is, NOV must have [died/suffered a serious injury] as a result of NOA driving at a speed or in a manner that was dangerous to the public.

For this to be the case, there must have been a relationship between the accused's dangerous driving and the victim's [death/injury]. It will not be sufficient if the collision simply happened to occur while NOA was driving dangerously, but was not due to his/her dangerous driving.

However, the accused's dangerous driving does not need to have been the only cause of NOV's [death/injury], or the direct or immediate cause. You may find that NOA's dangerous driving caused NOV to die/be seriously injured] if it was a substantial or significant cause of that result.

[*If it is alleged that NOV was seriously injured, add the following shaded section.*]

This element requires NOA's dangerous driving to have caused NOV to be seriously injured. It is not sufficient for NOV to have merely been injured.

The law defines the word injury to mean physical injury or harm to mental health, whether temporary or permanent. A serious injury is an injury which endangers life or is substantial and protracted.[476]

[*If multiple injuries were inflicted, add the following darker shaded section.*]

In making your decision, you do not have to look at each of NOV's injuries separately, and decide whether or not any one of them is a serious injury. A person may suffer a serious injury because of the cumulative effect of several injuries.

[*If the physical injuries caused ongoing psychological harm, add the following darker shaded section.*]

An injury may be substantial and protracted because of the combined effect of the immediate physical injuries and prolonged psychological injuries.

[*Add directions about any other issues that have arisen in relation to the third element, e.g.* "that the death was caused by an intervening act"/"that the death was not caused by a voluntary act". *See* 7.2.5.1 Charge: Culpable Driving – One Basis of Culpability *for an example of directions on intervening acts, as well as on the issue of voluntariness.*]

You should approach this element in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

In this case [*insert competing arguments and evidence relating to causation*].

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of dangerous driving causing [death/serious injury], the prosecution must prove to you, beyond reasonable doubt, that when the offence was committed:

One – NOA was driving a motor vehicle; and

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[476] The judge should consider including an example of a serious injury, such as brain damage, or a stabbing which causes significant blood loss.

Two – NOA was driving at a speed or in a manner that was dangerous to the public; and

Three – NOA's dangerous driving caused NOV to [die/suffer serious injury].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of dangerous driving causing [death/serious injury].

Comparison with Culpable Driving

[Where dangerous driving causing death is left as an alternative to culpable driving, the judge should explain the differences between the two offences.

The content of the explanation will vary depending on the basis of culpability alleged in relation to the culpable driving offence. For example:

- Where it is alleged that the accused was reckless, the judge should explain that the culpable driving offence requires proof that the accused was aware that his/her driving created a substantial risk of death or serious injury, whereas the dangerous driving offence does not require proof that the accused was aware that his/her driving was dangerous.
- Where it is alleged that the accused was grossly negligent, the judge should explain that while dangerous driving is also a serious offence, it is less serious than culpable driving. In addition, while culpable driving requires gross negligence, dangerous driving requires a serious breach of the proper management or control of a vehicle that creates a real risk that members of the public in the vicinity will be killed or seriously injured.
- Where it is alleged that the accused was affected by alcohol or drugs, the judge should explain that the dangerous driving offence requires proof that the dangerous driving caused the victim's death, whereas the culpable driving offence only requires proof that the driving (not the drugs or alcohol) caused the victim's death.]

Last updated: 30 November 2015

7.2.6.2 Charge: Dangerous Driving Causing Serious Injury (Pre-1/7/13)

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This charge may be given when the accused is charged with Dangerous driving causing serious injury between 19/03/2008 and 30/06/2013 or Dangerous driving causing death or serious injury between 13/10/2004 and 18/03/2008, where the conduct caused serious injury.

The judge should adapt the charge to state the correct name of the offence and whether the prosecution allege that the accused's dangerous driving caused death or serious injury.

The elements

I must now direct you about the crime of dangerous driving causing serious injury. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – at the time of the offence, the accused was driving a motor vehicle.

Two – the accused was driving at a speed or in a manner that was dangerous to the public.

Three – the dangerous driving caused the victim to be seriously injured.

I will now explain each of these elements in more detail.

Driving

The first element that the prosecution must prove is that the accused was driving a motor vehicle.

[*If this element is not in issue, add the following shaded section.*]

In this case it is not disputed that NOA was driving a motor vehicle when [*describe relevant incident*]. You should therefore have no difficulty finding this element proven.

[*If it is alleged that someone else was driving at the relevant time, add the following shaded section.*]

In this case, the prosecution submitted that it was NOA who was driving the [*describe vehicle*] when [*describe relevant incident and outline relevant prosecution evidence and/or arguments*]. The defence denied this, alleging that [*insert relevant defence evidence and/or arguments*].

It is for you to decide whether it was NOA who was driving at the relevant time. It is only if you are satisfied, beyond reasonable doubt, that s/he was, that this first element will be met.

[*Add directions about any other issues that have arisen in relation to the first element, e.g.* "that the accused was not driving a "motor vehicle""/"that the accused's acts did not constitute "driving""/"that the accused's acts were not voluntary." *See* 7.2.5.1 Charge: Culpable Driving – One Basis of Culpability *for an example of directions on what it means to "drive" a motor vehicle, as well as on the issue of voluntariness*.]

Dangerous Driving

The second element the prosecution must prove is that the accused was driving at a speed or in a manner that was dangerous to the public. That is, his/her driving involved a serious breach of the proper management or control of a vehicle which created a real risk that members of the public in the vicinity would be killed or seriously injured.

In determining whether this was the case, remember that people do not always drive as they should. Even the best drivers occasionally lose attention for a moment, or make minor mistakes. For this element to be satisfied, the accused must have driven at a speed or in a manner that significantly increased the risk of serious injury or death, over and above the ordinary risks of the road. This could be because NOA's driving increased the likelihood of a collision, or because it made it more likely that any injuries suffered in a collision would be serious.

The accused's manner of driving includes all matters concerned with the management and control of the vehicle, such as the accused's technical driving skill. As part of this, you will consider the condition of his/her vehicle.

In determining whether NOA's driving was dangerous, you must consider all of the circumstances in which s/he was driving. In this case, that includes [*describe relevant circumstances*, such as time of day, weather, lighting, condition of the driver, road conditions, traffic and vehicle condition].

However, you must not assume that simply because there was a collision, NOA's driving must have been dangerous. Sometimes accidents happen, for which no one will be criminally responsible.

[*If the driver's speed is in issue, add the following shaded section.*]

While the speed at which a person drives will be relevant to your decision, it will not be conclusive. It is just one factor to take into account. This is because it is possible for the accused to have driven above the speed limit, but not to have driven dangerously in the circumstances. Similarly, it is possible for the accused to have driven within the speed limit, but to have nevertheless driven dangerously.

[*If voluntariness is in issue, add the following shaded section.*]

In determining whether the accused's driving was dangerous, you may only take into account his/her voluntary actions. This is because the law says that a person cannot be held criminally responsible for actions which s/he committed involuntarily.

In this case, you have heard evidence that NOA fell asleep while driving, and that the collision

occurred while s/he was sleeping.[477] Obviously, a person is not acting voluntarily when s/he is sleeping. You therefore cannot find that NOA drove dangerously due to the way s/he drove whilst asleep.

However, that does not mean that you must acquit him/her if you find that s/he was asleep at the time of the collision. This second element will be satisfied if the prosecution can prove, beyond reasonable doubt, that the accused drove dangerously before falling asleep, when his/her actions were voluntary.

To determine if this was the case, you must focus on the accused's driving prior to falling asleep. Consider factors such as any warning signs the accused may have had that s/he was likely to fall asleep. If you find that by driving, or continuing to drive, in such circumstances s/he was creating a real risk of killing or seriously injuring others, this second element will be satisfied.

In this case, the prosecution alleged that NOA's manner of driving was dangerous because [*insert prosecution arguments and/or evidence, clearly identifying the facts alleged to have made it dangerous*]. The defence denied that NOA's driving was dangerous, arguing [*insert defence arguments and/or evidence*].

This second element will only be met if you are satisfied, beyond reasonable doubt, that his/her driving involved a serious breach of the proper management or control of a vehicle which created a real risk that members of the public in the vicinity would be killed or seriously injured.

Causation

The third element that the prosecution must prove is that NOA's dangerous driving caused NOV to be seriously injured. That is, NOV must have suffered a serious injury as a result of NOA driving at a speed or in a manner that was dangerous to the public.

For this to be the case, there must have been a relationship between the accused's dangerous driving and the victim's injury. It will not be sufficient if the collision simply happened to occur while NOA was driving dangerously, but was not due to his/her dangerous driving.

However, the accused's dangerous driving does not need to have been the only cause of NOV's injury, or the direct or immediate cause. You may find that NOA's dangerous driving caused NOV to be seriously injured if it was a substantial or significant cause of that result.

This element requires NOA's dangerous driving to have caused NOV to be seriously injured. It is not sufficient for NOV to have merely been injured. The law does not define the term "serious injury" – it is for you, as members of the jury, to determine whether the harm caused to NOV was sufficiently severe to be called a "serious injury".

In making this determination, you may take into account any physical injuries suffered by NOV, as well as matters such as [*insert any relevant matters, such as pain, unconsciousness, hysteria or bodily impairments*].

You are not required to look at each of NOV's injuries separately and assess whether or not they are "serious". A person may suffer a "serious injury" because of a combination of injuries.

[*Add directions about any other issues that have arisen in relation to the third element, e.g.* "that the injury was caused by an intervening act"/"that the injury was not caused by a voluntary act." *See* 7.2.5.1 Charge: Culpable Driving – One Basis of Culpability *for an example of directions on intervening acts, as well as on the issue of voluntariness*.]

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[477] This part of the charge has been drafted for use in cases where it is alleged that the accused fell asleep while driving. If it is alleged that the accused acted involuntarily for a different reason, it will need to be modified accordingly.

You should approach this element in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

In this case [*insert competing arguments and evidence relating to causation*].

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, before you can find NOA guilty of dangerous driving causing serious injury, the prosecution must prove to you, beyond reasonable doubt, that when the offence was committed:

One – NOA was driving a motor vehicle; and

Two – NOA was driving at a speed or in a manner that was dangerous to the public; and

Three – NOA's dangerous driving caused NOV to suffer serious injury].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of dangerous driving causing serious injury.

Last updated: 30 November 2015

7.2.6.3 Checklist: Dangerous Driving Causing Death

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused was driving a motor vehicle; and
2. The accused was driving dangerously; and
3. The accused's dangerous driving caused the victim's death.

Driving a Motor Vehicle

1. Was the accused driving a motor vehicle?

If Yes, then go to 2

If No, then the accused is not guilty of Dangerous Driving Causing Death

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Dangerous Driving

2. Did the accused drive dangerously?

Consider – Did his/her driving involve a serious breach of the proper management or control of a vehicle which created a real risk that members of the public in the vicinity would be killed or seriously injured?

If Yes, then go to 3

If No, then the accused is not guilty of Dangerous Driving Causing Death

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Causing Death

3. Was the accused's dangerous driving a substantial or significant cause of the victim's death?

If Yes, then the accused is guilty of Dangerous Driving Causing Death (as long as you have also answered Yes to questions 1 and 2)

If No, then the accused is not guilty of Dangerous Driving Causing Death

Last updated: 25 July 2012

7.2.6.4 Checklist: Dangerous Driving Causing Serious Injury

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This checklist is for conduct occurring on or after 1 July 2013. It must be adapted for conduct before that date.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused was driving a motor vehicle; and
2. The accused was driving dangerously; and
3. The accused's dangerous driving caused the victim serious injury.

Driving a Motor Vehicle

1. Was the accused driving a motor vehicle?

If Yes, then go to 2

If No, then the accused is not guilty of Dangerous Driving Causing Death

Dangerous Driving

2. Did the accused drive dangerously?

Consider – Did his/her driving involve a serious breach of the proper management or control of a vehicle which created a real risk that members of the public in the vicinity would be killed or seriously injured?

If Yes, then go to 3

If No, then the accused is not guilty of Dangerous Driving Causing Death

Causing Serious Injury

3. Did the accused's dangerous driving cause the victim serious injury?

3.1 Were the victim's injuries serious?

Consider – A serious injury is an injury which endangers life or is substantial and protracted.

If Yes, then go to 3.2

If No, then the accused is not guilty of Dangerous Driving Causing Serious Injury

3.2 Was the accused's dangerous driving a substantial or significant cause of those injuries?

If Yes, then the accused is guilty of Dangerous Driving Causing Serious Injury (as long as you have also answered Yes to questions 1, 2, and 3.1)

If No, then the accused is not guilty of Dangerous Driving Causing Serious Injury

Last updated: 30 November 2015

7.3 Sexual Offences

7.3.1 Statutory Directions in Sexual Offence Cases

The *Jury Directions Act 2015* contains several provisions which only apply in cases involving sexual offences. Information on these provisions is available in the following subchapters, and concern the following issues:

- 7.3.1.2 Consent and reasonable belief in consent (From 1/7/15)
- 7.3.1.4 Effect of delayed complaint on credit
- 7.3.1.5 Differences in a complainant's account
- 7.3.1.6 Evidence of a post-offence relationship
- 7.3.1.7 Distress

To support the identification of the need for these statutory directions, *Jury Directions Act 2015* Part 5, Division 1AA allows a judge to request, in a proceeding that relates to a sexual offence (including a conspiracy, incitement or attempt to commit a sexual offence), that the parties inform the judge whether there is likely to be evidence that would provide a good reason for giving any of the directions contained in Part 5. This power to request information from the parties does not oblige the judge to form a view, at that time, about whether to give the direction. Further, the power to request information is discretionary, and it will be a matter for the judge to decide whether to invoke that process (see *Jury Directions Act 2015* ss 44O, 44P).

Two other directions which may arise in sexual offences cases, but are not limited by the *Jury Directions Act 2015* to such cases, are Delay Causing Forensic Disadvantage and Delay Risking Honest but Erroneous Memory.

Last updated: 1 January 2023

7.3.1.1 Early Directions on Jury Assessment of Evidence about Consent and Reasonable Belief in Consent

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1. Part 5 of the *Jury Directions Act 2015* prescribes a series of directions that may or must be given in criminal proceedings that relate to a charge for a sexual offence, or a charge of conspiracy or incitement to commit a sexual offence.
2. Division 1A of Part 5 of the *Jury Directions Act 2015* is titled "Consent and reasonable belief in consent (offences before, on or after 1 July 2015)". It was inserted by s 48 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022*, which commenced operation on 1 January 2023.
3. By clause 6(4)(a) of Schedule 1 of the *Jury Directions Act 2015*, Division 1A applies to a trial that commences on or after 1 January 2023.
4. *Jury Directions Act 2015* s 47C provides that a judge must give directions on any of the following topics the judge considers there are good reasons to give:

- The absence of physical injury, violence or a threat;
- Responses to non-consensual acts;
- Other sexual activity;
- Personal appearance and irrelevant conduct;
- Non-consensual sexual acts between all sorts of people;
- General assumptions not informing a reasonable belief in consent.

5. These directions apply even if the absence of consent is not an element of the offence. In such circumstances, the judge may use a form of words which reflects that absence of consent is not an element, regardless of whether or how consent is referred to in the provision (*Jury Directions Act 2015* s 47A(2)–(4)).
6. In deciding whether there are good reasons to give one or more of these directions, the judge must have regard to any submissions by the prosecution and defence (*Jury Directions Act 2015* s 47C(2)).
7. A direction identified under s 47C must be given at the earliest time in the trial the judge determines is appropriate (*Jury Directions Act 2015* s 47C(3)), and may be given at any time during the trial, including before any evidence is adduced and in the final summing up (*Jury Directions Act 2015* s 47C(4)), and may be repeated at any time (*Jury Directions Act 2015* s 47C(6)).
8. Before the trial begins, the judge may ask the prosecution and defence whether it is likely that evidence will be adduced that would provide good reasons for giving any of those directions. This process of early identification does not require the judge to form a view at that time whether to give a direction, and does not prevent any party in the trial from seeking a direction which was not identified (*Jury Directions Act 2015* s 44P).
9. A direction on the absence of physical injury, violence or a threat is a direction "informing the jury that experience shows that–

    (a) there are many different circumstances in which people do and do not consent to a sexual act; and

    (b) people who do not consent to a sexual act may not be–

        (i) physically injured or subjected to violence; or

        (ii) threatened with physical injury or violence" (*Jury Directions Act 2015* s 47D).

10. A direction on responses to non-consensual acts is a direction "informing the jury that experience shows that:

    (a) people may react differently to a sexual act to which they did not consent, and there is no typical, proper or normal response; and

    (b) people who do not consent to a sexual act may not protest or physically resist the act.

    Example

    The person may freeze and not do or say anything" (*Jury Directions Act 2015* s 47E).

11. A direction on other sexual activity is a direction "informing the jury that experience shows that people who do not consent to a sexual act with a particular person on one occasion may have, on one or more other occasions, engaged in or been involved in consensual sexual activity-

(a) with that person or another person; or

(b) of the same kind or a different kind" (*Jury Directions Act 2015* s 47F).

12. A direction on personal appearance and irrelevant conduct is a direction "informing the jury that it should not be assumed that a person consented to a sexual act just because the person-

(a) wore particular clothing; or

(b) had a particular appearance; or

(c) drank alcohol or took any other drug; or

(d) was present in a particular location; or

Examples

1 The complainant attended a nightclub.

2 The complainant went to the accused's home.

(e) acted flirtatiously" (*Jury Directions Act 2015* s 47G).

13. A direction on non-consensual sexual acts occurring between all sorts of people is a direction "informing the jury that experience shows that–

(a) there are many different circumstances in which people do and do not consent to a sexual act; and

(b) sexual acts can occur without consent between all sorts of people, including–

(i) people who know each other;

(ii) people who are married to each other;

(iii) people who are in a relationship with each other;

(iv) people who provide commercial sexual services and people for whose arousal or gratification such services are provided;

(v) people of the same or different sexual orientations;

(vi) people of any gender identity, including people whose gender identity does not correspond to their designated sex at birth.

Examples

People who are transgender, non-binary, genderqueer or gender fluid" (Jury Directions Act 2015 s 47H).

14. A direction on general assumptions not informing a reasonable belief in consent is a direction "informing the jury that–

(a) a belief in consent based solely on a general assumption about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence) is not a reasonable belief; and

(b) if a belief in consent is based on a combination of matters including a general assumption of that kind, then, to the extent that it is based on that general assumption, it is not a reasonable belief.

Examples

Each of the following is an example of a general assumption of the kind referred to in this section-

(a) a general assumption that a person who gets drunk and flirts with another person consents to a sexual act with that other person;

(b) a general assumption that a person who dresses in a way that is considered sexually provocative, and who visits another person's home, consents to a sexual act with that other person" (*Jury Directions Act 2015* s 47I).

15. While the relevant transitional provisions mean that s 47I applies to all sexual offences, whenever committed, it is likely the direction has no relevance to offences committed before 1 July 2015, when the element of "awareness of non-consent" was replaced by "reasonable belief in consent". This means that, for offences committed before 1 July 2015, a judge will not likely have good reason to give a s 47I direction.

16. The *Jury Directions Act 2015* s 47I replaces the former *Jury Directions Act 2015* s 47(3)(c). While there are minor differences between the wording of the former s 47(3)(c)(ii) and the new s 47I(b), the effect of the two clauses is likely the same. While the examples were not in the original text of the provision, they reflect elaboration that was in the Explanatory Memorandum to the Crimes Amendment (Sexual Offences) Bill 2016 which introduced the original s 47(3)(c):

> These directions are designed to make clear that stereotyping opinions about sexual behaviour are not to be taken into account when assessing the reasonableness of a belief in consent. An example is an assumption by an accused that the complainant was consenting to sex with him because she was dressed provocatively and got drunk with him.

17. When giving this direction, the judge should identify what general assumptions might arise in the case.

18. This direction, in conjunction with the directions in s 47(3)(d) and (e), appears to bring Victorian law in line with the approach to reasonable beliefs in Western Australia under the Griffith Code. In *Aubertin v Western Australia* (2006) 33 WAR 87, McLure JA (Roberts-Smith and Buss JJA concurring) held, [46] that:

> Further, a person's values, whether they be informed by cultural, religious or other influences, are not part of a person's characteristics or attributes for the purpose of assessing the reasonableness of an accused's belief. For example, values resulting in extreme views as to the appropriate mode of dress for women, from which inferences about consent are purportedly drawn, cannot positively affect or inform the reasonableness of an accused's belief. Values do not impact on the capacity to perceive or appreciate primary objective facts or the capacity to process that information. In any event, reasonableness must be judged in the light of generally accepted community standards and attitudes.

Last updated: 9 November 2023

7.3.1.1.1 Statutory Directions on Consent

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Jury Directions Act 2015 s 47C provides that the following directions must be given at the earliest time in the trial that the trial judge determines is appropriate (assuming the judge is satisfied there are good reasons for giving the directions), and may be given before any evidence is adduced, and in the trial judge's summing up. The following directions are drafted on the basis that they will all be given at the start of the trial. Judges will need to modify these directions if they intend to give them at the end of the trial, or if the judge intends to omit any of these directions.

Jury Directions Act 2015 s 47C identifies six separate directions which may be given. This page contains the five directions identified in that section which are relevant to consent. See Statutory directions on belief in consent for the remaining direction.

Introduction

I am now going to give you some direction on how you assess parts of the evidence. The purpose of these directions is to inform you of what experience shows about the circumstances in which people consent, and do not consent, to sexual acts. These directions are often given in trials for sexual offences to help juries understand and assess the evidence. They do not reflect any judgment or opinion I might have about the evidence you might hear.

Absence of physical injury, violence or a threat

There are many different circumstances in which people do or do not consent to a sexual act. Non-consensual sexual acts can occur without causing injury or where the person is not subjected to violence or threatened. Do not assume that an absence of injuries, violence or threats means there was consent.

Responses to a non-consensual sexual act

People may react differently to a non-consensual sexual act. There is no typical, proper or normal response. Some people protest or physically resist, and others do not. Some people freeze and do not say or do anything when experiencing a non-consensual sexual act.

Other sexual activity[478]

Consent to one sexual act on one occasion does not establish consent to other acts, or on other occasions or with other people. In other words, a person who does not consent to a sexual act with a particular person on a particular occasion, may have consented to sexual acts on another occasion with that person or a different person, or to the same or different kinds of sexual acts.

[478] Criminal Procedure Act 2009 s 342 restricts the admissibility of evidence about other sexual activities of the complainant. The direction under this heading will likely only be required if the court has, or likely will, give leave to adduce evidence of the complainant's sexual history.

Personal appearance and irrelevant conduct

When you are listening to the evidence, and considering the issue of consent, there are a few factors you should be careful of. Do not assume a person consented to a sexual act just because they wore particular clothing, had a particular appearance, drank alcohol or took drugs, went to the accused's house,[479] or acted flirtatiously.

Non-consensual acts occur between all sorts of people

The final thing I want to say at the moment about the issue of consent is that there are many different circumstances in which people do and do not consent to a sexual act. Sexual acts can occur without consent between all sorts of people, including [*identify any features of the relationship between the complainant and accused which may be relevant*, such as "people who know each other", "people who are married or in a relationship with each other", "people who provide commercial sexual services and their customers", "people of the same or different sexual orientations" and "people of any gender identity"].

Do not assume that sexual acts without consent only occur in one kind of situation. You must decide whether the prosecution has proved the complainant did not consent by considering all the evidence and without jumping to conclusions.

Last updated: 1 January 2023

7.3.1.1.2 Statutory Direction on Belief in Consent

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I am now going to give you a short direction about what reasonable belief in consent means.

As you have heard, one element of charge [*identify relevant charge*] is that the accused had no reasonable belief that the complainant was consenting.

To decide whether a belief may have been reasonable, you must look at all the circumstances. In doing this, the law defines two matters you must take into account.

First, you must consider what steps the accused took to find out whether the complainant consented to the act.

Second, a belief that is solely based on a general assumption about when people consent is not a reasonable belief. If a belief is based partially on general assumptions and partially on other matters, you must ignore the influence of any general assumptions and look at whether the belief was reasonable, when based solely on those other matters. For example, you might decide that a belief that if someone drinks alcohol with you, then they consent to sexual activity with you, would be a belief based on a general assumption. If so, a belief based on a general assumption would not be a reasonable belief.

Last Updated: 1 January 2023

7.3.1.2 Consent and Reasonable Belief in Consent (From 1/7/15)

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[479] *Jury Directions Act 2015* s 47G(d) provides that the jury should not assume consent just because the person "was present in a particular place". The judge should identify the relevant place based on the facts of the case.

Note: This topic describes the law relating to consent and reasonable belief in consent for sexual offences committed on or after 1 July 2015. For information on consent and the fault element for offences committed before 1 July 2015, see 7.3.1.3 Consent and awareness of non-consent (Pre-1/07/15)

1. The *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* ('the 2014 Act') altered the statutory definition of several sexual offences, including rape and sexual assault to replace the subject fault element of "awareness of non-consent" with a partially objective fault element of "no reasonable belief in consent".
2. The purpose of this change was to simplify the law on rape and rape related offences, particularly in relation to an accused's claimed belief that the complainant was consenting (Criminal Law Review Consultation Paper "Review of Sexual Offences" September 2013, 3–37).
3. The 2014 Amendment Act also made consequential changes to the definitions of consent and sexual penetration.
4. These provisions were further amended by the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* ('the 2022 Act'). The 2022 Act introduced changes to both offence definitions (which apply to conduct committed from 30 July 2023 onwards) and jury directions.
5. This topic explains the law relevant to consent and reasonable belief in consent which applies to sexual offences committed on or after 1 July 2015.
6. This topic also discusses the statutory directions under the *Jury Directions Act 2015* which are designed to inform the jury about matters that may be relevant to their assessment of whether the prosecution has proved an absence of consent or reasonable belief in consent.
7. The *Crimes Act 1958* defines "consent" to mean "free agreement" (until 30 July 2023) or "free and voluntary agreement" (from 30 July 2023 onwards) and describes (non-exclusively) circumstances where a person "does not freely agree to an act" (s 34C between 1 July 2015 and 30 June 2017, s 36 from 1 July 2017 to 29 July 2023 and s 36AA from 30 July 2023 onwards).

Operation of Consent Provisions

8. The provisions discussed in this chapter only apply to proceedings for sexual offences, and do not apply to non-sexual offences where consent may be an issue, such as common assault and intentionally causing injury.

Commencement and Transition

9. Before 1 July 2015, *Crimes Act 1958* ss 36, 37AA and 37AAA provided for the meaning of consent and jury directions on consent. These sections were replaced by *Crimes Act 1958* s 34C and Jury Directions Act 2015 ss 46 and 47.
10. *Crimes Act 1958* s 34C and *Jury Directions Act 2015* ss 46 and 47 only apply to offences alleged to have been committed on or after 1 July 2015 (*Crimes Act 1958* s 626; *Jury Directions Act 2015* Schedule 1, clause 1(2)).
11. The amendments to the *Jury Directions Act 2015* introduced by the *Crimes Amendment (Sexual Offences) Act 2016* (other than the changed reference from *Crimes Act 1958* s 34C to *Crimes Act 1958* s 36) commenced on 26 September 2016, and apply to trials commenced on or after that date, for offences committed on or after 1 July 2015.
12. For offences committed before 1 July 2015, see 7.3.1.3 Consent and awareness of non-consent (Pre-1/7/15).

13. From 1 July 2017, the definition of consent was moved to *Crimes Act 1958* s 36, following the commencement of the remaining sections of the *Crimes Amendment (Sexual Offences) Act 2016*. In addition to the change of section number, the definition of consent included one additional circumstance in which a person does not consent (see s 36(2)(f)). The Amendment Act did not introduce any relevant transitional provisions to the *Crimes Act 1958*. As a matter of prudence, the Charge Book has adopted the view that s 36(2)(f) only applies to offences committed on or after 1 July 2017.

14. The 2022 Act made extensive changes to the *Crimes Act 1958* and the *Jury Directions Act 2015*. There are now two relevant transitional provisions:

    - Changes to the *Crimes Act 1958* by Part 2 of the 2022 Act only apply to offences alleged to have been committed after the commencement of Part 2. The default commencement date for Part 2 is 30 July 2023.
    - Changes to the *Jury Directions Act 2015* by Part 4 of the 2022 Act apply to trials and other hearings commenced after the commencement of Part 4, regardless of when the alleged offences were committed. As noted, Part 4 commenced operation on 1 January 2023 (*Jury Directions Act 2015* Schedule 1, clauses 6 and 7).[480]

Sexual Offences Where Consent is Relevant

15. Consent will generally be relevant to the following offences, as it is an element of each offence that there be an absence of consent:

    i) Rape (s 38)

    ii) Rape by compelling sexual penetration (s 39)

    iii) Sexual assault (s 40)

    iv) Sexual assault by compelling sexual touching (s 41)

    v) Assault with intent to commit a sexual offence (s 42)

16. Consent may be relevant to the following offences, as it is an element of the offence that there be an absence of consent in the particular circumstances identified in the offence provision:

    i) Incest (s 44 – as relevant to the defence of compulsion)

    ii) Sexual Penetration of a Child Under the Age of 16 (s 45)

    iii) Indecent Act With Child Under the Age of 16 (s 47)

    iv) Sexual Penetration of a 16 or 17 Year Old Child (s 48)

    v) Indecent Act With 16 or 17 Year Old Child (s 49)

    vi) Indecent Act With 17 Year Old Child (s 49 – repealed)

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[480] Between 1 January 2023 and 11 October 2023, Schedule 1 clause 6(2) provided an additional transition provision which meant that amendments to ss 46 and 47 of the *Jury Directions Act 2015* only applied to offences committed after 1 January 2023. This transitional provision has now been reversed, by a combination of clause 6(2A) and clause 7(1).

vii) Sexual Penetration of a Person with a Cognitive Impairment (ss 51(1), 52(1))

viii) Indecent Act with a Person with a Cognitive Impairment (ss 51(2), 52(2))

17. Offences contrary to s 47A (Persistent abuse of child under the age of 16) and s 49A as it stood before 1 July 2017 (Facilitating Sexual Offences Against Children) may also require consent directions if the underlying offence is listed above.

18. For offences under sections 45, 47, 48, 49, 51 and 52 (as in force before 1 July 2017), consent is not a defence unless the accused establishes an additional exculpatory matter, such as a belief that the child was aged 16 or over, or that the accused was married to the complainant. The relevant exculpatory matters are explained in the Charges and commentary for each offence.

19. Where consent is a defence, the prosecution must prove that the complainant did not consent (*Crimes Act 1958* ss 45(4A), 47(3), 48(3), 49(3), 51(6), 52(4)).

20. It is an unresolved question what, if any, additional fault element arises where consent is a defence (see *R v Deblasis & Deblasis* (2007) 19 VR 128; *R v Mark & Elmazovski* [2006] VSCA 251).

21. In cases where the accused is charged with sexual penetration of a child or indecent act with a child, the judge should require the parties to identify before the trial whether consent will be in issue, or whether it will only be the additional exculpatory matters which are in issue (*Criminal Procedure Act 2009* ss 182, 183, 199). This will allow the judge to determine what directions are required in relation to consent and, if necessary, will allow the parties to challenge those intended directions on an interlocutory appeal (*Criminal Procedure Act 2009* s 295).

22. While the *Crimes Act* does not expressly refer to a fault element associated with consent for offences before 1 July 2017, the prudent approach, which is taken in this Charge Book, is to require for these offences that the prosecution prove the accused was aware that the complainant was not or might not be consenting. For offences after 1 July 2017, the drafting of the defences for sexual offences against children indicates that belief in consent is not part of the defences.

Meaning of "Consent"

23. Between 1 July 2015 and 30 June 2017, "consent" was defined in s 34C of the *Crimes Act 1958* to mean "free agreement".

24. Between 1 July 2017 and 29 July 2023, s 36 of the *Crimes Act 1958* similarly defined consent as "free agreement".

25. From 30 July 2023, the 2022 Act amended s 36 of the *Crimes Act 1958* to define consent as "free and voluntary agreement", and also states that a person does not consent just because they do not resist the act, and that a person does not consent to an act just because they consented to the same or different act with the same or a different person.

26. Section 34C(2) of the *Crimes Act 1958* listed the following situations in which a person is regarded as not having given free agreement.

    (a) The person submits to the act because of force or the fear of force, whether to that person or someone else;

    (b) The person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;

    (c) The person submits to the act because the person is unlawfully detained;

    (d) The person is asleep or unconscious;

    (e) The person is so affected by alcohol or another drug as to be incapable of consenting to the act;

    (f) The person is incapable of understanding the sexual nature of the act;

    (g) The person is mistaken about the sexual nature of the act;

    (h) The person is mistaken about the identity of any other person involved in the act;

(i) The person mistakenly believes that the act is for medical or hygienic purposes;

(j) If the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes;

(k) The person does not say or do anything to indicate consent to the act;

(l) Having initially given consent to the act, the person later withdraws consent to the act taking place or continuing.

27. Section 36(2) lists all of these circumstances and included the additional circumstance:

- the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act (*Crimes Act 1958* s 36(2)(f)).

28. From 30 July 2023, the new *Crimes Act 1958* s 36AA contains the list of non-consent circumstances. While many of the former non-consent circumstances remain in the new s 36AA, some of those provisions have been restated, and the list has been reordered. For this reason, the new list is reproduced below:

(a) the person does not say or do anything to indicate consent to the act;

(b) the person submits to the act because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal, regardless of-

(i) when the force, harm or conduct giving rise to the fear occurs; and

(ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

Examples

Each of the following is a type of harm that can be done to a person as described in this paragraph-

(a) economic or financial harm;

(b) reputational harm;

(c) harm to the person's family, cultural or community relationships;

(d) harm to the person's employment;

(e) family violence involving psychological abuse or harm to mental health;

(f) sexual harassment.

(c) the person submits to the act because of coercion or intimidation-

(i) regardless of when the coercion or intimidation occurs; and

(ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

(d) the person submits to the act because the person is unlawfully detained;

(e) the person submits to the act because the person is overborne by the abuse of a relationship of authority or trust;

(f) the person is asleep or unconscious;

(g) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;

(h) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

Note

This circumstance may apply where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting.

(i) the person is incapable of understanding the sexual nature of the act;

(j) the person is mistaken about the sexual nature of the act;

(k) the person is mistaken about the identity of any other person involved in the act;

(l) the person mistakenly believes that the act is for medical or hygienic purposes;

(m) the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid;

(n) if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes;

(o) the person engages in the act on the basis that a condom is used and either-

(i) before or during the act, any other person involved in the act intentionally removes the condom or tampers with the condom; or

(ii) the person who was to use the condom intentionally does not use it;

(p) having given consent to the act, the person later withdraws consent to the act taking place or continuing.

29. Sections 34C, 36 and 36AA do not provide a definition of consent. Rather, they identify circumstances in which there is no consent. If the prosecution proves the existence of one of these circumstances, then the prosecution has proved an absence of consent and the jury does not need to separately decide whether there was no free, or free and voluntary, agreement (*DPP v Yeong* [2022] VSCA 179, [45]).

30. All versions of the section have identified that the list does not limit the circumstances in which there may be an absence of consent. This does not mean a court may add to the list. But where the prosecution relies on a circumstance which is not listed, the question for the jury will be whether the complainant did not consent in the sense that the complainant did not freely, or freely and voluntarily, agree to the act of sexual penetration (*DPP v Yeong* [2022] VSCA 179, [48]).

31. When applying the definition of consent as an absence of free, or free and voluntary, agreement, the court does not need to identify the parameters of free agreement in a way that avoids overlap with items on the list of deemed non-consent circumstances. A given circumstance could involve both an absence of free agreement, and the presence of a statutory non-consent circumstance (*DPP v Yeong* [2022] VSCA 179, [49]).

32. The existence of the offence of procuring sexual act by fraud (see, since 1 July 2017, *Crimes Act 1958* s 45) does not mean that fraudulent acts are carved out from the concept of consent (*DPP v Yeong* [2022] VSCA 179, [51]–[53]).

33. Section 34C(2)(b) and section 36(2)(b) states that submission because of "the fear of harm of any type, whether to that person or someone else or an animal" is not consent. The section provides no assistance as to the nature of the harm contemplated. It may extend beyond physical or psychological injury, but that has not yet been determined. The successor to these provisions in s 36AA(1)(b) expressly notes that it does not matter when the fear arose, or whether the fear is the result of a single incident or as part of an ongoing pattern. The section also contains examples of the kinds of harms which qualify for the purpose of the section, including economic or financial harm, reputational harm, harm to other relationships or employment, psychological abuse and harm to mental health or sexual harassment. In accordance with *Interpretation of Legislation Act 1984* s 36A, examples are not exhaustive and may extend but not limit the meaning of the provision.

34. New sections 36AA(1)(c) and (e) specify that submission because of coercion, intimidation or because the person is overborne by the abuse of a relationship of authority or trust is not consent.

35. Sections 34C(2)(e), 36(2)(e) and 36AA(1)(g) require that a person is "so affected" by drugs or alcohol as to be incapable of free agreement. Mere impairment of judgement or reduction of inhibitions does not negate free agreement (*R v Wrigley* 9/2/1995 CA Vic). Note that intoxication can also be relevant to the issue of reasonable belief in consent (see below).

36. Sections 34C(2)(f), 36(2)(g) and 36AA(1)(i) state that a person does not consent if they are incapable of understanding the sexual nature of the act. It must be proved that the person was unable to comprehend either that what is proposed is the physical fact of penetration, or that the act of penetration proposed is sexual (as distinct from an act of a totally different kind) (*R v Morgan* [1970] VR 337; *Neal v R* (2011) 32 VR 454).

37. Sections 34C(2)(f), 36(2)(g) and 36AA(1)(i) relate to the complainant's intellectual capacity. But "capacity to understand the sexual nature of the act" is not the only basis upon which a cognitive impairment may be relevant to consent. A person who understands the sexual nature of an act may be nevertheless incapable of freely agreeing to it, if that person is intellectually unable to make a refusal of consent or unable to understand his or her right to refuse consent (*R v Mobilio* [1991] 1 VR 339; *R v Eastwood* [1998] VSCA 42).

38. In deciding whether a complainant who knew the nature and character of an act of sexual intercourse had the capacity to give real consent to it, the jury can have regard to such things as the complainant's capacity to appreciate:

    - that most of the community draw a distinction in quality between sexual acts and other acts of intimacy; and
    - that a decision to consent or not involves questions of the morality or social acceptability of the conduct (*R v Mobilio* [1991] 1 VR 339; *R v Eastwood* [1998] VSCA 42).

39. Sections 34C(2)(i), 36(2)(j) and 36AA(1)(l) say that a person does not consent where they have a mistaken belief that the sexual penetration was for either a medical or hygienic purpose. At common law, mistake as to the purpose of penetration did not deprive consent of reality (*R v Mobilio* [1991] 1 VR 339. Note that the law stated in *Mobilio* as to capacity to consent is still correct).

40. Sections 34C(2)(j), 36(2)(k) and 36AA(1)(n) provide that a person does not consent to a sexual act with an animal if the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes.

41. Sections 34C(2)(k), 36(2)(l) and 36AA(1)(a) state that a person does not consent if "the person does not say or do anything to indicate consent to the act". This codifies what has been termed the 'communicative model' of consent, and requires communication of consent. This amends the law as it existed prior to 1 July 2015.

42. Prior to 1 July 2015, the jury were directed that the fact that the complainant did not say or do anything to indicate consent was "enough to show" that the act took place without consent (*Crimes Act 1958* s 37AAA(d)). Courts held that this was not a deeming provision, and that the prosecution was still required to prove the absence of consent. This required evidence to allow the jury to find, as a matter of fact, that the complainant did not say or do anything to indicate free agreement. It did not apply where there was an absence of evidence concerning the complainant's conduct at the time of the alleged sexual act (*ISJ v R* (2012) 38 VR 23).

43. The predecessor provision also did not affect the fault element for the offence, as the law did not require a person to satisfy himself or herself that the other person was consenting. Prior to 1 July 2015, the prosecution would fail to prove its case if it failed to establish the fault element due to the accused assuming that the complainant was consenting (*Gordon v R* [2010] VSCA 207). Due to the significant changes to Victoria's sexual offence laws on 1 July 2015, 26 September 2016 and 1 July 2023, *Gordon* must now be treated with caution.

44. Sections 34C(2)(l), 36(2)(m) and 36AA(1)(p) provide that a person does not consent if, having initially given consent to the act, the person later withdraws consent to the act taking place or continuing. This ensures that consent is an ongoing state of affairs and that a person must cease the relevant act if the other person withdraws consent.

45. There is nothing in ss 34C or 36 to deal with a situation where a person is mistaken as to one of the characteristics of the accused, and it is this characteristic which leads to consent. The common law holds that consent in such circumstances does not make the penetration unlawful (*Papadimitropoulos v R* (1957) 98 CLR 249).

46. However, in contrast to earlier iterations, s 36AA does contain several circumstances where consent is vitiated where the accused undermines a condition precedent to the consent.

47. First, s 36AA(1)(m) specifies that consent is negated if the sexual act occurs in the provision of commercial sexual services, and the person engaged in the act because of a false or misleading representation that the person will be paid. Such a false or misleading representation may be made by words or conduct (including by omission) and may be explicit or implicit (*Crimes Act 1958* s 36AA(2)). At common law, this behaviour had been held not to vitiate consent (*R v Linekar* [1995] 3 ALL ER 69) and instead was dealt with through the offence of procuring sexual act by fraud.

48. Second, s 36AA(1)(o) deals with the phenomenon of 'stealthing'. A person does not consent if the person engages in the sexual act on the basis that a condom is used and either the other person intentionally removes the condom or tampers with it, or the other person intentionally does not use a condom.

49. Section 36AA(1)(o) reflects the position reached in *DPP v Yeong* [2022] VSCA 179, where the Court held that it was open for a jury to find that consent to penetration with a condom did not extend to consent to penetration without a condom. This conclusion was reached on the basis the nature of the differences between sexual intercourse with a condom and without, which meant that deception about the use of a condom could undermine free agreement. The court also noted that it was not necessary to determine the boundaries of the kinds of deceptions or misunderstandings which could vitiate consent (*DPP v Yeong* [2022] VSCA 179, [92]–[96]).

Reasonable belief in consent

50. The following offences contain a fault element that the accused did not reasonably believe that the complainant was consenting:

    - Rape (s 38);
    - Rape by compelling sexual penetration (s 39);
    - Sexual assault (s 40);
    - Sexual assault by compelling sexual touching (s 41);
    - Assault with intent to commit a sexual assault (s 42).

51. This fault element will be satisfied if the prosecution proves one of the following mental states beyond reasonable doubt:

    - The accused believed that the complainant was not consenting.
    - The accused did not believe the complainant was consenting. This includes circumstances where the accused gave no thought as to whether the complainant was consenting.
    - Even if the accused believed the complainant was consenting, his/her belief was not reasonable in the circumstances.

Reasonable and unreasonable beliefs

52. The reasonableness of an accused's alleged belief in consent (including any steps taken to ascertain consent) was previously relevant only in determining whether the accused genuinely held such a belief (see *Crimes Act 1958* s 37AA(b) as in force before 1 July 2015). For sexual offences alleged to have been committed on or after 1 July 2015, reasonableness of belief is part of the fault element.

53. On 1 July 2017 the general provisions concerning reasonable belief in consent were repealed and replaced. The discussion below will identify the replacement provisions and any changes to the substance of the provisions.

54. According to *Crimes Act 1958* s 37G(1) (before 1 July 2017) and s 36A(1) (from 1 July 2017–29 July 2023):

> ...whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.

55. Without limiting this, the circumstances include any steps the accused took to find out whether the other person was consenting (*Crimes Act 1958* s 37G(2) (before 1 July 2017), s 36A(2) (from 1 July 2017 onwards)).

56. For offences committed from 30 July 2023 onwards, the new s 36A, introduced by the 2022 Act, states:

> A's belief that B consents to an act is not reasonable if, within a reasonable time before or at the time the act takes place, A does not say or do anything to find out whether B consents to the act (*Crimes Act 1958* s 36A(2)).

57. The effect of this provision is that whereas previously the steps taken to find out whether the other person consented were relevant to whether a belief is reasonable, the new provision means a belief in consent cannot be reasonable unless the accused said or did something to find out whether the other person consented.

58. According to the explanatory memorandum, the replacement of s 36A:

> [A]mends reasonable belief in consent to reflect an affirmative consent model. The provision implements recommendation 50(a) of the VLRC Report to formulate a requirement for a person to "take steps" to find out if the other person consents for their belief in consent to be reasonable.
> ...
> This requires A to have taken active steps to find out whether B consented to the sexual act for their belief in consent to be reasonable. This may include taking a verbal or non-verbal step to ascertain consent but would not include an internal thought process, which is inconsistent with a communicative model of consent.
> New section 36A(2) provides that A must say or do anything to find out if B consents "within a reasonable time before or at the time". What is a "reasonable time before" the sexual act depends on the circumstances. In most circumstances, it will only be a reasonable time if A said or did anything at the time of the sexual act or immediately before it. However, the provision recognises that there may be limited circumstances where it is reasonable to do or say something to ascertain consent at an earlier time, so long as the circumstances have not changed when the sexual act occurs.

59. This statutory restriction on when a belief in consent is reasonable is itself qualified by s 36A(3), which provides that s 36A(2) does not apply if the accused has a cognitive impairment or mental illness other than the effects of self-induced intoxication which is a substantial cause of the accused not saying or doing anything to find out whether the other person is consenting (*Crimes Act 1958* s 36A(3)).

60. The accused carries the burden of proving on the balance of probabilities the matters in s 36A(3) (*Crimes Act 1958* s 36A(4)).

61. The statutory restriction on reasonable belief is supplemented by the new s 37A(ab), which adds the following statutory objective to the sexual offence provisions:

> to promote the principle that consent to an act is not to be assumed – that consent involves ongoing and mutual communication and decision-making between each person involved (that is, each person should seek the consent of each other person in a way and at a time that makes it clear whether they consent)

Directions on consent and reasonable belief in consent on request

62. Divisions 1 and 1A of Part 5 of the *Jury Directions Act 2015* specify when a judge must give directions on consent or reasonable belief in consent.

63. The effect of these Divisions is that some directions are given at the end of the trial following a request (subject to the s 16 residual obligation to give directions not sought), while other directions are exempt from the Part 3 request process and must be given at the earliest time in the trial the judge determines is appropriate.

Early directions on consent and reasonable belief in consent

64. *Jury Directions Act 2015* s 47C provides that a judge must give directions on any of the following topics the judge considers there are good reasons to give:

    - The absence of physical injury, violence or a threat;
    - Responses to non-consensual acts;
    - Other sexual activity;
    - Personal appearance and irrelevant conduct;
    - Non-consensual sexual acts between all sorts of people;
    - General assumptions not informing a reasonable belief in consent.

65. These directions are explained in 7.3.1.1 – Early directions on jury assessment of evidence about consent and reasonable belief in consent.

Directions on consent and reasonable belief in consent on request

66. The *Jury Directions Act 2015* ss 46 and 47 specify further directions which the prosecution or defence may ask the judge to give under the Part 3 request process.

67. The directions the parties may request on consent are:

    - Inform the jury that a person can consent to an act only if the person is capable of consenting and free to choose whether or not to engage in or allow the act; or
    - Inform the jury that where a person has given consent to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place (*Jury Directions Act 2015* s 46(3)); or
    - Inform the jury of the relevant circumstances in which the law provides that a person does not consent to an act; or
    - Direct the jury that if the jury is satisfied beyond reasonable doubt that a circumstance referred to in section 36 of the *Crimes Act 1958* existed in relation to a person, the jury must find that the person did not consent to the act (*Jury Directions Act 2015* s 46(4)).

68. As directions governed by Part 3 of the *Jury Directions Act 2015*, a judge should only give these directions if requested by a party or if there are substantial and compelling reasons, in the absence of a request, to give the directions (*Jury Directions Act 2015* ss 12, 14, 15, 16).

69. A judge must direct on consent with reference to the issues and evidence in the trial. In many trials the issue will not turn on the special cases described in ss 34C or 36. In those cases the standard charge should be adapted to focus on the true issues in the trial.

70. Section 47 provides that the prosecution or defence counsel may request any of the following directions on reasonable belief in consent:

(a) direct the jury that if the jury concludes that the accused knew or believed that a circumstance referred to in section 34C, 36 or 36AA (depending on the date of the alleged offence) of the *Crimes Act 1958* existed in relation to a person, that knowledge or belief is enough to show that the accused did not reasonably believe that the person was consenting to the act; or

(b) direct the jury that in determining whether the accused who was intoxicated had a reasonable belief at any time–

(i) if the intoxication was self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as the accused at the relevant time; and

(ii) if the intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the accused and who is in the same circumstances as the accused at the relevant time; or

(d) direct the jury that in determining whether the accused had a reasonable belief in consent, the jury must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent; or

(e) direct the jury that in determining whether the accused had a reasonable belief in consent, the jury may take into account any personal attribute, characteristic or circumstance of the accused (Jury Directions Act 2015 s 47(3).

Directions on awareness of non-consent circumstance

71. Section s 47(3)(a) allows the prosecution or defence to seek a direction that knowledge of a non-consent circumstance "is enough to show that the accused did not reasonably believe that the person was consenting".

72. The effect of this provision is that where it is proved that the accused knew or believed that a non-consent circumstance existed at the moment of the relevant sexual act, the accused cannot rely on a so-called defence of reasonable belief in consent (*Hubbard v The Queen* [2020] VSCA 303, [37], [64]).

Directions on relevance of intoxication

73. The following material should be read in conjunction with 8.5 Statutory Intoxication (From 1/11/14) and associated charges.

74. In sexual offence cases, intoxication is potentially relevant in four ways:

- Intoxication of the complainant may be relevant to the complainant's consent;
- Intoxication of the complainant may be relevant to whether the accused had a reasonable belief in consent;
- Intoxication of the accused may be relevant to whether the accused believed the complainant consented;
- Intoxication of the accused may be relevant to whether the accused's belief in the complainant's consent was reasonable.

75. Sections 34C(2)(e), 36(2)(e) and 36AA(1)(g) provide that a person does not consent if he or she is so intoxicated as to be incapable of consenting. However, intoxication of the complainant may, in some cases, also contribute to a mistaken belief in consent, where the accused is not aware that the complainant is so intoxicated as to be incapable of consenting (see *R v SAX* [2006] QCA 397; *R v Soloman* [2006] QCA 244).

76. When directing the jury on the relevance of the accused's intoxication, it may be important to separate the effects of intoxication on whether the accused held a belief in consent and whether any such belief was reasonable. It is erroneous to conflate these two issues and suggest that self-induced intoxication is not relevant to the mental element of reasonable belief in consent (*O'Loughlin v R* [2011] QCA 123).

77. *Jury Directions Act 2015* s 47(3)(b) provides for a direction that the jury must not have regard to self-induced intoxication for the purpose of determining whether a belief was reasonable and must have regard to the degree of intoxication if it was not self-induced.

78. This reflects the provisions of *Crimes Act 1958* ss 37H (from 1 July 2015 to 30 June 2017) and 36B (from 1 July 2017 onwards), which provide that in determining whether the accused had a reasonable belief in the complainant's consent, self-induced intoxication by the accused at the time of the offending must not be taken into account (ss 37H(1)(a), 36B(1)(a)).

79. Instead, the reasonableness of the belief must be determined according to the standard of a reasonable person who is not intoxicated, but is otherwise in the same circumstances as the accused at the relevant time (ss 37H(1)(a), 36B(1)(a)).

80. However, if the intoxication is not self-induced, the standard to be used is that of a reasonable person intoxicated to the same extent as the accused at the time of the offending, and who is in the same circumstances as the accused at the relevant time (ss 37H(1)(b), 36B(1)(b)).

81. Whether the intoxication is self-induced is governed by ss 37H(2)–(3) (from 1 July 2015 to 30 June 2017) or 36B(2)–(3) (from 1 July 2017 onwards). In summary, intoxication is self-induced unless it came about involuntarily, as a result of fraud, emergency, duress, or force, or through drug use in accordance with prescription or manufacturer directions (other than when the accused had reason to believe the drug would significantly impair judgment or control). This will be a matter for the jury to determine, if it is in issue.

82. For more information about directing a jury in cases where the parties dispute whether the intoxication was self-induced, see 8.5.2 Charge: Statutory Intoxication (From 1/11/14) (self-induced contested).

Direction about community expectations

83. Under *Jury Directions Act 2015* s 47(3)(d), the jury may be directed that in determining whether the accused had a reasonable belief in consent, the jury must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent.

84. This imports the approach of using community standards and attitudes as the yardstick for assessing reasonableness (see *Aubertin v The State of Western Australia* (2006) 33 WAR 87; Crimes Amendment (Sexual Offences and Other Matters) Bill 2014, Explanatory Memorandum).

85. As also reflected in the Crimes Amendment (Sexual Offences) Bill 2016 Explanatory Memorandum, this provision clarifies that in assessing whether the accused had no reasonable belief in consent, the jury need not consider whether the accused considered his or her belief to be reasonable.

Direction about the relevance of the accused's attributes, characteristics and circumstances

86. *Jury Directions Act 2015* s 47(3)(e) provides that a party may seek a direction telling the jury that the accused's personal attributes, characteristics or circumstances are relevant to determining whether the accused had a reasonable belief in consent.

87. Section 47(3)(e) must be read in conjunction with s 47(4), which was introduced at the same time. Section 47(4) provides that a good reason for not giving this direction is that the personal attribute, characteristic or circumstance–

(a) did not affect, or is not likely to have affected, the accused's perception or understanding of the objective circumstances; or

(b) was something that the accused was able to control; or

(c) was a subjective value, wish or bias held by the accused, whether or not that value, wish or bias was informed by any particular culture, religion or other influence (*Jury Directions Act 2015* s 47(4)).

88. Under *Jury Directions Act 2015* s 14, a judge must give a requested direction unless there are good reasons for not giving the direction. Section 47(4) is a statutory statement of certain circumstances in which a judge may find good reasons for not giving the requested direction.

89. In *Aubertin v Western Australia* (2006) 33 WAR 87 McLure JA (Roberts-Smith and Buss JJA concurring) at [43] stated (emphasis added):

> For there to be an operative mistake under s 24, an accused must have acted under an actual belief in the existence of a state of things (subjective element) and the accused's belief must be reasonable (mixed element). The focus in this case is on the mixed element. The mixed element is not wholly objective; reasonableness is not to be adjudged by the standard of the hypothetical ordinary or reasonable person. The mixed element is a combination of subjective and objective aspects. The requirement that the belief be reasonable imports an objective standard. The subjective aspect is that the reasonableness is to be judged by reference to the personal attributes and characteristics of the accused that are capable of affecting his or her appreciation or perception of the circumstances in which he or she found himself or herself (See also *Pallett v Paul* [2007] WASC 290; *Bailey v Doncon* [2007] WASC 252).

90. The Act appears designed to adopt this same division, recognising that personal circumstances, attributes and characteristics are relevant to reasonableness of belief, but only to the extent that they may affect the accused's perceptions of the objective circumstances.

91. The following table is based on an analysis of decisions from other jurisdictions which allow personal circumstances to influence whether a belief is reasonable. It must be used with caution, as there is no guidance yet on exactly how section 47(3)(e) and 47(4) operate. See *R v Mrzljak* [2005] 1 Qd R 308; *Aubertin v Western Australia* (2006) 33 WAR 87; *R v Julian* (1998) 100 A Crim R 430; *R v Conlon* (1993) 69 A Crim R 92; *Rope v R* [2010] QCA 194; *R v Dunrobin* [2008] QCA 116.

Relevant to reasonableness	Irrelevant to reasonableness
Age of accused	Accused's values and beliefs, whether informed by cultural, religious or other influences
Maturity of accused	Self-induced intoxication of the accused
Language difficulties between the accused and complainant	
Physical disabilities of the accused	
Mental disabilities of the accused, including intellectual impairment	

92. A useful example of how the accused's personal characteristics may affect his appreciation or perception is *R v Dunrobin* [2008] QCA 116. In this case, the accused suffered chronic paranoid schizophrenia. Evidence was led that the accused had poor complex reasoning, had difficulty understanding ambiguous situations and was prone to misinterpret the actions of others. The appellate court held that the trial judge had failed to direct the jury on how these characteristics could give rise to an honest but mistaken belief in consent, where the complainant ceased protesting against his attempts to sexually penetrate her.

93. In cases where both the accused and the complainant have a cognitive impairment, it may be necessary for the judge to link the accused's cognitive impairment to two discrete issues: Was the accused aware of whether the complainant had a capacity to consent; and did the accused hold a reasonable belief that the complainant was consenting? As noted above in relation to intoxication, it is an error to conflate these two questions (see *R v Mrzljak* [2005] 1 Qd R 308).

94. Queensland and Western Australian courts have also indicated that gender and ethnicity are relevant to reasonableness. However, there is no guidance on how precisely those matters "are capable of affecting [the accused's] appreciation or perception of the circumstances in which he or she found himself or herself" (compare *Aubertin v Western Australia* (2006) 33 WAR 87; *Commissioner of Police v Stehbens* [2013] QCA 81, [16]).

Relating the law to the facts in issue

95. *Jury Directions Act 2015* ss 65 and 66 require the judge to relate the directions on consent and reasonable belief in consent to the facts in issue, and to the elements of the offence being tried in respect of which the direction is given, so as to aid the jury's comprehension of the direction. See Judge's Summing Up on Issues and Evidence.

Last updated: 9 November 2023

7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/07/15)

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1. Section 36 of the *Crimes Act 1958* defines "consent" to mean "free agreement" and describes (non-exclusively) seven particular circumstances where a person "does not freely agree to an act". In this respect s 36 is a deeming provision.

2. Sections 37, 37AAA and 37AA provide for jury directions that must be given in respect of the complainant's consent and the accused's awareness of that state of consent in sexual offence cases, where these matters are in issue.

Operation of Consent Provisions

3. Section 36 applies to the interpretation of Subdivision (8A) to (8D) of the *Crimes Act 1958*, that is, the sexual offences found in sections 38 to 52.

4. The operation of ss 37, 37AAA and 37AA is limited in three ways:

    i) The three sections create a scheme of directions that are only to be given where "relevant to a fact in issue in a proceeding" (s 37(1) & (2)).

    ii) Sections 37AAA(a)–(c) and 37AA rely on the definition of consent found in s 36. They are therefore only relevant to proceedings where s 36 applies.

    iii) Sections 37AAA(d)–(e) and 37AA involve directions about consent to "sexual acts".

5. These limitations have the effect that ss 37, 37AAA and 37AA do not apply to non-sexual offences where consent may be an issue, such as common assault and intentionally causing injury.

Commencement and Transition

6. Section 37 was amended, and ss 37AAA and 37AA were introduced by the *Crimes Amendment (Rape) Act 2007*. The new provisions apply only to trials commenced after 1 January 2008. The old s 37 still applies in trials commenced prior to 1 January 2008 (*Crimes Act 1958* s 609(1)).

Sexual Offences Where Consent is Relevant

7. Consent will generally be relevant to the following offences, as it is an element of each offence that there be an absence of consent:

   i) Rape (s 38(2)(a))

   ii) Rape (Failure to withdraw) (s 38(2)(b))

   iii) Compelled Rape (s 38(3)(a))

   iv) Compelled Rape (Failure to withdraw) (s 38(3)(b))

   v) Compelling Sexual Penetration (s 38A)

   vi) Indecent Assault (s 39)

   vii) Assault with Intent to Rape (s 40)

8. Consent may be relevant to the following offences, as it is an element of the offence that there be an absence of consent in the particular circumstances identified in the offence provision:

   i) Incest (s 44 – as relevant to the defence of compulsion)

   ii) Sexual Penetration of a Child Under the Age of 16 (s 45)

   iii) Indecent Act With Child Under the Age of 16 (s 47)

   iv) Sexual Penetration of a 16 or 17 Year Old Child (s 48)

   v) Indecent Act With 16 or 17 Year Old Child (s 49)

   vi) Indecent Act With 17 Year Old Child (s 49 – repealed)

   vii) Sexual Penetration of a Person with a Cognitive Impairment (ss 51(1), 52(1))

   viii) Indecent Act with a Person with a Cognitive Impairment (ss 51(2), 52(2))

9. Offences contrary to s 47A (Persistent abuse of child under the age of 16) and s 49A (Facilitating Sexual Offences Against Children) may also require consent directions if the underlying offence is listed above.

Sexual Offences Where Awareness of Absence of Consent is Relevant

10. Sections 38, 38A, & 39 each expressly describes a fault element (or mens rea) associated with the complainant's lack of consent. This is, the accused must have acted while aware that the complainant was not or might not have been consenting, or while not giving any thought to whether the complainant was consenting. None of the other consent-relevant offences listed above include "awareness of non consent" as a statutory fault element.

11. Whether this additional awareness element should be implied for other sexual offences has not been authoritatively determined. See Consent and Child Sexual Offences (below).

12. For rape, compelled sexual penetration and indecent assault the *Crimes Amendment (Rape) Act 2007* introduced a new statutory fault element. For these offences it is no defence for accused persons to assert that they were not aware that the complainant might not have been consenting to the sexual act because they had not given any thought to whether or not the complainant was consenting (*Crimes Act 1958* ss 38(2)(a)(ii), 38(4)(b)(ii), 38A(3)(b)(ii), 39(2)(b)).

13. It is unclear whether this additional fault element was acknowledged under the common law, and if so whether it should now be applied to offences where it is not a statutory element. See further the discussion in 7.3.3 Rape and Aggravated Rape (Pre-1/1/92). The charge book charges only include this fault element where it is a statutory fault element. If it is to be applied in other cases, the charge will need to be amended.

Sexual Offences Where Consent May be Relevant

14. For offences under sections 45, 47, 48, 49, 51 and 52, consent is not a defence unless the accused establishes an additional exculpatory matter, such as a belief that the child was aged 16 or over, or that the accused was married to the complainant. The relevant exculpatory matters are explained in the Charges and commentary for each offence.

15. Where consent is a defence, the prosecution must prove that the complainant did not consent (*Crimes Act 1958* ss 45(4A), 47(3), 48(3), 49(3), 51(6), 52(4)).

16. It is an unresolved question whether, where consent is a defence, the prosecution must also prove that the accused was aware that the complainant was not consenting (see *R v Deblasis & Deblasis* (2007) 19 VR 128; *R v Mark & Elmazovski* [2006] VSCA 251).

17. In cases where the accused is charged with sexual penetration of a child or indecent act with a child, the judge should require the parties to identify before the trial whether consent will be in issue, or whether it will only be the additional exculpatory matters which are in issue (*Criminal Procedure Act 2009* ss 182, 183, 199). This will allow the judge to determine what directions are required in relation to consent and, if necessary, will allow the parties to challenge those intended directions on an interlocutory appeal (*Criminal Procedure Act 2009* s 295).

18. While the *Crimes Act* does not expressly refer to a fault element associated with consent, the prudent approach, which is taken in this Charge Book, is to adopt the fault element provided for offences under sections 38, 38A and 39.

Meaning of "Consent"

19. "Consent" is defined in s 36 of the *Crimes Act 1958* to mean "free agreement". This definition of consent applies to all of the provisions in Subdivisions 8A to 8D of the *Crimes Act* (ss 38–52).

20. Section 36 of the *Crimes Act 1958* lists situations in which a person is regarded as not having given free agreement. This is not an exhaustive list.

21. Section 36 is not expressly drafted as a "deeming provision", but it is relatively clear that it must now be treated this way. This interpretation is supported for trials commenced on or after 1 January 2008 by s 37AAA(b) and (c) which require juries to be directed about the effect of s 36 in terms that assume that s 36 is a deeming provision on the question of whether the complainant consented to the sexual penetration (*Wilson v R* (2011) 33 VR 340).

22. Section 36(a) states that submission in circumstances of "force or fear of force" is not consent. The only degree of violence necessary is whatever is necessary to achieve penetration (*R v Bourke* [1915] VLR 289; *R v Burles* [1947] VLR 392).

23. Section 36(b) states that submission because of "the fear of harm of any type to that person or someone else" is not consent. The section provides no assistance as to the nature of the harm contemplated. It may extend beyond physical or psychological injury, but that has not yet been determined.

24. Section 36(d) requires that a person is "so affected" by drugs or alcohol as to be incapable of free agreement. Mere impairment of judgement or reduction of inhibitions does not negate free agreement (*R v Wrigley* 9/2/1995 CA Vic). Note that intoxication can also be relevant to the issues of intention and mistaken belief (see 8.7 Common Law Intoxication).

25. Section 36(e) states that a person does not consent if they are incapable of understanding the sexual nature of the act. It must be proved that the person was unable to comprehend either that what is proposed is the physical fact of penetration, or that the act of penetration proposed is sexual (as distinct from an act of a totally different kind) (*R v Morgan* [1970] VR 337; *Neal v R* (2011) 32 VR 454). The complainant's understanding of the moral significance of the act is not relevant to this issue (*R v Mobilio* [1991] 1 VR 339; *R v Eastwood* [1998] VSCA 42).

26. Section 36(e) relates to the complainant's intellectual capacity. But "capacity to understand the sexual nature of the act" is not the only basis upon which a cognitive impairment may be relevant to consent. A person who understands the sexual nature of an act may be nevertheless incapable of freely agreeing to it, if that person is intellectually unable to make a refusal of consent or unable to understand his or her right to refuse consent (*R v Mobilio* [1991] 1 VR 339; *R v Eastwood* [1998] VSCA 42).

27. In deciding whether a complainant who knew the nature and character of an act of sexual intercourse had the capacity to give real consent to it, the jury could have regard to such things as the complainant's capacity to appreciate:

    - that most of the community draw a distinction in quality between sexual acts and other acts of intimacy; and
    - that a decision to consent or not involves questions of the morality or social acceptability of the conduct (*R v Mobilio* [1991] 1 VR 339; *R v Eastwood* [1998] VSCA 42).

28. Section 36(g) says that a person does not consent where they have a mistaken belief that the sexual penetration was for either a medical or hygienic purpose. This section changed the pre-existing common law, which held that mistake as to the purpose of penetration did not deprive consent of reality (*R v Mobilio* [1991] 1 VR 339. Note that the law stated in *Mobilio* as to capacity to consent is still correct).

29. There is nothing in s 36 to deal with a situation where a woman is mistaken as to one of the characteristics of the accused, and it is this characteristic which leads her to consent. The common law holds that consent in such circumstances does not make the penetration unlawful (*Papadimitropoulos v R* (1957) 98 CLR 249).

30. The fact that a man has agreed to pay a specified sum in return for sex and leaves without paying does not mean that consent was vitiated by fraud (*R v Linekar* [1995] 3 ALL ER 69).

Directions on consent (s 37AAA)

31. Where consent is in issue, and where relevant (but not otherwise) the judge must direct the jury in respect of the matters set out in s 37AAA. They are:

(a) the meaning of consent set out in section 36;

(b) that the law deems a circumstance specified in section 36 to be a circumstance in which the complainant did not consent;

(c) that if the jury is satisfied beyond reasonable doubt that a circumstance specified in section 36 exists in relation to the complainant, the jury must find that the complainant was not consenting;

(d) that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement;

(e) that the jury is not to regard a person as having freely agreed to a sexual act just because–

(i) she or he did not protest or physically resist; or

(ii) she or he did not sustain physical injury; or

(iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person (*Crimes Act 1958* ss 37, 37AAA).

The significance of the absence of communication

32. Section 37AAA(d) addresses the circumstance where the jury finds that the complainant did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place.

33. It requires the judge to direct the jury that this fact "is enough to show that the act took place without [the complainant's] free agreement" (see also *Wilson v R* (2011) 33 VR 340).

34. It is wrong to direct a jury that, if satisfied that the complainant did not say or do anything to indicate free agreement, then they must find the complainant did not consent (*Yannic v The Queen* [2021] VSCA 150, [70]).

35. Section 37AAA(d) is not a deeming provision and the onus remains on the prosecution to establish the absence of consent. There must be evidence that allows the jury to find an absence of consent and it is a question for the jury whether it is satisfied that there was an absence of consent (*ISJ v R* (2012) 38 VR 23).

36. Where the possibility of consent is a real issue, the section only applies where there is positive evidence that the complainant did not say or do anything to indicate free agreement. It does not apply where there is an absence of evidence concerning the complainant's conduct at the time of the alleged sexual act (*ISJ v R* (2012) 38 VR 23).

37. The section is also not relevant where the complainant gives evidence that they plainly and clearly stated their absence of consent and physically resisted the accused, while the accused alleges that the complainant clearly expressed their willingness to have sexual activity and did not resist in any way. In those circumstances, the factual basis for a direction under s 37AAA(d) will not be relevant to a fact in issue. The section is not a fallback where the jury rejects a primary case that the complainant overtly communicated their non-consent (*Jabir v The Queen* [2010] VSCA 342; *Yannic v The Queen* [2021] VSCA 150, [35]–[40], [63]).

38. Section 37AAA(d) does not affect the prosecution's obligation to separately prove that the accused was aware that the complainant was not consenting or might not be consenting. The law does not require a person to satisfy himself or herself that the other person is consenting. The prosecution will fail to prove its case if it fails to establish the fault element due to the accused assuming that the complainant was consenting (*Gordon v R* [2010] VSCA 207).

Contemporaneous indications of consent

39. The *Crimes (Sexual Offences) Act 2006* inserted into the former s 37(1)(a) the phrase "at the time at which the act took place". This was intended to make it clear that "consent to one act at one time is not consent to other acts at other times" (Explanatory Memorandum to the *Crimes (Sexual Offences) Bill 2006*).

When should a s 37AAA direction be given

40. The judge must give a s 37AAA direction if, and only if the direction is relevant to a fact in issue in the proceeding (*Crimes Act 1958* ss 37(1), (2)).

41. For this purpose, the facts in issue are the facts which have been placed in issue in the proceeding, and not the ultimate issues which constitute the elements of the offence (*R v Yusuf* (2005) 11 VR 492, [18]; *Yannic v The Queen* [2021] VSCA 150, [60]).

42. As noted above, a section 37AAA(d) direction can only be given if there is evidence that the complainant did not say or do anything to indicate consent. Giving that direction where the complainant gives evidence that they communicated their absence of consent is confusing and unhelpful (*Yannic v The Queen* [2021] VSCA 150, [64]).

Interaction between ss 37AAA and 37AA

43. Prior to the commencement of the new ss 37, 37AAA and 37AA, the original s 37 created mandatory directions in relation to both consent (ss 37(1)(a) and (b)), and the accused's state of mind about the complainant's consent (s 37(1)(c)).

44. While s 37AAA in terms refers only to the question of consent, it is likely that some of the matters listed in s 37AAA (such as the significance of non-communication, non-resistance and prior consent) are also capable of affecting whether a belief in consent is reasonable and should be mentioned when giving directions under s 37AA.

Other directions on consent

45. A judge must direct on consent with reference to the issues and evidence in the trial. In many trials the issue will not turn on the special cases described in s 36. In those cases the standard charge should be adapted to focus on the true issue in the trial.

Directions on the accused's belief in consent (s 37AA)

46. In appropriate circumstances (see below) the judge must direct the jury in the terms described in s 37AA, that is:

> [I]n considering whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was not consenting or might not have been consenting, the jury must consider-
>
> (a) any evidence of that belief; and
>
> (b) whether that belief was reasonable in all the relevant circumstances having regard to-
>
> (i) in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant; and
>
> (ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and
>
> (iii) any other relevant matters.

47. "Other relevant matters" under s 37AA(b)(iii) may include a discussion of the impact of the accused's intoxication on his or her capacity to interpret the complainant's words or conduct, or on his or her formation of a belief in consent (*Khan v R* [2011] VSCA 286).

Awareness and belief

48. For the purposes of the fault element of rape, compelling sexual penetration and indecent assault, the accused's awareness that the complainant is not or might not be consenting is the real issue (*R v Getachew* (2012) 248 CLR 22). It is unclear whether this is also the real issue in relation to any fault element involving consent for other sexual offences in ss 44 to 52.

49. An assertion by the accused that s/he believed the complainant was consenting is relevant only to raising a reasonable doubt about whether s/he was aware that the complainant was not or might not be consenting (*R v Getachew* (2012) 248 CLR 22).

50. The existence of a belief in consent is not necessarily inconsistent with the fault element. It is possible for the prosecution to prove that the accused was aware that the complainant was not or might not have been consenting even though the accused had some belief in consent (*R v Getachew* (2012) 248 CLR 22).

51. For example, a belief that the complainant may have been or was probably consenting may not provide an answer to a charge of rape, because these states of mind may demonstrate that the accused was aware that the complainant might not be consenting or did not turn his or her mind to whether the complainant might not be consenting (*R v Getachew* (2012) 248 CLR 22).

52. The judge should explain the difference between a "belief in consent" and an awareness that the complainant might not be consenting and that:

> It is for the prosecution to establish that the accused did not have a belief in consent that creates a reasonable doubt that he was aware that the complainant was not or might not be consenting. Whether the belief does create a doubt will depend upon the jury's findings of fact as to the nature and extent of that belief (*NT v R* [2012] VSCA 213, [16]).

The significance of the reasonableness of the accused's belief

53. Section 37AA (like the former s 37(1)(c)) directs the jury to consider the reasonableness of the accused's belief in consent. However, this direction does not mean that the accused's belief in consent is relevant only if it is reasonable. Instead, the reasonableness of belief is relevant only to the jury's assessment of whether or not the belief was in fact held (*DPP v Morgan* [1976] AC 182; *R v Ev Costa* 2/4/1997 CA Vic; *R v Saragozza* [1984] VR 187; *R v Zilm* (2006) 14 VR 11; *Worsnop v R* (2010) 28 VR 187; *R v Getachew* (2012) 248 CLR 22).

54. The reasonableness of the accused's belief must be considered as "no more than a guide" as to whether the accused in fact believed that the complainant was consenting (*R v Laz* [1998] 1 VR 453).

55. Judges should explicitly tell the jury that the reasonableness of the belief "is no more than a guide to whether the belief was in fact held" (*R v Ev Costa* 2/4/1997 CA Vic; *R v Lucin* 25/3/1994 CA Vic; *R v Munday* (2003) 7 VR 423; *R v Zilm* (2006) 14 VR 11).

56. Judges will also need to tell the jury that the accused's belief does not have to be reasonable as a matter of law, and that the ultimate question is whether prosecution has proven that, in fact, the accused was aware that the complainant was not consenting or might not be consenting (*R v Munday* (2003) 7 VR 423; *R v Zilm* (2006) 14 VR 11; *R v Gose* (2009) 22 VR 150; *Wilson v R* (2011) 33 VR 340).

The significance of an awareness of a s 36 circumstance

57. An awareness of a circumstance listed in s 36 is relevant to the reasonableness of a belief in consent. However, it is erroneous to tell the jury that, if the accused is aware that a s 36 circumstance either applies to the complainant or might apply to the complaint, then the accused is aware that the complainant is not consenting or might not be consenting. Proof of the existence of a s 36 circumstance combined with proof of the accused's awareness of that circumstance does not remove the Crown's obligation to prove the fault element (*R v Getachew* (2012) 248 CLR 22; *Wilson v R* (2011) 33 VR 340; *Neal v R* (2011) 32 VR 454).

58. An accused may be aware of the possibility that a s 36 circumstance exists without that awareness affecting his or her awareness of an absence of consent. Proof that the accused was aware that the complainant was not or might not be consenting must be assessed on the evidence as a whole (*R v Getachew* (2012) 248 CLR 22; *Neal v R* (2011) 32 VR 454; *Wilson v R* (2011) 33 VR 340; *Brennan v R* [2012] VSCA 151).

59. For example, an accused may believe that the complainant had consented prior to falling asleep, and that the consent continued to operate while he or she was asleep. While *Crimes Act 1958* s 36(d) states that a person does not consent while he or she is asleep, the law does not deem the accused to be aware of this, and so the prosecution may not be able to prove that the accused was aware that the complainant was not or might not be consenting.

60. The law requires juries to understand the distinction between:

    - Being satisfied that the accused was aware that a s 36 circumstance existed or might have existed; and
    - Being satisfied that the prosecution had excluded, beyond reasonable doubt, the possibility that the accused, despite being aware that a s 36 circumstance existed or might have existed, might not have been aware of the absence or possible absence of consent (*Wilson v R* (2011) 33 VR 340 (Maxwell P)).

61. Awareness of the existence or possible existence of a s 36 circumstance is merely a matter the jury must consider when deciding whether the prosecution has proven that the accused was aware that the complainant was not or might not be consenting. While proof that the accused was aware of the existence of a s 36 circumstance may lead to an inference that the accused was aware that the complainant was not consenting, it will not necessarily do so in all cases (*Roberts v R* [2011] VSCA 162; *Duwah v R* [2011] VSCA 262; *Wilson v R* (2011) 33 VR 340; *Brennan v R* [2012] VSCA 151).

62. However, if belief in consent is not raised as an issue at trial (either by assertion or by the evidence) proof that the complainant did not consent due to the existence of a s 36 circumstance and proof that the accused was aware of that circumstance can, without more, demonstrate that the accused was aware that the complainant was not or might not be consenting (*R v Getachew* (2012) 248 CLR 22).

When should the s 37AA direction be given?

63. The judge must give a s 37AA direction if, and only if belief in consent is raised as an issue at the trial. This will occur when evidence is led or an assertion is made about the possibility that accused believed that the complainant was consenting to the sexual act (*Crimes Act 1958* ss 37(1), 37AA. See also *R v Getachew* (2012) 248 CLR 22).

64. Section 37(2) provides that a s 37AA direction must not be given if it is "not relevant to the facts in issue in the proceeding". Where there is no evidence of a belief in consent and no assertion of a belief in consent, the judge must not give a direction under s 37AA (*R v Getachew* (2012) 248 CLR 22; *ISJ v R* (2012) 38 VR 23).

65. The rules contained in ss 37(1) and (2) reflect the common law obligation to direct the jury on so much of the law as is necessary to enable them to determine the issues in the case (*R v Yusuf* (2005) 11 VR 492; *Jabir & Ahmed v R* [2010] VSCA 342).

66. A judge only needs to direct the jury on "real issues" that plainly arise from the evidence, as distinct from remote or artificial possibilities (*R v Getachew* (2012) 248 CLR 22; *R v Alexander* [2007] VSCA 178).

67. In assessing whether a matter is in issue, the court will have regard to the matters identified by the parties in accordance with *Jury Directions Act 2015* s 11 and the directions requested under *Jury Directions Act 2015* s 12. Where the case is conducted purely on the basis that the alleged conduct did not occur and the defence does not request directions on awareness of non-consent, then a s 37AA direction will not be necessary (see *Gul v R* [2017] VSCA 153, [39]–[40]).

68. If the evidence of the accused's belief is inseparable from the evidence that the complainant consented, it may not be necessary to direct the jury on considering the reasonableness of the accused's belief. However, a direction will be required if there is evidence that supports a finding that the accused had a mistaken belief in consent (*Jabir & Ahmed v R* [2010] VSCA 342; *Sibanda v R* (2011) 33 VR 67; *R v Bertrand* (2008) 20 VR 222; *R v Salih* [2005] VSCA 282 (Harper AJA)).

69. A belief in consent usually arises out of some relationship, act or conduct. There must be some evidence underpinning a belief in consent beyond speculation. This might arise from some pre-existing relationship or conduct (*Sibanda v R* (2011) 33 VR 67).

70. Where there is evidence of intoxication which is capable of showing that the accused's mind was sufficiently "befuddled" to have formed a genuine but mistaken belief as to consent, the jury must be directed appropriately in relation to that evidence (*R v Ev Costa* 2/4/1997 CA Vic. See also: 8.7 Common Law Intoxication).

Direction on non-advertence

71. There are no mandatory directions to be given in respect of the non-advertent mental state described in *Crimes Act 1958* ss 38(2)(a)(ii), 38(4)(b)(ii), 38A(3)(b)(ii), 39(2)(b).

72. Section 37AA is the key provision concerning the directions to be given in respect of the accused's awareness of the complainant's state of consent. However, s 37AA is solely concerned with the circumstance where "evidence is led or an assertion is made that the accused believed that the complainant was consenting to a sexual act". As a result it has no relevance to directions to be given in respect of the possibility of non-advertence.

Relating the law to the facts in issue

73. Section 37(3) requires the judge to relate the directions in s 37 to the facts in issue, and to the elements of the offence being tried in respect of which the direction is given, so as to aid the jury's comprehension of the direction.

74. The judge must relate the law to the facts in issue even where the evidence is brief (*R v Yusuf* (2005) 11 VR 492).

75. The judge must relate the directions to any relevant facts which have been placed in issue in the proceeding, and not just to the ultimate issues comprising the elements of the offence (*R v Yusuf* (2005) 11 VR 492).

76. The critical issues must be precisely identified in the course of the directions on the law, and must be highlighted by referring to the competing contentions and the evidence relevant to resolution of those issues. In particular, when the directions of law are given, there needs to be reference to the evidence of the complainant relevant to the critical issues. The issues of fact and law must also be related to the Record of Interview and the evidence of the accused (if any) as to their state of mind, and the factors that influenced it. The evidence must also be related to the ultimate issue of whether it has been established beyond reasonable doubt that the complainant consented and/or that the accused had the necessary state of mind concerning the absence of consent (*R v Zilm* (2006) 14 VR 11).

77. Judges may also relate their directions to events occurring after the alleged offence, as long as that evidence constitutes part of the whole context in which the alleged offending occurred (*R v Salih* [2005] VSCA 282).

78. If a judge tells the jury that the reason for giving these directions is that they are required by law, the judge must also explain to the jury that these are matters which will guide them in their determination of whether the relevant elements of the charge have been established (*Defina v R* 3/3/1993 CA Vic).

Last updated: 21 July 2021

7.3.1.3.1 Charge: Belief in Consent (Pre–1/07/15)

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This charge contains two alternative ways to explain the effect of *Crimes Act 1958* s 37AA. Judges should choose one form of explanation, or may combine several options depending on what is most likely to clearly and correctly explain the relevant law to the jury.

Alternative 1

In considering whether the prosecution has proved that NOA was aware that NOC was not consenting or might not have been consenting to the penetration, you must consider any evidence that the accused believed that the complainant was consenting and whether that raises a doubt about whether s/he was aware that NOC was not or might not be consenting. [*Briefly summarise relevant prosecution and defence evidence and arguments*.[481]]

In deciding whether NOA believed that the complainant was consenting, you must consider whether it would have been reasonable for him/her to hold that belief in all the circumstances. This is not because the law requires that the belief be reasonable. It does not. A person may genuinely hold a belief, despite it being unreasonable and you could not find this element proven merely because you find that NOA's alleged belief in consent was unreasonable. The reasonableness of the accused's alleged belief is no more than a guide to help you decide whether or not the accused held that belief.

In considering the reasonableness of the NOA's belief, the following [two/three] factors may be relevant.

[*Where a circumstance listed in section 36 or 37AAA(d) or (e) is relevant, add the following shaded section*.]

First, if you are satisfied that NOC was not consenting because you are satisfied that [*describe relevant section 36 or 37AAA(d) or (e) circumstance(s)*], then you must consider whether NOA was aware that [*describe relevant section 36 or 37AAA(d) or (e) circumstance(s)*] as his/her knowledge of that matter is also relevant to whether s/he believed that NOC was consenting. However, knowledge by NOA that [*describe relevant section 36 or 37AAA(d) or (e) circumstance*] does not determine whether s/he was aware that NOC was not or might not be consenting.[482]

[First/Second], you must consider whether the accused took any steps to find out whether the complainant was consenting and if so, the nature of those steps. In this case [*identify any evidence and/or competing arguments about the steps taken by the accused*].

[Second/Third], you must consider any other relevant factors. That includes [*identify any evidence and/or competing arguments about the accused's state of mind. In particular:*

- Evidence of what was said and done by both parties at the time of the alleged penetration (including evidence before the jury, statements in police interviews and any complaint evidence admitted as evidence of the facts);
- Consider the history of the parties;
- Consider both direct and circumstantial evidence.]

[481] The judge should generally require counsel to identify any evidence relevant to this issue before commencing the charge to the jury.

[482] The judge may consider adding an example to further explain this point.

It is not for the accused to prove that s/he believed that the complainant was consenting. It is for the prosecution to disprove the existence of a belief in consent which would have prevented NOA from having an awareness that NOC was not consenting or might not have been consenting. [*State whether the Crown disputes that NOA had such a belief at all.*] The prosecution must satisfy you that NOA was aware that NOC was not or might not be consenting, even if he believed NOC was consenting.

There is a difference between a belief in consent which NOA relies upon and an awareness that NOC was not or might not be consenting, which is what this element is about. That is because there are different strengths of belief.

- At one end of the scale, I might have a belief as to something and the strength of that belief leaves no possibility for error.
- At the other end of the scale, I can have a belief as to something while being aware that I might be mistaken. For example, I might believe that I parked my car on the fourth level of a carpark, but I'm aware that it might be on the third level. I then go to the fourth level to find my car, even though I'm aware it might not be there.

In order to prove this element of awareness, the prosecution must prove to you that NOA did not have such a strong belief that NOC was consenting that s/he did not think of the possibility that she might not be consenting. In determining the strength of NOA's belief in consent, you should consider the matters I just mentioned that are relevant to whether the belief was held. This includes any evidence of the belief, [whether the accused was aware that [*describe relevant section 36 or 37AAA(d) or (e) circumstances*], whether the accused took steps to find out whether the complainant was consenting and any other relevant factors.

It is for the prosecution to show NOA did not have a belief that creates a reasonable doubt that s/he was actually aware NOC was not, or might not have been, consenting.

The prosecution will therefore prove this element if you are satisfied that even though NOA believed NOC was consenting, he was still aware that s/he might not be consenting.

Alternative 2

In this case, [evidence has been led/the defence argue] that at the time of the sexual penetration NOA believed that NOC was consenting to the sexual act. [*Briefly summarise relevant prosecution and defence evidence and arguments.*]

If the accused believed the complainant was consenting, that may raise a reasonable doubt about this element.

There are two matters you must consider regarding this [evidence/argument] about NOA's belief in consent.

First, you must look at any evidence of that belief. [*Identify relevant evidence.*]

Second, you must consider whether that belief was reasonable in the circumstances. This is because the reasonableness of a belief is a guide to whether it is held. There are [two/three] factors for you to look at when judging whether a belief in consent was reasonable.

[*Where a circumstance listed in section 36 or 37AAA(d) or (e) is relevant, add the following shaded section.*]

One, if you find that [*describe relevant section 36 or 37AAA(d) or (e) circumstance(s)*], you must consider whether the accused was aware that [*describe relevant section 36 or 37AAA(d) or (e) circumstance(s)*]. However, even if you find that NOA was aware that [*describe relevant section 36 or 37AAA(d) or (e) circumstance(s)*], that does not necessarily prove that NOA was aware that NOC was not or might not be consenting. It just affects whether a belief in consent was reasonable.

[One/Two], whether the accused took any steps to find out whether the complainant was consenting or might not be consenting and if so, the nature of those steps. In this case [*identify any evidence and/or competing arguments about the steps taken by the accused*].

[Second/Third], any other relevant factors. That includes [*identify any evidence and/or competing arguments about the accused's state of mind. In particular:*

- Evidence of what was said and done by both parties at the time of the alleged penetration (including evidence before the jury, statements in police interviews and any complaint evidence admitted as evidence of the facts);
- Consider the history of the parties;
- Consider both direct and circumstantial evidence.]

Remember though that these [two/three] factors are only relevant because the reasonableness of a belief is a guide to whether NOA in fact held that belief. However, the law does not require that the accused's beliefs are reasonable. An unreasonable belief that is genuinely held can raise a reasonable doubt about this element.

So far, I've been speaking about a belief in consent. But remember that the element is that the prosecution must prove that at the time of the sexual penetration the accused:

- was aware that the complainant was not or might not be consenting; or
- was not giving any thought to whether the complainant was not or might not be consenting.[483]

A belief in consent and an awareness that the complainant might not be consenting are different ideas.[484] It is for the prosecution to show that NOA did not have a belief in consent of a kind that leaves you with a reasonable doubt that s/he was actually aware that NOC was not or might not be consenting. Whether a belief in consent raises a reasonable doubt about this element depends on your view of the nature and extent of NOA's alleged belief in consent.

Last updated: 10 October 2012

7.3.1.4 Effect of Delayed Complaint on Credit

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Scope

1. The law concerning delayed complaint and its impact on credibility in sexual offence cases is governed by the *Jury Directions Act 2015* Part 5 Division 2. This Division applies to trials commenced on or after 29 June 2015 (*Jury Directions Act 2015* Sch cl 2).
2. Division 2 applies to criminal proceedings that relate (wholly or partly) to a charge for 'a sexual offence' (*Jury Directions Act 2015* s 50). 'Sexual offence' has the same meaning as in the Criminal Procedure Act 2009 (*Jury Directions Act 2015* s 3), and includes attempt, incitement and conspiracy to commit one of the listed offences (*Criminal Procedure Act 2009* s 4).

[483] For offences alleged to have been committed before 1/1/08, the second bullet point must be omitted.

[484] Judge may wish to insert a suitable example at this point to explain the scope for a person to believe one thing and be aware that they might be mistaken.

Overview

3. If, before any evidence is adduced in a trial and after hearing submissions from the parties, the trial judge considers it is likely that there will be evidence in the trial that suggests there was a delay in complaint or that the complainant did not make a complaint, the trial judge must direct the jury about the relevance of delay to credit (*Jury Directions Act 2015* s 52).
4. The judge may form this view on the basis of the depositions, through the matter being addressed during a pre-trial directions hearing, or through a pre-trial document filed under the *Criminal Procedure Act 2009* (see *Criminal Procedure Act 2009* ss 182, 199 and 200).
5. The direction on the effect of delayed complaint on credit must be given before evidence about the delay in making a complaint is adduced and may be given before any evidence is adduced (*Jury Directions Act 2015* s 52(1)).
6. Under section 51 of the *Jury Directions Act 2015*, there are certain statements about complainants in sexual offences which the trial judge, the prosecution and defence counsel are prohibited from making (*Jury Directions Act 2015* s 51).
7. Depending on the circumstances of the case, the judge may also need to warn the jury about any forensic disadvantages caused by the delay, about Recent Complaint or about differences in the complainant's account.

Relevance of Delayed Complaint

8. At common law, the absence of "recent complaint" was relevant to the credibility of the complainant as it could be used in evaluating the consistency of the complainant's evidence (*Kilby v R* (1973) 129 CLR 460; *Crofts v R* (1996) 186 CLR 427; *R v Miletic* [1997] 1 VR 593; *R v Matthews* [1999] 1 VR 534; *R v WEB* (2003) 7 VR 200).
9. However, section 52 of the *Jury Directions Act 2015* now requires the judge to give the jury certain directions which are relevant to assessing the significance of delay. These directions are designed to address certain misconceptions jurors may have about the significance of delay (see Department of Justice, *Jury Directions: A Jury-Centric Approach*, 2015).
10. While section 51 of the Act prohibits certain statements or suggestions about the impact of delay (See Prohibited Directions and Statements below), nothing in Part 5, Division 2 prevents or restricts the defence from cross-examining the complainant about the reasons for the delay. The defence is entitled to cross-examine a complainant to explore the reasons for a delay (*WSJ v R* [2010] VSCA 339).

When to Direct the Jury

11. If, before any evidence is adduced in a trial and after hearing submissions from the parties, the trial judge considers it is likely that there will be evidence in the trial that suggests there was a delay in making a complaint or that the complainant did not make a complaint, the trial judge must give a section 52 direction (*Jury Directions Act 2015* s 52).
12. The term 'delay in making a complaint' is defined in the Act to include where:
    - the complainant has not pursued, or continued to pursue, the complaint in a timely manner; and
    - the complainant has not made a complaint at the first, or a subsequent, reasonable opportunity to complain (*Jury Directions Act 2015* s 50).
13. This requires the judge to make an objective assessment of the interval between the alleged offending and the complaint, and the evidence that will likely be led in the trial.

14. The direction must be given before the evidence of the delay is adduced (*Jury Directions Act 2015* s 52(1)(a)).
15. The judge may elect to give the direction before any evidence is adduced (*Jury Directions Act 2015* s 52(1)(b)) and may give the direction more than once (*Jury Directions Act 2015* s 52(3)).
16. If the judge forms the view during the trial that there is evidence that the complainant delayed in making a complaint or did not make a complaint, the judge must give the jury a section 52 direction as soon as possible (*Jury Directions Act 2015* s 52(2)).
17. Section 52(2) ensures that juries will receive a section 52 direction even if the issue of delay is not identified at the start of the trial.
18. The obligation to give a section 52 direction does not depend on a request from the prosecutor or defence counsel (*Jury Directions Act 2015* s 52(2A)).

Content of directions

19. In giving a section 52 direction, the judge must inform the jury that experience shows that:
    - people may react differently to sexual offences and there is no typical, proper or normal response to a sexual offence; and
    - some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint;
    - delay in making a complaint in respect of a sexual offence is a common occurrence
    - there may be good reasons why a person may not complain, or may delay in complaining, about a sexual offence (*Jury Directions Act 2015* s 52(4)).
20. This direction is designed to reflect empirical research about the behaviour of victims of sexual assault. It also aims to counter common misconceptions about such behaviour, which wrongly assumes that most victims of sexual assault will complain at the first opportunity and that failure to do suggests that the complainant is not a "real victim" (Victorian Department of Justice, *Jury Directions: A Jury-Centric Approach*, 2015).
21. It is not appropriate for a judge to tell the jury that they must have this direction "at the forefront of your minds" when assessing the evidence (*Hermanus v R* (2015) 49 VR 486, [45] (Osborn JA)).
22. While *Jury Direction Act 2015* s 6 provides that the trial judge need not use any particular form of words, it can be dangerous to substitute words like 'disclose' and 'disclosure' for 'complain' or 'complaint'. Such substitution risks encouraging the jury to assume that the complainant's earlier statement is true, when that is a matter in issue in the trial (*Nenna v The Queen* [2021] VSCA 183, [103]–[105]).
23. As part of this direction, the judge may give an example of a good reason for delay. This example does not need to be based on the evidence given in the trial (*Jury Directions Act 2015* ss 52(4A), (4B)).
24. The explicit power to give an example of a good reason was introduced by the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act* 2022 and was designed to address remarks by the Court of Appeal in *Ford v The Queen* [2020] VSCA 162. Since the direction may be given before any evidence is led, it is likely that abstract examples of possible good reasons, rather than examples identified by the complainant, will be more appropriate (Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 Explanatory Memorandum, 50).
25. Possible reasons for delay may include:
    - being ignorant about the nature, quality and character of the act performed upon them;
    - feeling powerless (particularly where, as is usually the case, the offender is a family member or close acquaintance);
    - trusting the offender, or being emotionally dependent on them;

- fearing family dissolution or punishment for the offender;
- continuing to be in a sexual relationship with the offender;
- feeling that the relationship with the offender is special;
- being sworn to secrecy or compelled to secrecy by threats;
- feeling responsible, guilty or to blame for the acts;
- feeling shame and embarrassment;
- fearing discouragement or disbelief on the part of family and of officials (see *R v ERJ* (2010) 200 A Crim R 270; *Svajcer v R* [2010] VSCA 116; *Jones v R* (1997) 191 CLR 439; *M v R* (1994) 181 CLR 487).

26. The judge should not refer to growing public knowledge of sexual abuse by teachers and members of clergy in a case where the offending does not involve abuse of institutional power relationships (*Hermanus v R* (2015) 49 VR 486, [51]).
27. When giving examples of possible good reasons, the judge should make sure their directions on the topic:
    - Do not overawe the jury;
    - Do not purport to give expert evidence;
    - Are not expressed as the experience of courts or the experience of judges;
    - Are directed to identifying reasonable possibilities as a matter of general human experience (*Hermanus v R* (2015) 49 VR 486, [29]–[34] (Osborn JA)).
28. The judge must also exercise caution and restraint in offering possible reasons, due to the risk that any such reasons may be misinterpreted by the jury (*Hermanus v R* (2015) 49 VR 486, [177] (McLeish JA)).
29. When informing the jury of possible reasons for delay, the judge must distinguish between the direction of law and the examples. The judge must not give the impression that they are endorsing any particular reason as a good reason for delay, or endorsing a reason given by the complainant as being a good reason (*Briggs v The King* [2024] VSCA 80, [105]–[109]).
30. Where the complainant has identified a reason for delay, the judge should not emphasise that the complainant has given that explanation him or herself. Such a direction improperly diminishes the weight of the evidence, and creates a risk that the jury might give less weight to the complainant's explanation and testimony generally (*Svajcer v R* [2010] VSCA 116).

Forensic Disadvantage Warning Does Not Remove Need for Direction

31. The need for directions under Part 5 Division 2 of the *Jury Directions Act 2015* is independent of any directions on forensic disadvantage given under Part 4 Division 5 of the Act (see 4.8.1 Delay Causing Forensic Disadvantage). The directions address very different issues, and should be considered independently.

Prohibited Directions and Statements

32. The trial judge, the prosecution and defence counsel (or the accused if unrepresented) must not say, or suggest in any way, to the jury that:
    - the law regards complainants in sexual offence cases as an unreliable class of witness; or
    - complainants in sexual offence cases are an unreliable class of witness; or
    - complainants who delay in making a complaint or do not make a complaint are, as a class, less credible or require more careful scrutiny than other complainants

- complainants who provide commercial sexual services are, as a class, less credible or require more careful scrutiny than other complainants
- complainants who have a particular sexual orientation are, as a class, less credible or require more careful scrutiny than other complainants
- complainants who have a particular gender identity are, as a class, less credible or require more careful scrutiny than other complainants (*Jury Directions Act 2015* s 51(1)).

33. This does not prohibit any of those parties saying or suggesting that the particular complainant's delay does, or may, affect their credibility (*Jury Directions Act 2015* s 51 Notes).
34. Where the prosecution or defence breaches this prohibition, the judge must correct the statement or suggestion unless there are good reasons for not doing so (*Jury Directions Act 2015* s 7).
35. A judge must not say, or suggest in any way, to the jury that, because the complainant delayed in making, or failed to make, a complaint that:
    - it would be dangerous or unsafe to convict the accused; or
    - the complainant's evidence should be scrutinised with great care (*Jury Directions Act 2015* s 51(2)).
36. A judge must not instruct the jury that the failure of the complainant to complain at the earliest possible opportunity is evidence of consent (*Kilby v R* (1973) 129 CLR 460).
37. The *Jury Directions Act 2015* also abolishes the common law rule which requires a judge to direct the jury that delay in complaint may cast doubt on the reliability of the complainant's evidence and that the jury should take this into account when assessing the complainant's credibility (*Jury Directions Act 2015* s 54).
38. This abolition reverses the common law rule attributed to *Crofts v R* (1996) 186 CLR 427 which required judges to balance the statutory directions which informed the jury that there may be good reasons for a complainant to delay in complaining (see *Jury Directions Act 2015* s 54 Notes).

Last updated: 14 May 2024

7.3.1.4.1 Charge: Effect of Delayed Complaint on Credit

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This charge has been drafted for use in cases where the trial judge considers that there is likely to be evidence in the trial that suggests that the complainant delayed in making a complaint or did not make a complaint.

For this purpose, a complaint delayed in making a complaint if the complainant did not pursue or continue to pursue the complaint in a timely manner or the complainant did not make a complaint at the first or a subsequent reasonable opportunity.

This charge is designed to be given before any evidence is adduced. It will need to be adapted if it is given after evidence has been led.

As you will become aware, the offence[s] in this trial [is/are] alleged to have occurred [*indicate date(s) or date range(s)*].

You will hear evidence that NOC did not inform anyone about these offences until [*indicate date*], which was [*indicate delay*] after the offence[s] [was/were] alleged to have taken place.[485]

[485] If the section 52 direction is only relevant to some of the offences charged, this paragraph must be modified accordingly.

I must give you the following direction of law about this delay. Experience shows that people react differently to sexual offences and there is no typical, proper or normal response to a sexual offence. Some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint. It is a common occurrence for there to be a delay in making a complaint about a sexual offence and there may be good reasons why a person does not complain, or complain immediately, about a sexual offence.

The purpose of this direction is to warn you that you must decide the case on the evidence before you and not on the basis of assumptions that might be made about how a person may or may not behave or act if they have experienced a sexual assault.

Last updated: 30 July 2023

7.3.1.5 ***Differences in a Complainant's Account***

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Warning! These directions were introduced the *Jury Directions and Other Acts Amendment Act 2017*. There has not yet been appellate guidance on the operation of these provisions. This information should be used with caution. Further information about the *Jury Directions and Other Acts Amendment Act 2017* is available in the Department of Justice and Regulation report, 'Jury Directions: A Jury-Centric Approach Part 2'.

Overview

1. Following amendments which commenced on 1 October 2017, the *Jury Directions Act 2015* contains provisions for a mandatory statutory direction about how the jury assesses differences in a complainant's account.
2. These provisions apply to criminal proceedings that relate (wholly or partly) to a charge for 'a sexual offence' (*Jury Directions Act 2015* s 54A). 'Sexual offence' has the same meaning as in the Criminal Procedure Act 2009 (*Jury Directions Act 2015* s 3), and includes attempt, incitement and conspiracy to commit one of the listed offences (*Criminal Procedure Act 2009* s 4).
3. The judge is only required to give the direction if, after hearing prosecution and defence submissions, the judge thinks there is evidence in the trial that suggests a difference in the complainant's account of the alleged sexual offence that is relevant to the complainant's credibility or reliability (*Jury Directions Act 2015* s 54D).

Background to the direction

4. This direction was introduced by the *Jury Directions and Other Acts Amendment Act 2017*. It applies to trials that commence on or after 1 October 2017.
5. The direction is intended to address common misconceptions that occur in sexual offence trials: that a 'real' victim would remember all details of an offence, and be consistent in how they describe the offending whenever they are asked to do so (Victoria, *Parliamentary Debates*, Legislative Assembly, 22 February 2017, 18 (Martin Pakula, Attorney-General); see further Department of Justice and Regulation, Jury Directions: A Jury-Centric Approach Part 2, February 2017, pp 19–22).
6. While it remains up to a jury to assess whether the differences are relevant to the complainant's credibility and reliability, the directions set out in *Jury Directions Act 2015* s 54D(2) are intended to assist a jury to deal with any differences in the complainant's account on an informed basis, rather than relying on unconscious misconceptions.

Meaning of difference

7. *Jury Directions Act 2015* s 54C, as amended in 2017, provides an inclusive list of what constitutes a 'difference' in the complainant's account. It includes:

   (a) A gap in that account;

   (b) An inconsistency in that account; and

   (c) A difference between that account and another account.

8. This definition appears to cover both incomplete accounts (such as where a complainant does not reveal all alleged offending in the first interview with police) and inconsistent accounts (both inconsistencies that emerge between police statements or that emerge in the course of cross-examination). For a discussion of the significance of inconsistencies that emerge in cross-examination, see Failure to Challenge Evidence (Browne v Dunn) and *Ward v R* [2017] VSCA 37.

When is the direction required?

9. There are two conditions which must be met before the judge is required to give a differences in account direction:

   - The case must be a criminal proceeding that relates wholly or partly to a charge for a sexual offence or a charge for an offence of conspiracy or incitement to commit a sexual offence (*Jury Directions Act 2015* s 54A); and
   - The judge, after hearing submissions from the prosecution and defence counsel, considers that there is evidence in the trial that suggests a difference in the complainant's account of the offence charged that is relevant to the complainant's credibility or reliability (*Jury Directions Act 2015* s 54D).

10. Unlike many directions under the *Jury Directions Act 2015*, the request process in Part 3 does not apply to this direction. The judge may form the view that they should give a differences in account direction either on their own motion, or following a request from the prosecution (*Jury Directions Act 2015* s 54D(2A)).

Timing of Direction

11. The direction on differences appears designed to be given after evidence of differences emerges in the trial. This may be contrasted with the direction on delay in complaint, which is designed to be given before any evidence is adduced in the trial (compare *Jury Directions Act 2015* ss 52 and 54D).

12. The Act is silent on whether the direction should be given as a direction in running when inconsistencies emerge, or whether the judge should wait until final directions. The timing of the direction may be at the discretion of the judge, taking into account matters such as the significance of the differences, the likely length of the trial and any other matters that appear relevant.

13. The judge may repeat the direction on differences at any time in the trial (*Jury Directions Act 2015* s 54D(3)).

Content of the direction

14. Where a judge thinks that there is evidence suggesting such a difference, the judge must inform the jury that:

(a) It is up to the jury to decide whether the offence charged, or any alternative offence, was committed; and

(b) Differences in a complainant's account may be relevant to the jury's assessment of the complainant's credibility and reliability; and

(c) Experience shows that:

(i) People may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time; and

(ii) Trauma may affect different people differently, including by affecting how they recall events; and

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

(iv) Both truthful and untruthful accounts of a sexual offence may contain differences; and

(d) It is up to the jury to decide:

(i) Whether or not any differences in the complainant's account are important to assessing the complainant's credibility and reliability; and

(ii) Whether they believe all, some or none of the complainant's evidence.

Prior Inconsistent Statements

15. Where the difference in a complainant's account is an inconsistency, a direction on the use of prior inconsistent statements may be required. See Previous Representations (Hearsay, Recent Complaint and Prior Statements) for further information.

Last updated: 1 January 2023

7.3.1.5.1 Charge: Differences in Complainant's Account

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This direction is designed to be used in cases involving a sexual offence if, after hearing counsel's submissions, the judge considers there is evidence that suggests a difference in the complainant's account of the offence that is relevant to the complainant's credibility or reliability.

Differences in complainant's account

In this case you have heard evidence that [*insert details of the evidence that suggests a difference in the complainant's account of the offence*].

You may think that this shows that there have been differences in what NOC has said on different occasions.

For this purpose, a difference can be a gap in NOC's account, an inconsistency in NOC's account or a difference between NOC's account and another account.

[*Insert the following shaded section if it is appropriate to narrow the definition of differences.*]

In this case, the parties are agreed that the only relevant form of difference is [a gap in NOC's account/an inconsistency in NOC's account/a difference between NOC's account and another account]. So when I speak of differences, I am referring to [*refer to relevant difference*].

You may use a difference in NOC's account when you are assessing his/her credibility and reliability. When you are assessing the evidence, bear in mind that experience shows that:

- People may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time;
- Trauma may affect different people differently, including by affecting how they recall events;
- It is common for there to be differences in accounts of a sexual offence. For example, people may describe a sexual offence differently at different times, to different people or in different contexts; and
- Both truthful and untruthful accounts of a sexual offence may contain differences.

The purpose of these directions is to warn you that you must decide the case on the evidence before you and not on the basis of assumptions that might be made about how a person may or may not behave or act if they have experienced a sexual assault.

It is up to you to decide whether or not the differences in NOC's account are important when assessing NOC's credibility and reliability. It is up to you to decide whether you believe all, some or none of his/her evidence.

Ultimately, the question you must decide is whether the prosecution has proved beyond reasonable doubt that NOA committed NOO.

Last updated: 1 January 2023

7.3.1.6 Evidence of a Post-Offence Relationship

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1. The *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* introduced a statutory direction on post-offence relationships in sexual offence cases. These provisions are found in the *Jury Directions Act 2015* Part 5 Division 4.
2. These provisions only apply to criminal proceedings that relate (wholly or partly) to a charge for 'a sexual offence' (Jury Directions Act 2015 s 54E). 'Sexual offence' has the same meaning as in the Criminal Procedure Act 2009 (Jury Directions Act 2015 s 3), and includes attempt, incitement and conspiracy to commit one of the listed offences (Criminal Procedure Act 2009 s 4).
3. For the purpose of this Division, 'evidence of a post-offence relationship' means:

   Evidence that suggests that, after the offence charged is alleged to have been committed, the complainant–

   (a) continued a relationship with the accused; or

   (b) otherwise continued to communicate with the accused (*Jury Directions Act 2015* s 54G).

4. If, before any evidence is adduced in a trial and after hearing submissions from the parties, the trial judge considers it is likely that there will be evidence in the trial of a post-offence relationship, the trial judge must give the direction in s 54H(5) (*Jury Directions Act 2015* s 54H(1)).
5. The judge may form this view on the basis of the depositions, through the matter being addressed during a pre-trial directions hearing, or through a pre-trial document filed under the Criminal Procedure Act 2009 (see *Criminal Procedure Act 2009* ss 182, 199 and 200).
6. The direction on the post-offence relationship must be given before evidence about the post-offence relationship is adduced and may be given before any evidence is adduced (*Jury Directions Act 2015* s 54H(1)), and may be repeated at any time in the trial (Jury Directions Act 2015 s 54H(4)).
7. If the judge later forms the view that there is or will be evidence of a post-offence relationship, the judge must give the s 54H direction as soon as practicable (*Jury Directions Act 2015* s 54H(2)).

8. The *Jury Directions Act 2015* Part 3 request process does not apply to the direction on post-offence relationships. Instead, the onus is on the judge to decide whether the direction is necessary, though the prosecution may request the direction (*Jury Directions Act 2015* s 54H(3)).

9. A direction on evidence of a post-offence relationship must inform the jury that experience shows that:

   (a) people may react differently to a sexual offence, and there is no typical, proper or normal response; and

   (b) some people who are subjected to a sexual act a sexual offence will never again contact the person who subjected them to the offence, while others-

      (i) may continue a relationship with that person; or

      (ii) may otherwise continue to communicate with them; and

   (c) there may be good reasons why a person who is subjected to a sexual offence–

      (i) may continue a relationship with the person who subjected them to the offence; or

      (ii) may otherwise continue to communicate with that person (Jury Directions Act 2015 s 54H(5)).

10. The judge may give the jury an example of a good reason why a person would continue a relationship or otherwise may continue to communicate with that person (*Jury Directions Act 2015* s 54H(6)), and an example of a good reason does not need to be based on the evidence given in the trial (*Jury Directions Act 2015* s 54H(7)).

11. There is currently no judicial guidance on when a person may have good reasons for continuing a relationship for the purpose of this provision. As with the direction on delayed complaint, the JDA expects judges to give the direction before the complainant gives evidence. The judge should consider whether to identify good reasons which the complainant is likely to give (based on the judge's knowledge of complainant's statements and any pre-recorded evidence), or whether to give generic reasons. See 7.3.1.4 Effect of delayed complaint on credit for examples of good reasons in the context of delay.

Post-offence relationships and child complainants

12. For a time, it was thought that this direction was not applicable if the complainant was a child, as the provision referred to a person "subjected to a sexual act without their consent" and consent is not an element of sexual offences against children.

13. This issue has been resolved through amendments made by Part 8 of the *Justice Legislation Amendment Act 2023* which commenced on 11 October 2023. Section 61 of that Act amended s 54H of the *Jury Directions Act 2015* to remove references to consent. These amendments apply to any trials commencing after 11 October 2023 (*Jury Directions Act 2015* Schedule 1, clause 7(2)).

Last updated: 9 November 2023

7.3.1.6.1 Charge: Evidence of a Post-Offence Relationship

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This charge has been drafted for use in cases where the trial judge considers that there is likely to be evidence in the trial that suggests that the complainant continued a relationship with the alleged offender.

This charge is designed to be given before any evidence is adduced. It will need to be adapted if it is given after evidence has been led.

This charge is designed to be given immediately after a direction on delay in complaint. If a direction on delay in complaint is not necessary, or if the judge gives the directions at separate times, the direction must be adapted.

Another feature of this delay is that NOC continued to [live with/visit/write to/study with] NOA. You will likely hear evidence that, to outward appearances, NOC's relationship with NOA continued during the period of the alleged offending.

I must give you the following direction about this continued relationship. As I said before, experience shows that people may react differently to sexual offences and there is no typical, proper or normal response. Some people break contact with their alleged offender immediately and never see them again, while others may continue a relationship with that person or otherwise continue to communicate with them. As with a delay in complaining, there may be good reasons why a person would continue a relationship with their alleged offender, or otherwise continue to communicate with them.

The purpose of this direction is to warn you that you must decide the case on the evidence before you and not on the basis of assumptions that might be made about how a person may or may not behave or act if they have experienced a sexual assault.

Last updated: 9 November 2023

7.3.1.7 Distress

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Overview

1. Evidence of a complainant's "distress" during or shortly after an alleged sexual offence may be admitted as circumstantial evidence that independently supports the complainant's evidence (*R v Redpath* (1962) 46 Cr App R 319; *R v Flannery* [1969] VR 584; *R v Sailor* [1994] 2 Qd R 342; *R v Tubou* [2001] NSWCCA 306; *R v Mathe* [2003] VSCA 165; *R v Shillings* [2003] NSWCCA 272).
2. The law concerning distress evidence developed at a time when judges were generally required to warn juries about the dangers of convicting the accused on the uncorroborated evidence of victims of sexual offences. Judges are now prohibited from directing the jury about the need for corroboration (*Evidence Act 2008* s 164). Despite this change in the underpinning of the law of distress, earlier decisions continue to apply (see cases discussed and cited in *Paull v The Queen* [2021] VSCA 339; *Seccull v The King* [2022] VSCA 219).
3. In addition, *Jury Directions Act 2015* s 54K requires the judge to direct the jury about the possibility of the complainant being distressed while giving evidence.

Distress Evidence as Circumstantial Evidence

4. Distress evidence is a form of circumstantial evidence, with similarities to post-offence conduct evidence (*Flora v R* [2013] VSCA 192).
5. Distress evidence may be used as circumstantial evidence where it is reasonably open to the jury to infer that there was a causal connection between the alleged offending and the distress (*Flora v R* [2013] VSCA 192).
6. Distress evidence may also form part of the narrative when evidence is led of a previous complaint. While this portion of the evidence is admissible, it is admissible only to help the trier of fact put the conversation in context, and to understand what was conveyed during the conversation (*Seccull v The King* [2022] VSCA 219, [88]), and is not independently probative distress evidence.

Independent Evidence

7. The probative value of distress evidence is likely to be slight or non-existent where it is given only by the complainant. The value of such evidence is intrinsically linked with the complainant's credibility, and likely adds little to the complainant's account. At common law, distress evidence was incapable of providing corroboration unless it was given by an independent witness who observed the distress (see *Eades v R* [2001] WASCA 329; *R v Meyer* [2007] VSCA 115).

Probative Value of Distress Evidence

8. For distress evidence to be relevant, it must be reasonably open for the jury to infer that there was a causal connection between the offence and the distress (*Flora v R* [2013] VSCA 192; *Seccull v The King* [2022] VSCA 219, [30], [93], [97], [100]).

9. As distress is a form of circumstantial evidence, this inference will not be open to the jury if the connection between the alleged offending and the observed distress is too remote or tenuous (*R v Link* (1992) 60 A Crim R 264; *R v Schlaefer* (1984) 37 SASR 207; *R v Roissetter* [1984] 1 Qd R 477). See also Circumstantial Evidence and Inferences.

10. This inference may also not be open to the jury where there are multiple possible causes of the observed distress. To be admissible, it must be open to the jury to reasonably infer that the alleged offending, rather than some other matter, caused the distress (*R v Flannery* [1969] VR 586; *R v Mathe* [2003] VSCA 165; *R v McNamara* [2002] NSWCCA 248. But c.f. *R v Schlaefer* (1984) 37 SASR 207; *R v Link* (1992) 60 A Crim R 264).

11. However, evidence of distress is not rendered inadmissible simply because of competing theories as to its cause. As with evidence of incriminating conduct, other competing causes are relevant to weight not relevance, unless the evidence is 'intractably neutral'. It is rare that distress evidence will be intractably neutral, as items of circumstantial evidence must be considered in the context of all the evidence in the case (*Flora v R* [2013] VSCA 192. See also *R v Ciantar* (2006) 16 VR 26; *R v Rogers* [2008] VSCA 125; *R v Mitrovic* [1999] SASC 478).

No Need for Evidence to Unequivocally Establish Identity or Guilt

12. As long as it is open for the jury to find a causal connection between the complainant's distress and the alleged offending, and the evidence is capable of supporting the complainant's account in a material particular, the jury may use distress evidence even if:

    - It does not establish the identity of the accused (*R v Major & Lawrence* [1998] 1 Qd R 317); or
    - It does not point unequivocally to the accused's guilt (*R v Taylor* (2003) 8 VR 213; *Doney v R* (1990) 171 CLR 207; *R v Berrill* [1982] Qd R 508).[486]

Evaluation of Distress Evidence

13. Circumstance which a jury may wish to take into account when evaluating distress evidence include:

    - The age of the complainant;
    - The interval between the alleged offence and the observed distress;

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[486] Some earlier cases stated that distress evidence has no probative value unless there were no other possible causes for the distress (R v Link (1992) 60 A Crim R 264; R v Schlaefer (1984) 37 SASR 207). These decisions appear inconsistent with Doney v R (1990) 171 CLR 207 and the modern understanding of circumstantial evidence. See also Flora v R [2013] VSCA 192.

- The conduct and appearance of the complainant between the alleged offence and the observed distress; and
- The circumstances at the time of the observed distress (see *R v Flannery* [1969] VR 586).

Timing of Observed Distress

14. The probative value of distress evidence diminishes rapidly with time. This is because the greater the interval there is between the alleged offending and the observed distress, the greater the risk that the distress was caused by something other than the alleged offence (*R v Sailor* [1994] 2 Qd R 342; *R v BM* [2005] VSCA 260; *R v Link* (1992) 60 A Crim R 264).
15. A time may eventually be reached when the only way to establish a connection between the observed distress and the alleged offending is by relying on the complainant's own evidence about the cause of his/her distress. In such a situation, the distress evidence will likely have no probative value (as the complainant cannot support his/her own account) (*R v Sailor* [1994] 2 Qd R 342).

Complainant Not Aware of Observation

16. The probative value of distress evidence is higher when the complainant is not aware that s/he is being observed (*R v Redpath* (1962) 46 Cr App R 319).

Distress When Making a Complaint

17. Special difficulties arise where distress is observed when the complainant is making a complaint. This is because it is difficult to establish that the distress is caused by the offending, rather than by the process of making a complaint or giving evidence (*R v Sailor* [1994] 2 Qd R 342; *R v Flannery* [1969] VR 586; *R v Redpath* (1962) 46 Cr App R 319; *Paull v The Queen* [2021] VSCA 339. See also *Nimely v The King* [2023] VSCA 20, [26]).

Directions to the Jury

Pre-trial distress

18. The need for a direction on distress depends on whether a direction is sought or whether there are substantial and compelling reasons to give a direction in the absence of any request (*Jury Directions Act 2015* ss 14, 15, 16). See Directions Under Jury Directions Act 2015 for information on when directions are required.
19. When directing the jury on independently probative distress evidence, the judge should:
    - Explain that evidence of observed distress shortly after the alleged offending may be treated as independent or corroborative evidence of the charge;
    - Explain that evidence of distress is only relevant if the jury is satisfied that it is causally connected to the alleged offending;
    - Warn about the weaknesses inherent in distress, and that it generally carries little weight (other than in exceptional circumstances) (see *R v Brdarovski* [2006] VSCA 23; *R v Flannery* [1969] VR 586; *Paull v The Queen* [2021] VSCA 339; *Seccull v The King* [2022] VSCA 219).

Distress Evidence and Recent Complaint Evidence

20. At common law, it was necessary to instruct the jury about the separate uses of evidence of distress and evidence of recent complaint. This was because the two classes of evidence were different and must be used in different ways (see *R v Roach* [1988] VR 665; *R v Brdarovski* [2006] VSCA 231).
21. The need for this distinction does not arise under the *Evidence Act 2008*. Both distress evidence and the making of a recent complaint can be used in proof of the offence (see *Evidence Act 2008* s 66).

Distress while giving evidence

22. If the complainant will give evidence, the judge must give the jury a direction on the possibility of the complainant being distressed while giving evidence, unless there are good reasons not to do so (*Jury Directions Act 2015* s 54K(1)).
23. The judge must give this direction about the possibility of the complainant being distressed before the complainant gives evidence, unless there are good reasons not to do so (*Jury Directions Act 2015* s 54K(2)).
24. When directing the jury about the possibility of the complainant being distressed, the judge must inform the jury that experience shows that–
    - because trauma affects people differently, some people may show obvious signs of emotion or distress when giving evidence about a sexual offence, while others may not;
    - both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of emotion or distress (*Jury Directions Act 2015* s 54K(5)).
25. The judge may repeat this direction at any time in the trial (*Jury Directions Act 2015* s 54K(4)).
26. The judge must have regard to the submissions of the parties when deciding whether there are good reasons for not giving the direction at all, or for not giving the direction before the witness gives evidence (*Jury Directions Act 2015* s 54K(3)).
27. This direction is based on research that jurors may believe that a person who has been the subject of a sexual offence will always display emotion when recounting the offending. Instead, emotional reactions of a sexual offence victim can be highly variable (Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 Explanatory Memorandum, 54–55). This direction is therefore designed to reduce the potential for the jury to give improper weight to the complainant's display of emotion when evaluating the credibility of the complainant's evidence.
28. This direction supplements the common law prohibition on the judge telling the jury that they may consider a display of emotion by the witness when giving evidence is a matter that may support the complainant's credibility (see *Paull v The Queen* [2021] VSCA 339).Jury Directions Act 2015 s 54K does not affect the rules or directions required in relation to pre-trial distress (Nimely v The King [2023] VSCA 20, [30]).

Last updated: 22 March 2023

7.3.1.7.1 Charge: Pre-Trial Distress

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You have heard evidence about NOC's apparent distress [*identify circumstances of distress and elaborate if necessary on the details of the distress*].

If you find that NOC was distressed immediately after the alleged offence, the prosecution invites you to use this as indirect evidence that supports its case that [*describe the issue the evidence may support, e.g.* "s/he did not consent to the penetration")]. In other words, the prosecution says that the distress supports a conclusion that NOC suffered a traumatic event. Given the timing of the distress, the prosecution say that the only possible traumatic event was the alleged [*identify relevant offence*].

[*Insert relevant prosecution arguments*.] The defence dispute this, and say [*insert relevant defence arguments*].

I must give you the following directions of law about this piece of evidence. First, you can use the evidence in the way the prosecution suggests. But you may only do so if you are satisfied there is no other reason why NOC could have appeared distressed at that time. Second, the experience of the law is that evidence of observed distress is a weak type of evidence and you should not give this evidence much weight.

Last updated: 1 January 2023

7.3.1.7.2 Charge: Distress when Giving Evidence

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This direction must be given before the complainant gives evidence in a trial for a sexual offence, unless the judge finds there are good reasons for not giving it at that time, or not giving it at all.

One of the witnesses you will hear from is NOC, who is the person who says [s/he] was the subject of NOA's offences. When you are hearing his/her evidence, you must bear in mind the following direction of law. Experience shows that some people may show obvious signs of distress when giving evidence about an alleged sexual offence, while others may not. This is because trauma affects people differently. Both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of emotion. To that direc*tion, I add the following comment*, which you may accept or reject. You should be slow to put any weight on whether NOC displays emotion when giving evidence. There are too many factors which can influence whether NOC displays emotion for that to be a safe tool for judging [his/her] evidence.

The purpose of this direction is to warn you that you must decide the case on the evidence before you and not on the basis of assumptions that might be made about how a person may or may not behave or act if they have experienced a sexual assault.

Last updated: 1 January 2023

7.3.2 Rape (From 1/1/92)

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Types of Rape

Offences committed on or after 1 July 2015

1. The *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* commenced operation of 1 July 2015. The Act substituted a new Subdivision (8A) in Division 1 of Part 1 of the *Crimes Act 1958* and a new definition of consent in section 34C.
2. On 1 July 2017, this definition of consent was moved to section 36 by the *Crimes Amendment (Sexual Offences) Act 2016*.
3. Sections 38 and 39 of the *Crimes Act 1958* create the two distinct offences of 'rape' and 'rape by compelling sexual penetration' (compelled rape):
    i) A person (A) commits rape when he/she intentionally sexually penetrates another person (B), without B's consent, and does not reasonably believe that B consents to the penetration (s 38(1));
    ii) A person (A) commits compelled rape when he/she intentionally causes another person (B) to sexually penetrate A, B, another person or an animal, or be sexually penetrated by another person or an animal without B's consent, and does not reasonably believe that B consents to doing that act (s 39(1)).
4. Prior to 1 July 2017, the definition of sexual penetration in *Crimes Act 1958* s 37D meant that causing a person to be sexually penetrated by a third person was dealt with as rape. Due to changes introduced by the *Crimes Amendment (Sexual Offences) Act 2016,* from 1 July 2017 this scenario is dealt with by the offence of compelled rape.
5. Prior to 1 July 2015, the *Crimes Act 1958* contained separate provisions for rape by sexual penetration and rape by failure to withdraw after sexual penetration. However, "failure to withdraw" is now included within the definition of sexual penetration (see "Sexual penetration" below).

6. Prior to 1 July 2015, different offences existed in respect of the accused compelling a person to sexually penetrate the accused or a third person (see *Crimes Act 1958* s 38(3)), and an accused compelling a person to sexually penetrate themselves or an animal (see *Crimes Act 1958* s 38A). All of these types of conduct are now included under the single compelled rape provision in s 39.

Offences committed between 1 January 2008 and 1 July 2015

7. Between 1 January 2008 and 1 July 2015, section 38 of the *Crimes Act 1958* defined four distinct forms of rape. A person committed rape by:

   i) Intentionally sexually penetrating another person without their consent, while being aware that the person is not or might not be consenting, or while not giving any thought to whether the person is not or might not be consenting (s 38(2)(a));

   ii) After sexual penetration, failing to withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting (s 38(2)(b));

   iii) Compelling a person to sexually penetrate the offender or another person (s 38(3)(a)); and

   iv) Compelling a person who has sexually penetrated the offender or another person not to withdraw (s 38(3)(b)).

8. This charge book includes charges for s 38(2)(a) rape, and s 38(3)(a) compelled rape. If a case involves a failure to withdraw, contrary to ss 38(2)(b) and 38(3)(b), these charges will need to be modified accordingly.

9. Where the pleading confines the rape to the kind of rape which is proscribed by s 38(2)(a), and at no point during the trial is it alleged that the accused had committed the kind of rape proscribed by s 38(2)(b), the judge should not direct the jury about s 38(2)(b) rape (*R v SAB* (2008) 20 VR 55; [2008] VSCA 150).

10. Section 38(3) compelled rape is a wholly different offence to s 38A compelled sexual penetration. Section 38(3) applies where the complainant is compelled to sexual penetrate the offender or "another person" (i.e. a person other than the victim). Section 38A involves either compulsion of the victim to sexually penetrate him or herself (i.e. self-penetration) or compelled bestiality.

Rape and compelled rape

11. As there have been no reported cases to date addressing the requirements of compelled rape, this commentary is primarily concerned with rape simpliciter. It is assumed that most of the principles will be equally applicable to compelled rape (with appropriate modifications), and the charges relating to compelled rape have been drafted accordingly.

Operation of rape provisions in the Crimes Act 1958

12. The offence of rape has changed significantly over time:

Date	Offence	*Crimes Act* 1958	Key changes
On/after 1 Jul 2017	Rape; compelled rape	s 38; s 39	New legislative definition of sexual penetration and compelled rape reclassified some conduct from rape to compelled rape

On/after 1 Jul 2015	Rape; compelled rape	s 38; s 39	New legislative definitions of rape and compelled rape (including a new fault element of no reasonable belief in consent) *Crimes Amendment (Sexual Offences and Other Matters) Act* 2014
1 Jan 2008 – 30 Jun 2015	Rape; compelled rape	s 38(2)(a); s 38(4)	Rape and compelled rape definitions expanded (introducing new fault element based on non-advertence to the complainant's state of mind) *Crimes Amendment (Rape) Act* 2007
1 Dec 2006 – 31 Dec 2007	Compelled rape	s 38(3)	Compelled rape definition modified (to make the offences gender neutral) *Crimes (Sexual Offences) Act* 2006
22 Nov 2000 – 20 Nov 2005	Compelled rape	s 38(3)	First legislative definition of compelled rape *Crimes (Rape) Act 2000*
1 Jan 1992–21 Nov 2000	Rape	s 38(1)–(2)	New legislative definition of rape *Crimes (Rape) Act 1991*
5 Aug 1991 – 31 Dec 1991	Rape	s 38	Rape definition modified *Crimes (Sexual Offences) Act 1991*
1 Mar 1981 – 3 Aug 1991	Rape	s 45	First legislative definition of rape *Crimes (Sexual Offences) Act 1980*
Pre 1 Mar 1981	Rape	None	Common law

13. If an offence is alleged to have been committed between two dates which straddle any of the commencement dates described above, the allegation is to be treated as relating to the period before the commencement of the new provision (*Crimes (Rape) Act 1991* s 9(4); *Crimes Act 1958* ss 593(4), 606A(2), 609(4)).

General guidelines

Offences committed on or after 1 July 2015

14. There are three elements of rape under s 38(1). A person (A) commits rape if:

    i) A intentionally sexually penetrates another person (B);

    ii) B does not consent to the penetration; and

    iii) A does not reasonably believe that B is consenting to the penetration.

Offences committed before 1 July 2015

15. There were four elements of rape under s 38(2)(a). A person committed rape if he or she:

    i) Sexually penetrated another person;

    ii) Intentionally;

    iii) Without that person's consent;

    iv) While being aware that the person was not consenting or might not have been consenting or while not giving any thought to whether the person was not consenting or might not have been consenting.

All offences

16. It is preferable to use the language of the legislation in charging the jury on the elements of rape (*R v Soldo* [2005] VSCA 136; *R v Zilm* (2006) 14 VR 11 (Callaway JA)).

17. Judges should take care not to run the elements together. In particular, judges should not instruct the jury that the final element relates to "the guilty mind of the accused". For example, for offences committed before 1 July 2015, judges should not instruct the jury that the prosecution must prove that the accused "intended to commit the crime of rape in the sense that, at the time of sexual penetration, he [or she] realized that the complainant was not consenting or might not be consenting". This direction runs together the second and fourth elements (*R v Soldo* [2005] VSCA 136; *R v Zilm* (2006) 14 VR 11 (Callaway JA)).

18. A judge should not use the word "reckless" when directing the jury about the accused's knowledge as to lack of consent, as it is not used in the statutory language and it may mislead the jury because of its multiple legal meanings (*R v Ev Costa* 2/4/1997 CA Vic).

"Sexual penetration"

Offences committed on or after 1 July 2017

19. For offences committed on or after 1 July 2017 "Sexual penetration" is defined by s 35A of the *Crimes Act 1958*. This definition applies to all offences in Subdivisions (8A) to (8FA).

20. Section 35A provides that:

(1) A person (A) sexually penetrates another person (B) if-

(a) A introduces (to any extent) a part of A's body or an object into B's vagina; or

(b) A introduces (to any extent) a part of A's body or an object into B's anus; or

(c) A introduces (to any extent) their penis into B's mouth; or

(d) A, having introduced a part of A's body or an object into B's vagina, continues to keep it there; or

(e) A, having introduced a part of A's body or an object into B's anus, continues to keep it there; or

(f) A, having introduced their penis into B's mouth, continues to keep it there.

(2) A person sexually penetrates themselves if-

(a) the person introduces (to any extent) a part of their body or an object into their own vagina; or

(b) the person introduces (to any extent) a part of their body or an object into their own anus; or

(c) having introduced a part of their body or an object into their own vagina, they continue to keep it there; or

(d) having introduced a part of their body or an object into their own anus, they continue to keep it there.

(3) A person (A) sexually penetrates an animal if A engages in conduct with the animal that would involve sexual penetration as defined by subsection (1) were the animal another person (B).

(4) A person (B) is sexually penetrated by an animal if B engages in conduct with the animal that would involve sexual penetration as defined by subsection (1) were the animal another person (A).

(5) In relation to sexual penetration of an animal, a reference to the vagina or anus includes a reference to any similar part.

21. As with the former s 37D, the definition of sexual penetration does not contain an exception for good faith medical or hygienic procedures (compare *Crimes Act 1958* s 35 prior to 1 July 2015). Instead, this exception is provided by dedicated provisions that apply in relation to offences (see, e.g. ss 48A, 49T, 50G).

Offences committed between 1 July 2015 and 30 June 2017

22. Between 1 July 2015 and 30 June 2017 "sexual penetration" was defined by s 37D of the *Crimes Act 1958* for the offences in ss 38–43 (including rape and compelled rape). This definition is different from that in s 35, which continues to apply to all other sexual offences, and to rape or compelled rape committed prior to 1 July 2015.

23. Section 37D provides that sexual penetration includes:

- Penile penetration of the vagina, the anus or the mouth of another person; and
- Penetration by a part of the body (e.g. a finger) or by some other object of the vagina or the anus, but not the mouth.

24. The definition of "sexual penetration" in s 37D also includes the act of continuing to keep a body part or object in the vagina or anus once introduced, or the act of continuing to keep a penis in the mouth once introduced (ss 37D(1)(d)–(f)). This removes the need to distinguish between an act of sexual penetration and an act of failure to withdraw after sexual penetration.

25. A person (A) also commits sexual penetration of another person (B), if

    - A causes a third person to sexually penetrate B; or
    - A causes an act of penetration of B's anus or vagina by the penis of an animal (s 37D(2)).

26. The definition of sexual penetration in s 37D does not contain an exception for good faith medical or hygienic procedures (compare *Crimes Act 1958* s 35 prior to 1 July 2015). Instead, this exception is built into the relevant offences, rather than the definition of sexual penetration (ss 38(3), 39(3)).

Offences committed before 1 July 2015

27. Before 1 July 2015 "sexual penetration" was defined by s 35 of the *Crimes Act 1958* as

    - Penile penetration of the vagina, the anus or the mouth of another person; and
    - Penetration by a part of the body (e.g. a finger) or by some other object of the vagina or the anus, but not the mouth.

28. Conduct that would otherwise have fallen within the definition of sexual penetration will not do so if carried out in good faith in the course of a procedure for medical or hygienic purposes (*Crimes Act 1958* s 35(1)). In such cases it is for the prosecution to satisfy the jury that the accused did not subjectively believe that there was a proper medical or hygienic purpose for carrying out the act (*R v Zaidi* (1991) 57 A Crim R 189).

All offences

29. It is not sufficient for the relevant body part to have simply been touched. It must have been penetrated to some extent (*Anderson v R* [2010] VSCA 108).

30. Penetration need only be slight or fleeting. The definitions of sexual penetration include the words "to any extent" (See *Crimes Act 1958* ss 35 (before 1 July 2015), 37D (on or after 1 July 2015) and 35A (on or after 1 July 2017). See also *Randall v R* (1991) 53 A Crim R 380; *Anderson v R* [2010] VSCA 108).

31. The purpose of the penetration is irrelevant. It need not have been committed for the purposes of sexual gratification (*R v Dunn* 15/4/1992 CA NSW).

32. While in most cases the prosecution will be able to particularise the method of penetration (e.g., the complainant was penetrated by a penis; or the complainant's vagina was penetrated), in some cases this will not be possible. In such cases, it will be sufficient for the prosecution to particularise the penetration by reference to the relevant possibilities (e.g., the complainant was penetrated by a penis, a bodily part or some other object; or the complainant's vagina or anus was penetrated) (*R v Castles (Ruling No.1)* (2007) 17 VR 329; *El-waly v The Queen* (2012) 46 VR 656, [53]-[54]; *Saab v The Queen* [2022] VSCA 116, [85]; *Stanford v DPP* [2024] VSCA 35, [41]-[44]).

33. Where alternative possible methods of penetration are left to the jury, they do not need to unanimously agree about which of those methods was used. They only need to unanimously agree that penetration took place (*R v Castles (Ruling No.1)* (2007) 17 VR 329).

34. However, if the indictment specifies a mode of penetration, the jury must reach a verdict in relation to that mode of penetration. It cannot find the accused guilty on the basis of a mode of penetration different to that specified in the indictment (*Stanford v DPP* [2024] VSCA 35, [41]-[44]).

"Vagina"

All offences

35. The definition of vagina includes "the external genitalia" (s 35 (before 1 July 2015 and on or after 1 July 2017)/s 37C (between 1 July 2015 and 30 June 2017)). It has been held that this phrase is not within ordinary usage and needs more explanation. Where penetration is in issue, the jury should have explained to them "in precise and simple terms, what would constitute penetration of the outer lips of the vagina, and to have summarised the evidence as it related to that issue" (*R v A J S* (2005) 12 VR 563. See also *Randall v R* (1991) 53 A Crim R 380; *Anderson v R* [2010] VSCA 108; *R v MG* (2010) 29 VR 305).

36. The definition of vagina also includes a surgically constructed vagina (s 35 (before 1 July 2015 and on or after 1 July 2017)/s 37C (between 1 July 2015 and 30 June 2017)). The offence can therefore apply to the penetration of transsexual people.

"Consent"

All offences

37. "Consent" is defined in the *Crimes Act 1958* to mean "free agreement" (s 36 (before 1 July 2015 and on or after 1 July 2017)/s 34C (between 1 July 2015 and 30 June 2017)).

38. This definition of consent is relevant both to whether the complainant "consented" to the penetration, and to the accused's state of mind regarding whether the complainant was consenting (the fault element).

39. The *Crimes Act 1958* also provides a non-exhaustive list of situations in which a person is regarded as not having given consent. The listed situations in the earlier version (s 36, for offences committed before 1 July 2015) were similar, but slightly narrower than those currently listed (s 34C, for offences committed between 1 July 2015 and 30 June 2017/s 36, for offences committed on or after 1 July 2017).

40. The provisions defining consent have never been expressly drafted as "deeming provisions", but it is relatively clear that they must be treated this way. This interpretation is supported for trials commenced on or after 1 January 2008 by either s 37AAA(b) and (c) for offences committed before 1 July 2015 and by *Jury Directions Act 2015* s 46(4)(b) for offences committed on or after 1 July 2015 (see also *R v Getachew* (2012) 248 CLR 22, [19]).

41. For a full discussion of this topic see 7.3.1.3 Consent and awareness of non-consent (Pre-1/7/15) and 7.3.1.2 Consent and reasonable belief in consent (From 1/07/15).

Fault element: the accused's awareness of, or belief in, consent

Offences committed on or after 1 July 2015

Warning! This element has not yet been considered by the Court of Appeal. The following material is provided as a guide only and must be used with caution.

42. The third element is that the accused "does not reasonably believe that [the complainant] consents to the penetration" (*Crimes Act 1958* s 38(1)(c)).

43. This fault element will be satisfied by any one of the following mental states:

    i) The accused believed that the complainant was not consenting;

    ii) The accused did not believe the complainant was consenting. This includes circumstances where the accused gave no thought as to whether the complainant was consenting;

iii) The accused believed the complainant was consenting, but his/her belief was not reasonable in the circumstances.

44. This element introduces objectivity into the fault element for rape and rape related offences (Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 Explanatory Memo).

45. This element is explained in more detail in 7.3.1.2 Consent and reasonable belief in consent (From 1/07/15).

Offences committed between 1 January 2008 and 1 July 2015

46. For offences committed between 1 January 2008 and 1 July 2015, the fault element consists of proof that the accused had any one of the following three different mental states:

    i) An awareness that the complainant was not consenting (ss 38(2)(a)(i)), 38(4)(b)(i);

    ii) An awareness that the complainant might not be consenting (ss 38(2)(a)(i)), 38(4)(b)(i);

    iii) A failure to give any thought to whether or not the complainant was consenting (ss 38(2)(a)(ii), 38(4)(b)(ii)).

Awareness of the real possibility of non-consent

47. The word "might" in the phrase "might not be consenting" suggests a test based on the "possibility" of non-consent. It does not suggest that the accused must have been aware that it was "probable" that the complainant was not consenting. However, the possibility of non-consent must be real, not just theoretical (*R v Ev Costa* 2/4/1997 CA Vic).

Non-advertence

48. For offences committed after 1 January 2008 it is no defence for the accused to assert that he or she was not aware that the complainant might not have been consenting to the sexual act because the accused had not given any thought to whether or not the complainant was consenting (*Crimes Act 1958* ss 38(2)(a)(ii), 38(4)(b)(ii)).

49. Prior to this amendment it was uncertain whether or not "non-advertence" provided a defence. On one view, non-advertence was a culpable state under the common law, and this continued for the statutory offence of rape – see *DPP v Morgan* [1976] AC 182 and *R v Tolmie* (1995) 37 NSWLR 660. However, the Crimes Amendment (Rape) Bill 2007 was enacted on the basis that this mental state was not previously culpable (see Attorney-General Rob Hulls, Second Reading Speech, Crimes Amendment (Rape) Bill 2007). The charge–book charges reflect this view. If non-advertence was a culpable mental state prior to the amendment, and it is an issue in a pre-amendment case, the charge will need to be modified.

Effect of intoxication on awareness

50. Intoxication can also be relevant to the issue of mistaken belief in consent. See 8.7 Common Law Intoxication for more information.

Jury directions on awareness of or belief in consent

51. Sections 37 and 37AA of the *Crimes Act 1958* provide a framework of directions in respect of the accused's awareness of the complainant's state of consent. These directions are mandatory where relevant to the facts in issue in a proceeding (*Crimes Act 1958* s 37(1)).

52. For a full discussion of this topic see 7.3.1.3 Consent and awareness of non-consent (Pre-1/7/15).

Compelled rape

Offences committed on or after 1 July 2017

53. "Rape by compelling sexual penetration" is a separate offence contained in s 39.

54. The elements of compelled rape are as follows (s 39(1)):

    (a) A person (A) intentionally causes another person (B) –

        (i) to sexually penetrate A; or

        (ii) to sexually penetrate themselves, or

        (iii) to sexually penetrate another person (C) or an animal, or

        (iv) to be sexually penetrated by C or by an animal; and

    (b) B does not consent to the sexual penetration; and

    (c) A does not reasonably believe that B consents to the sexual penetration.

55. In contrast to the offence as it stood before 1 July 2015 (see Offences committed between 1 July 2015 and 30 June 2017 below), the complainant for this offence is either the person who sexually penetrates another person or an animal, or, under s 39(1)(a)(iv), is sexually penetrated by another person or an animal.

Offences committed between 1 July 2015 and 30 June 2017

56. "Rape by compelling sexual penetration" is a separate offence contained in s 39.

57. The elements of compelled rape are as follows (s 39(1)):

    (1) An accused person commits compelled rape if s/he:

        (a) intentionally causes another person to sexually penetrate –

            (i) the accused; or

            (ii) themselves, or

            (iii) a third person, or

            (iv) an animal; and

        (b) the person doing the penetrating does not consent to doing the act of sexual penetration; and

        (c) the accused does not reasonably believe that that person consents to doing that act.

58. The elements of the offence are similar to those of rape, but rather than the accused intentionally sexually penetrating the complainant, the accused intentionally causes the complainant to sexually penetrate either the accused, him/herself, a third person or an animal (s 39(1)(a)).

59. The definition of sexual penetration includes the following:

    i) A person sexually penetrates themselves if they introduce a part of their own body or an object into their anus or vagina, or having so introduced such body part or object, continues to keep it there (s 37D(3)).

    ii) A person sexually penetrates an animal if they introduce a part of their own body or an object into the animal's anus or vagina, or their penis into the animal's mouth, or having so introduced such body part or object, continues to keep it there (s 37D(4)).

60. While the accused must intentionally cause the penetration, compulsion is not a separate element. Compulsion is shown through the elements of lack of consent by the person doing the penetration, and lack of a reasonable belief by the accused in that consent, as in the offence of rape (s 39(1)).

61. The accused will have committed the offence of compelled rape in relation to the person s/he causes to do the penetrating, not the person penetrated. Where the accused causes the complainant to penetrate a third person, the accused will have committed rape simpliciter of that third person, assuming the other elements are met (s 37D(2)).

62. For the purposes of compelled rape, it is the consent of the complainant, that is the person doing the sexual penetration, and the accused's belief in that person's consent, that is relevant.

Offences committed before 1 July 2015

63. The compelled rape offences, like rape, involve sexual penetration without consent. For offences committed before 1 July 2015, the physical roles of offender and victim are reversed, and the compelled rape offence adds the additional concept of "compulsion" (see *Crimes Act 1958* s 38(3)).

64. Compulsion is defined in s 38(4) as follows:

> (4) For the purposes of subsection (3), a person compels another person (the victim) to engage in a sexual act if the person compels the victim (by force or otherwise) to engage in that act–
>
> (a) without the victim's consent; and
>
> (b) while–
>
> (i) being aware that the victim is not consenting or might not be consenting; or
>
> (ii) not giving any thought to whether the victim is not consenting or might not be consenting.

65. This definition is mirrored for the separate offence of compelling sexual penetration contrary to s 38A (*Crimes Act 1958* s 38A(3)).

Last updated: 1 July 2017

7.3.2.1A Charge: Rape (From 30/7/23)

Click here for a Word version of this document for adaptation

Warning! Judges should also consider whether to repeat any of the directions specified in 7.3.1.1.1 Statutory directions on consent and 7.3.1.1.2 Statutory direction on belief in consent.

The elements

I must now direct you about the crime of rape. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused intentionally sexually penetrated the complainant.

Two – the complainant did not consent to the sexual penetration.

Three– the accused did not reasonably believe that the complainant consented to the sexual penetration.

I will now explain each of these elements in more detail.[487]

Intentional Sexual Penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant in the way alleged. [*If in issue, add*: The prosecution must also prove that the accused did this act consciously, voluntarily, and deliberately.[488]]

Act of sexual penetration

The law defines the term sexual penetration to include a number of different acts. In this case the prosecution must prove that NOA introduced [*identify item or body part*, *e.g.* "his penis"] to any extent into NOC's [vagina/anus/mouth].[489]

[*If relevant add*:

- NOA's [*identify item or body part*] does not need to have gone all the way into NOC's [vagina/anus/mouth]. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface*, *e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation.]

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced [*identify body part or object*] to any extent between the outer lips of NOC's vagina.

In this case [*insert relevant evidence or competing arguments about proof of sexual penetration*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed intention or voluntariness in issue, add the shaded section.*]

The prosecution must prove that the accused sexually penetrated the complainant consciously, voluntarily, and deliberately.

This requirement is in issue here because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case*, *e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the

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[487] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proved."

[488] Described in the instructions within this charge as the "voluntariness" requirement.

[489] If sexual penetration by failure to withdraw, or by causing another person or an animal to sexually penetrate the complainant, is in issue the charge will need to be modified accordingly.

time of the penetration"].

Lack of consent

The second element that the prosecution must prove is that the sexual penetration happened without the complainant's consent.

Consent is a state of mind. The law says that consent means free and voluntary agreement. So the prosecution must prove that NOC did not freely and voluntarily agree to being sexually penetrated by NOA at the time.[490]

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs.*]

The law says that a person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

The law says that where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following shaded section.*]

In some circumstances the law says that the complainant did not freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence*:

(a) the person does not say or do anything to indicate consent to the act;
(b) the person submits to the act because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal, regardless of-
  (i) when the force, harm or conduct giving rise to the fear occurs; and
  (ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;
(c) the person submits to the act because of coercion or intimidation-
  (i) regardless of when the coercion or intimidation occurs; and
  (ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;
(d) the person submits to the act because the person is unlawfully detained;
(e) the person submits to the act because the person is overborne by the abuse of a relationship of authority or trust;
(f) the person is asleep or unconscious;
(g) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;
(h) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;
(i) the person is incapable of understanding the sexual nature of the act;
(j) the person is mistaken about the sexual nature of the act;
(k) the person is mistaken about the identity of any other person involved in the act;
(l) the person mistakenly believes that the act is for medical or hygienic purposes;
(m) the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid;
(n) if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes;
(o) the person engages in the act on the basis that a condom is used and either-

[490] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

(i) before or during the act, any other person involved in the act intentionally removes the condom or tampers with the condom; or
(ii) the person who was to use the condom intentionally does not use it;

(p) having given consent to the act, the person later withdraws consent to the act taking place or continuing.

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting.

However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this second element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

No reasonable belief in consent

The third element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused did not reasonably believe that the complainant was consenting.[491]

This third element will be met in any of the following circumstances [*insert relevant section(s) from the following and apply to the evidence*:

- The accused believed that the complainant was not consenting.
- The accused gave no thought to whether the complainant was consenting.
- Even if the accused may have believed that the complainant was consenting, this belief was not reasonable in the circumstances.]

The prosecution only needs to prove one of these three states of mind. If the prosecution does not prove to you beyond reasonable doubt that NOA had any of these states of mind about the complainant's consent, then you must not find this element proven, and you must not find NOA guilty of this offence.

In this case, [evidence has been led/the defence argue] that at the time of the sexual penetration NOA reasonably believed that NOC was consenting to the sexual act. [*Briefly summarise relevant prosecution and defence evidence and arguments.*]

[*If a party requests a direction on the relevance of knowledge of a deemed non-consent circumstance under s 34C(2), add the shaded section.*]

If you find that [*describe relevant* Crimes Act 1958 *s 36AA circumstance(s)*], you must consider whether the accused knew or believed that [*describe relevant* Crimes Act 1958 *s 36AA circumstance(s)*]. If you find that NOA knew or believed that [*describe relevant* Crimes Act 1958 *s 36AA circumstance(s)*], that is enough to show that NOA did not reasonably believe that NOA was consenting and you may find this element proved.

[491] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

A belief will be reasonable if there are reasonable grounds for a person in the position of the accused to hold that belief. You must also consider all the circumstances when deciding whether a belief in consent was reasonable.

[*Refer to competing prosecution and defence evidence and arguments on reasonable belief in consent*.]

A belief in consent is not reasonable unless the accused said or did something a reasonable time before the sexual act to find out whether the other person consented to that act.[492] In this case [*identify any evidence and/or competing arguments about the steps taken by the accused*].

[*If a party requests a direction about the relevance of community expectations to whether a belief is reasonable, add the following shaded section.*]

When you are considering whether a belief in consent is unreasonable, you must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent. As members of the community, you have the best idea of what the community would reasonably expect of NOA in the circumstances in forming a reasonable belief in consent.

[*If a party requests a direction about the accused's personal attributes, characteristics or circumstances, add the following shaded section.*]

In deciding whether the prosecution has proved that the accused did not have a reasonable belief in consent you may take into account any personal attributes or characteristics of the accused, or the circumstances of the accused. In this case, this would include [*identify relevant attributes, characteristics and circumstances*].[493]

[*If a party requests a direction on the relevance of self-induced intoxication, add the following shaded section.*]

If you find that NOA was intoxicated at the relevant time, you must not take this into account when assessing whether he/she reasonably believed that NOC was consenting. The law requires you to consider whether his/her belief in NOC's consent would have been reasonable to a person who was not intoxicated at the relevant time.[494]

Medical or hygienic purposes

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

According to the law, the accused has not committed the offence of rape if the sexual penetration was done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*name*

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[492] This direction must be modified if the accused seeks to invoke *Crimes Act 1958* s 36A(3), to claim that they have a cognitive impairment or mental illness which was a substantial cause of not saying or doing anything to find out whether the complainant consented. Depending on whether the prosecution is contesting the issue, the judge may need to direct the jury about the basic rule that a person must say or do something to ascertain consent, the exception in the case of a mental illness or cognitive impairment, the onus on the accused to establish the exception, and the fact that the basic rule will apply if the accused fails to establish the exception on the balance of probabilities.

[493] When a party seeks this direction Jury Directions Act 2015 s 47(4) specifies good reasons for not giving this direction. See 7.3.2 Rape (From 1/1/92) for guidance.

[494] This direction will need to be modified if the intoxication is not self–induced. See Jury Directions Act 2015 s 47(3)(b)(ii) and 8.5.2 Charge: Statutory Intoxication (Self–induced contested) for guidance.

of object or body part] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of rape the prosecution must prove to you beyond reasonable doubt:

One – that NOA intentionally sexually penetrated NOC in the way alleged; and

Two – that NOC did not consent to the sexual penetration; and

Three – that at the time of the sexual penetration NOA did not reasonably believe that NOC was consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of rape.

Last updated: 30 July 2023

7.3.2.1 Charge: Rape (1/7/15–29/7/23)

Click here for a Word version of this document for adaptation

Warning! This charge contains many optional directions which may be requested by a party. Judges must take care to ensure that requested directions are appropriate to the circumstances of the case. Judges should also consider whether to repeat any of the directions specified in 7.3.1.1.1 Statutory directions on consent and 7.3.1.1.2 Statutory direction on belief in consent.

The elements

I must now direct you about the crime of rape. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused intentionally sexually penetrated the complainant.

Two – the complainant did not consent to the sexual penetration.

Three– the accused did not reasonably believe that the complainant consented to the sexual penetration.

I will now explain each of these elements in more detail.[495]

[495] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proved."

Intentional Sexual Penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant in the way alleged. [*If in issue, add*: The prosecution must also prove that the accused did this act consciously, voluntarily, and deliberately.[496]]

Act of sexual penetration

The law defines the term sexual penetration to include a number of different acts. In this case the prosecution must prove that NOA introduced [*identify item or body part*, *e.g.* "his penis"] to any extent into NOC's [vagina/anus/mouth].[497]

[*If relevant add:*

- NOA's [*identify item or body part*] does not need to have gone all the way into NOC's [vagina/anus/mouth]. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface*, *e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation.]

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced [*identify body part or object*] to any extent between the outer lips of NOC's vagina.

In this case [*insert relevant evidence or competing arguments about proof of sexual penetration*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed intention or voluntariness in issue, add the shaded section.*]

The prosecution must prove that the accused sexually penetrated the complainant consciously, voluntarily, and deliberately.

This requirement is in issue here because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case*, *e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

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[496] Described in the instructions within this charge as the "voluntariness" requirement.

[497] If sexual penetration by failure to withdraw, or by causing another person or an animal to sexually penetrate the complainant, is in issue the charge will need to be modified accordingly.

Lack of consent

The second element that the prosecution must prove is that the sexual penetration happened without the complainant's consent.

Consent is a state of mind. The law says that consent means free agreement. So the prosecution must prove that NOC did not freely agree to being sexually penetrated by NOA at the time.[498]

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs.*]

The law says that a person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

The law says that where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following shaded section.*]

In some circumstances the law says that the complainant did not freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

a) the person submits to the act because of force or the fear of force, whether to that person or someone else;

b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;

c) the person submits to the act because the person is unlawfully detained;

d) the person is asleep or unconscious;

e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;

f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

g) the person is incapable of understanding the sexual nature of the act;

h) the person is mistaken about the sexual nature of the act;

i) the person is mistaken about the identity of any other person involved in the act;

j) the person mistakenly believes that the act is for medical or hygienic purposes;

k) if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes;

l) the person does not say or do anything to indicate consent to the act;

m) having initially given consent to the act, the person later withdraws consent to the act taking place

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[498] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

or continuing]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting.

However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this second element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

No reasonable belief in consent

The third element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused did not reasonably believe that the complainant was consenting.[499]

This third element will be met in any of the following circumstances [*insert relevant section(s) from the following and apply to the evidence*:

- The accused believed that the complainant was not consenting.
- The accused gave no thought to whether the complainant was consenting.
- Even if the accused may have believed that the complainant was consenting, this belief was not reasonable in the circumstances.]

The prosecution only needs to prove one of these three states of mind. If the prosecution does not prove to you beyond reasonable doubt that NOA had any of these states of mind about the complainant's consent, then you must not find this element proven, and you must not find NOA guilty of this offence.

In this case, [evidence has been led/the defence argue] that at the time of the sexual penetration NOA reasonably believed that NOC was consenting to the sexual act. [*Briefly summarise relevant prosecution and defence evidence and arguments*].

[*If a party requests a direction on the relevance of knowledge of a deemed non-consent circumstance under s 34C(2) or s 36, add the shaded section.*]

If you find that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*], you must consider whether the accused knew or believed that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*]. If you find that NOA knew or believed that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*], that is enough to show that NOA did not reasonably believe that NOA was consenting and you may find this element proved.

A belief will be reasonable if there are reasonable grounds for a person in the position of the accused to hold that belief. You must also consider all the circumstances when deciding whether a belief in consent was reasonable.

[*Refer to competing prosecution and defence evidence and arguments on reasonable belief in consent*.]

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[499] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

In looking at the evidence, you should consider whether the accused took any steps to find out whether the complainant was consenting or might not be consenting and, if so, the nature of those steps. In this case [*identify any evidence and/or competing arguments about the steps taken by the accused*].

[*If a party requests a direction about the relevance of community expectations to whether a belief is reasonable, add the following shaded section.*]

When you are considering whether a belief in consent is unreasonable, you must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent. As members of the community, you have the best idea of what the community would reasonably expect of NOA in the circumstances in forming a reasonable belief in consent.

[*If a party requests a direction about the accused's personal attributes, characteristics or circumstances, add the following shaded section.*]

In deciding whether the prosecution has proved that the accused did not have a reasonable belief in consent you may take into account any personal attributes or characteristics of the accused, or the circumstances of the accused. In this case, this would include [*identify relevant attributes, characteristics and circumstances*].[500]

[*If a party requests a direction on the relevance of self-induced intoxication, add the following shaded section.*]

If you find that NOA was intoxicated at the relevant time, you must not take this into account when assessing whether he/she reasonably believed that NOC was consenting. The law requires you to consider whether his/her belief in NOC's consent would have been reasonable to a person who was not intoxicated at the relevant time.[501]

Medical or hygienic purposes

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

According to the law, the accused has not committed the offence of rape if the sexual penetration was done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object or body part*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

Application of Law to Evidence

[If not previously done, apply the law to the relevant evidence here.]

Summary

To summarise, before you can find NOA guilty of rape the prosecution must prove to you beyond reasonable doubt:

One – that NOA intentionally sexually penetrated NOC in the way alleged; and

Two – that NOC did not consent to the sexual penetration; and

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[500] When a party seeks this direction Jury Directions Act 2015 s 47(4) specifies good reasons for not giving this direction. See 7.3.2 Rape (From 1/1/92) for guidance.

[501] This direction will need to be modified if the intoxication is not self–induced. See *Jury Directions Act 2015* s 47(3)(b)(ii) and 8.5.2 Charge: Statutory Intoxication (Self–induced contested) for guidance.

Three – that at the time of the sexual penetration NOA did not reasonably believe that NOC was consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of rape.

Last updated: 30 July 2023

7.3.2.2 Checklist: Rape (From 1/7/15)

Click here to obtain a Word version of this document

This checklist can be used where rape is alleged to have been committed on or after 1 July 2015.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally sexually penetrated the complainant in the way alleged; and

2. The complainant did not consent to the sexual penetration; and

3. The accused did not reasonably believe that the complainant consented to the sexual penetration.

The Accused's Acts

1. Did the accused intentionally sexually penetrate the complainant in the way alleged?

If Yes then go to 2

If No, then the accused is not guilty of Rape

Consent

2. Did the sexual penetration occur without the complainant's consent?

If Yes then go to 3

If No, then the accused is not guilty of Rape

The Accused's State of Mind

3. At the time of sexual penetration, did the accused reasonably believe that the complainant was consenting?

3.1 Did the accused believe that the complainant was not consenting?

If Yes, then the accused is guilty of Rape (as long as you have answered yes to Questions 1 and 2)

If No, go to 3.2

3.2 Did the accused not hold a belief that the complainant was consenting?

If Yes then the accused is guilty of Rape (as long as you have answered yes to Questions 1 and 2)

If No, go to 3.3

3.3 Are you satisfied that even if the accused may have believed that the complainant was consenting, that this belief was not reasonable in the circumstances?

If Yes then the accused is guilty of Rape (as long as you have answered yes to Questions 1 and 2)

If No, then the accused is not guilty of Rape

Last updated: 30 November 2015

7.3.2.3 Charge: Rape (1/1/08–30/6/15)

Click here to obtain a Word version of this document for adaptation

The elements

I must now direct you about the crime of rape.[502] To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt.

One – the accused sexually penetrated the complainant in the way alleged.

Two – the accused did this intentionally.

Three – the complainant did not consent to the sexual penetration.

Four – the accused had one of the following three states of mind about the complainant's consent –

(a) The accused was aware that the complainant was not consenting, or

(b) The accused was aware that the complainant might not be consenting, or

(c) The accused was not giving any thought to whether the complainant was not or might not be consenting.

I will now explain each of these elements in more detail.[503]

Sexual Penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused sexually penetrated the complainant in the way alleged. [*If in issue, add*: The prosecution must also prove that the accused did this act consciously, voluntarily, and deliberately.[504]]

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[502] This charge is based on the definition of rape in *Crimes Act 1958* s 38(2)(a). If failure to withdraw is in issue (s 38(2)(b)), the charge will need to be modified accordingly. For a charge based on the definition of rape in *Crimes Act 1958* s 38(3), see 7.3.2.7 Charge: Compelled Rape (1/1/08 – 30/6/15).

[503] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[504] Described in the instructions within this charge as the "voluntariness" requirement

Act of sexual penetration

The law defines the term sexual penetration to include a number of different acts. In this case the prosecution must prove that NOA introduced [*identify item or body part, e.g.* "his penis"] to any extent into NOC's [vagina/anus/mouth].

[*If relevant add:*

- NOA's [*identify item or body part*] does not need to have gone all the way into NOC's [vagina/anus/mouth]. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation.]

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced [*identify body part or object*] to any extent between the outer lips of NOC's vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

According to the law, the introduction of an object or body part other than the penis into the [vagina/anus] of a complainant does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert relevant evidence or competing arguments about proof of sexual penetration*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed voluntariness in issue, add the shaded section.*]

As I have directed you, the prosecution must prove that the accused sexually penetrated the complainant consciously, voluntarily, and deliberately.

This requirement is in issue here because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the sexual penetration was intentional.[505]

[*If intention is not in issue, add the shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.*

● The accused admits that s/he intentionally sexually penetrated the complainant.

● If you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally.]

Consent

The third element that the prosecution must prove is that the complainant was not consenting at the time to the sexual penetration.

The law says that consent means free agreement. So the prosecution must prove that NOC did not freely agree to being sexually penetrated by NOA [at the time in question].

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because she or he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence the complainant did not indicate agreement, add the following shaded section.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without

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[505] Because rape is an offence of basic intent (the intent to commit the physical act of penetrating the complainant) proof of the intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Instead, mental state issues related to the act of penetration should generally be addressed by voluntariness directions. This will be the case if the issue is negation of intent by involuntariness, unconsciousness or accident. If different "intention" issues arise, this charge should be adapted.

that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

In determining whether NOC did not freely agree to be sexually penetrated, you must consider all of the relevant evidence, including what s/he is alleged to have said and done, or not said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about [his/her] state of mind at that time.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this third element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

State of Mind of the Accused

The fourth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused:

- was aware that the complainant was not or might not be consenting; or
- was not giving any thought to whether the complainant was not or might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.[506]

Belief in Consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of rape the prosecution must prove to you beyond reasonable doubt:

One – that NOA sexually penetrated NOC in the way alleged; and

Two – that NOA intended to sexually penetrate NOC; and

Three – that NOC did not consent to the sexual penetration; and

Four – that at the time of the sexual penetration NOA either:

- was aware that the complainant was not or might not be consenting; or

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[506] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

- was not giving any thought to whether the complainant was not or might not be consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of rape.

Last updated: 30 July 2023

7.3.2.4 Checklist: Rape (1/1/08–30/6/15)

Click here to obtain a Word version of this document

This checklist can be used where the offence is alleged to have been committed between 1 January 2008 and 30 June 2015.

Four elements the prosecution must prove beyond reasonable doubt:

1. The accused sexually penetrated the complainant in the way alleged; and

2. The accused intended to sexually penetrate the complainant; and

3. The complainant did not consent to the sexual penetration; and

4. The accused was aware that the complainant was not or might not be consenting or was not giving any thought to whether the complainant was not or might not be consenting.

The Accused's Acts

1. Did the accused sexually penetrate the complainant in the way alleged?

If Yes then go to 2

If No, then the accused is not guilty of Rape

Intention

2. Did the accused intend to sexually penetrate the complainant?

If Yes then go to 3

If No, then the accused is not guilty of Rape

Consent

3. Did the sexual penetration occur without the complainant's consent?

If Yes then go to 4

If No, then the accused is not guilty of Rape

The Accused's State of Mind

4. At the time of sexual penetration:

4.1 Was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes then the accused is guilty of Rape (as long as you have answered yes to Questions 1, 2 and 3)

If No, then go to 4.2

4.2 Was the accused giving any thought to whether or not the complainant was consenting?

If Yes, then the accused is not guilty of Rape

If No then the accused is guilty of Rape (as long as you have answered yes to Questions 1, 2 and 3)

Last updated: 18 March 2008

7.3.2.5 Charge: Rape (Pre-1/1/08)

Click here to obtain a Word version of this document

This charge can be used for trials of rape offences allegedly committed between 1/1/1992 and 30/12/2007.

The elements

I must now direct you about the crime of rape.[507] To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt.

One – the accused sexually penetrated the complainant in the way alleged.

Two – the accused did this intentionally.

Three – the complainant did not consent to the sexual penetration.

Four – the accused was aware either that the complainant was not consenting, or that the complainant might not be consenting.

I will now explain each of these elements in more detail.[508]

[507] This charge is based on the definition of rape in *Crimes Act 1958* (Vic) s 38(2)(a). If failure to withdraw is in issue (s 38(2)(b)), the charge will need to be modified accordingly. For a charge based on the definition of rape in *Crimes Act 1958* (Vic) s 38(3), see 7.3.2.7 Charge: Compelled Rape (1/1/08 – 30/6/15).

[508] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

Sexual Penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused sexually penetrated the complainant in the way alleged. [*If in issue, add*: The prosecution must also prove that the accused did this act consciously, voluntarily, and deliberately.[509]]

Act of sexual penetration

The law defines the term sexual penetration to include a number of different acts. In this case the prosecution must prove that NOA introduced [*identify item or body part, e.g.* "his penis"] to any extent into NOC's [vagina/anus/mouth].

[*If relevant add:*

- NOA's [*identify item or body part*] does not need to have gone all the way into NOC's [vagina/anus/mouth]. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation.]

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced [*identify body part or object*] to any extent between the outer lips of NOC's vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

According to the law, the introduction of an object or body part other than the penis into the [vagina/anus] of a complainant does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert relevant evidence or competing arguments about proof of sexual penetration*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed voluntariness in issue, add the shaded section.*]

As I have directed you, the prosecution must prove that the accused sexually penetrated the complainant consciously, voluntarily, and deliberately.

This requirement is in issue here because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of

[509] Described in the instructions within this charge as the "voluntariness" requirement.

the penetration"].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the sexual penetration was intentional.[510]

[*If intention is not in issue, add the shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.*

- The accused admits that s/he intentionally sexually penetrated the complainant.
- If you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally.]

Consent

The third element that the prosecution must prove is that the complainant was not consenting at the time to the sexual penetration.

The law says that consent means free agreement. So the prosecution must prove that NOC did not freely agree to being sexually penetrated by NOA [at the time in question].

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because she or he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence the complainant did not indicate agreement, add the following shaded section.*]

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[510] Because rape is an offence of basic intent (the intent to commit the physical act of penetrating the complainant) proof of the intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Instead, mental state issues related to the act of penetration should generally be addressed by voluntariness directions. This will be the case if the issue is negation of intent by involuntariness, unconsciousness or accident. If different "intention" issues arise, this charge should be adapted.

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

In determining whether NOC did not freely agree to be sexually penetrated, you must consider all of the relevant evidence, including what s/he is alleged to have said and done, or not said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about [his/her] state of mind at that time.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this third element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

State of Mind of the Accused

The fourth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.[511]

Belief in Consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of rape the prosecution must prove to you beyond reasonable doubt:

One – that NOA sexually penetrated NOC in the way alleged; and

Two – that NOA intended to sexually penetrate NOC; and

Three – that NOC did not consent to the sexual penetration; and

Four – that at the time of the sexual penetration NOA was either:

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[511] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of rape.

Last updated: 30 July 2023

7.3.2.6 Checklist: Rape (Pre-1/1/08)

Click here to obtain a Word version of this document for adaptation

This checklist can be used where the offence is alleged to have been committed prior to 1 January 2008.

Four elements the prosecution must prove beyond reasonable doubt:

1. The accused sexually penetrated the complainant in the way alleged; and
2. The accused intended to sexually penetrate the complainant; and
3. The complainant did not consent to the sexual penetration; and
4. The accused was aware that the complainant was not consenting or was aware that the complainant might not be consenting.

The Accused's Acts

1. Did the accused sexually penetrate the complainant in the way alleged?

If Yes then go to 2

If No, then the accused is not guilty of Rape

Intention

2. Did the accused intend to sexually penetrate the complainant?

If Yes then go to 3

If No, then the accused is not guilty of Rape

Consent

3. Did the sexual penetration occur without the complainant's consent?

If Yes then go to 4

If No, then the accused is not guilty of Rape

The Accused's State of Mind

4. At the time of sexual penetration, was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes then the accused is guilty of Rape (as long as you have answered yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of Rape

Last updated: 18 March 2008

7.3.2.7A Charge: Compelled Rape (30/7/23 onwards)

Click here to download a Word version of this charge

Note: This charge has been drafted for a case where the accused caused the complainant to sexually penetrate the accused. The charge must be modified if the accused causes the complainant to sexually penetrate themselves, a third party or an animal, or causes the complainant to be sexually penetrated by a third party or an animal.

The elements

I must now direct you about the crime of compelled rape. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused intentionally caused the complainant to sexually penetrate the accused.

Two – the complainant did not consent to doing the act of sexual penetration.

Three – the accused did not reasonably believe that the complainant consented to doing the act of sexual penetration.

I will now explain each of these elements in more detail.[512]

Intentional causing Sexual Penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused intentionally caused the complainant to sexually penetrate the accused in the way alleged. [*If in issue, add*: The prosecution must also prove that the accused did this act consciously, voluntarily, and deliberately.[513]]

Act of sexual penetration

The law defines the term sexual penetration to include a number of different acts. In this case the prosecution must prove that NOA caused NOC to [*identify relevant form of sexual penetration*].

[*If relevant add*:

- NOC's [*identify item or body part*] does not need to have gone all the way into NOA's [vagina/anus/mouth]. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface*, *e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation.]

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[512] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[513] Described in the instructions within this charge as the "voluntariness" requirement

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA caused NOC to introduce [*identify body part or object*] to any extent between the outer lips of NOA's vagina.

It is a question for you, using your common sense and judgment, whether NOA caused NOC to sexually penetrate the accused. There is no special legal test you use to decide whether the accused caused something to happen. Here, the prosecution say that NOA caused [*identify relevant sexual act*] by [*identify relevant evidence and arguments*]. The defence dispute this, and say [*identify relevant evidence and arguments*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed intention or voluntariness in issue, add the shaded section.*]

The prosecution must prove that the accused caused NOC to sexually penetrate him/her/them consciously, voluntarily, and deliberately.

This requirement is in issue here because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA caused NOC to introduce his finger into NOA's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time he/she/they caused the penetration"].

Lack of consent

The second element that the prosecution must prove is that the sexual penetration happened without the complainant's consent.

Consent is a state of mind. The law says that consent means free and voluntary agreement. So the prosecution must prove that NOC did not freely and voluntarily agree to sexually penetrating NOA at the time.[514]

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs.*]

The law says that a person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

The law says that where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following shaded section.*]

In some circumstances the law says that the complainant did not freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

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[514] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

(a) the person does not say or do anything to indicate consent to the act;

(b) the person submits to the act because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal, regardless of-

(i) when the force, harm or conduct giving rise to the fear occurs; and

(ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

(c) the person submits to the act because of coercion or intimidation-

(i) regardless of when the coercion or intimidation occurs; and

(ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

(d) the person submits to the act because the person is unlawfully detained;

(e) the person submits to the act because the person is overborne by the abuse of a relationship of authority or trust;

(f) the person is asleep or unconscious;

(g) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;

(h) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

(i) the person is incapable of understanding the sexual nature of the act;

(j) the person is mistaken about the sexual nature of the act;

(k) the person is mistaken about the identity of any other person involved in the act;

(l) the person mistakenly believes that the act is for medical or hygienic purposes;

(m) the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid;

(n) if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes;

(o) the person engages in the act on the basis that a condom is used and either-

(i) before or during the act, any other person involved in the act intentionally removes the condom or tampers with the condom; or

(ii) the person who was to use the condom intentionally does not use it;

(p) having given consent to the act, the person later withdraws consent to the act taking place or continuing.

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting.

However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this second element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

No reasonable belief in consent

The third element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused did not reasonably believe that the complainant was consenting.[515]

This third element will be met in any of the following circumstances [*insert relevant section(s) from the following and apply to the evidence*:

- The accused believed that the complainant was not consenting.
- The accused gave no thought to whether the complainant was consenting.
- Even if the accused may have believed that the complainant was consenting, this belief was not reasonable in the circumstances.]

The prosecution only needs to prove one of these three states of mind. If the prosecution does not prove to you beyond reasonable doubt that NOA had any of these states of mind about the complainant's consent, then you must not find this element proven, and you must not find NOA guilty of this offence.

In this case, [evidence has been led/the defence argue] that at the time of the sexual penetration NOA reasonably believed that NOC was consenting to the sexual act. [*Briefly summarise relevant prosecution and defence evidence and arguments.*]

[*If a party requests a direction on the relevance of knowledge of a deemed non-consent circumstance under s 36AA, add the shaded section*.]

If you find that [*describe relevant Crimes Act 1958 section 36AA circumstance(s)*], you must consider whether the accused knew or believed that [*describe relevant Crimes Act 1958 section 36AA circumstance(s)*]. If you find that NOA knew or believed that [*describe relevant Crimes Act 1958 section 36AA circumstance(s)*], that is enough to show that NOA did not reasonably believe that NOA was consenting and you may find this element proved.

A belief will be reasonable if there are reasonable grounds for a person in the position of the accused to hold that belief. You must also consider all the circumstances when deciding whether a belief in consent was reasonable.

[*Refer to competing prosecution and defence evidence and arguments on reasonable belief in consent*.]

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[515] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

A belief in consent is not reasonable unless the accused said or did something a reasonable time before the sexual act to find out whether the other person consented to that act.[516] In this case [*identify any evidence and/or competing arguments about the steps taken by the accused*].

[*If a party requests a direction about the relevance of community expectations to whether a belief is reasonable, add the following shaded section*.]

When you are considering whether a belief in consent is unreasonable, you must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent. As members of the community, you have the best idea of what the community would reasonably expect of NOA in the circumstances in forming a reasonable belief in consent.

[*If a party requests a direction about the accused's personal attributes, characteristics or circumstances, add the following shaded section*.]

In deciding whether the prosecution has proved that the accused did not have a reasonable belief in consent you may take into account any personal attributes or characteristics of the accused, or the circumstances of the accused. In this case, this would include [*identify relevant attributes, characteristics and circumstances*].[517]

[*If a party requests a direction on the relevance of self-induced intoxication, add the following shaded section*.]

If you find that NOA was intoxicated at the relevant time, you must not take this into account when assessing whether he/she reasonably believed that NOC was consenting.

The law requires you to consider whether his/her belief in NOC's consent would have been reasonable to a person who was not intoxicated at the relevant time.[518]

Medical or hygienic purposes

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

According to the law, the accused has not committed the offence of compelled rape if he/she/they caused the sexual penetration in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object or body part*] by NOC into NOA's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

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[516] This direction must be modified if the accused seeks to invoke *Crimes Act 1958* s 36A(3), to claim that they have a cognitive impairment or mental illness which was a substantial cause of not saying or doing anything to find out whether the complainant consented. Depending on whether the prosecution is contesting the issue, the judge may need to direct the jury about the basic rule that a person must say or do something to ascertain consent, the exception in the case of a mental illness or cognitive impairment, the onus on the accused to establish the exception, and the fact that the basic rule will apply if the accused fails to establish the exception on the balance of probabilities.

[517] When a party seeks this direction *Jury Directions Act 2015* s 47(4) specifies good reasons for not giving this direction. See Rape for guidance.

[518] This direction will need to be modified if the intoxication is not self–induced. See *Jury Directions Act 2015* s 47(3)(b)(ii) and Charge: Statutory Intoxication (Self–induced) for guidance.

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, before you can find NOA guilty of rape the prosecution must prove to you beyond reasonable doubt:

One – that NOA intentionally caused NOC to sexually penetrate him/her/them; and

Two – that NOC did not consent to that sexual penetration; and

Three – that at the time of the sexual penetration NOA did not reasonably believe that NOC was consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of compelled rape.

Last updated: 13 October 2023

7.3.2.7B Charge: Compelled Rape (1/7/15 – 29/7/23)

Click here to download a Word version of this charge

Note: This charge has been drafted for a case where the accused caused the complainant to sexually penetrate the accused. The charge must be modified if the accused causes the complainant to sexually penetrate themselves, a third party or an animal, or causes the complainant to be sexually penetrated by a third party or an animal.

The elements

I must now direct you about the crime of compelled rape. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused intentionally caused the complainant to sexually penetrate the accused.

Two – the complainant did not consent to doing the act of sexual penetration.

Three– the accused did not reasonably believe that the complainant consented to doing the act of sexual penetration.

I will now explain each of these elements in more detail.[519]

[519] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

Intentional causing Sexual Penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused intentionally caused the complainant to sexually penetrate the accused in the way alleged. [*If in issue, add*: The prosecution must also prove that the accused did this act consciously, voluntarily, and deliberately.[520]]

Act of sexual penetration

The law defines the term sexual penetration to include a number of different acts. In this case the prosecution must prove that NOA caused NOC to [*identify relevant form of sexual penetration*].

[*If relevant add*:

- NOC's [*identify item or body part*] does not need to have gone all the way into NOA's [vagina/anus/mouth]. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation.]

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA caused NOC to introduce [*identify body part or object*] to any extent between the outer lips of NOA's vagina.

It is a question for you, using your common sense and judgment, whether NOA caused NOC to sexually penetrate the accused. There is no special legal test you use to decide whether the accused caused something to happen. Here, the prosecution say that NOA caused [*identify relevant sexual act*] by [*identify relevant evidence and arguments*]. The defence dispute this, and say [*identify relevant evidence and arguments*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed intention or voluntariness in issue, add the shaded section.*]

The prosecution must prove that the accused caused NOC to sexually penetrate him/her/them consciously, voluntarily, and deliberately.

This requirement is in issue here because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA caused NOC to introduce his finger into NOA's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time he/she/they caused the penetration"].

Lack of consent

The second element that the prosecution must prove is that the sexual penetration happened without the complainant's consent.

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[520] Described in the instructions within this charge as the "voluntariness" requirement.

Consent is a state of mind. The law says that consent means free agreement. So the prosecution must prove that NOC did not freely agree to sexually penetrating NOA at the time.[521]

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs*.]

The law says that a person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

The law says that where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following shaded section*.]

In some circumstances the law says that the complainant did not freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence*:

a) the person submits to the act because of force or the fear of force, whether to that person or someone else;

b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;

c) the person submits to the act because the person is unlawfully detained;

d) the person is asleep or unconscious;

e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;

f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

g) the person is incapable of understanding the sexual nature of the act;

h) the person is mistaken about the sexual nature of the act;

i) the person is mistaken about the identity of any other person involved in the act;

j) the person mistakenly believes that the act is for medical or hygienic purposes;

k) if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes;

l) the person does not say or do anything to indicate consent to the act;

m) having initially given consent to the act, the person later withdraws consent to the act taking place or continuing]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to

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[521] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

NOC, you must find that s/he was not consenting.

However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this second element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

No reasonable belief in consent

The third element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused did not reasonably believe that the complainant was consenting.[522]

This third element will be met in any of the following circumstances [*insert relevant section(s) from the following and apply to the evidence*:

- The accused believed that the complainant was not consenting.
- The accused gave no thought to whether the complainant was consenting.
- Even if the accused may have believed that the complainant was consenting, this belief was not reasonable in the circumstances.]

The prosecution only needs to prove one of these three states of mind. If the prosecution does not prove to you beyond reasonable doubt that NOA had any of these states of mind about the complainant's consent, then you must not find this element proven, and you must not find NOA guilty of this offence.

In this case, [evidence has been led/the defence argue] that at the time of the sexual penetration NOA reasonably believed that NOC was consenting to the sexual act. [*Briefly summarise relevant prosecution and defence evidence and arguments.*]

[*If a party requests a direction on the relevance of knowledge of a deemed non-consent circumstance under s 34C(2) or s 36, add the shaded section*.]

If you find that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*], you must consider whether the accused knew or believed that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*]. If you find that NOA knew or believed that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*], that is enough to show that NOA did not reasonably believe that NOA was consenting and you may find this element proved.

A belief will be reasonable if there are reasonable grounds for a person in the position of the accused to hold that belief. You must also consider all the circumstances when deciding whether a belief in consent was reasonable.

[*Refer to competing prosecution and defence evidence and arguments on reasonable belief in consent*.]

In looking at the evidence, you should consider whether the accused took any steps to find out whether the complainant was consenting or might not be consenting and, if so, the nature of those steps. In this case [*identify any evidence and/or competing arguments about the steps taken by the accused*].

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[522] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

[*If a party requests a direction about the relevance of community expectations to whether a belief is reasonable, add the following shaded section*.]

When you are considering whether a belief in consent is unreasonable, you must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent. As members of the community, you have the best idea of what the community would reasonably expect of NOA in the circumstances in forming a reasonable belief in consent.

[*If a party requests a direction about the accused's personal attributes, characteristics or circumstances, add the following shaded section*.]

In deciding whether the prosecution has proved that the accused did not have a reasonable belief in consent you may take into account any personal attributes or characteristics of the accused, or the circumstances of the accused. In this case, this would include [*identify relevant attributes, characteristics and circumstances*].[523]

[*If a party requests a direction on the relevance of self-induced intoxication, add the following shaded section*.]

If you find that NOA was intoxicated at the relevant time, you must not take this into account when assessing whether he/she reasonably believed that NOC was consenting.

The law requires you to consider whether his/her belief in NOC's consent would have been reasonable to a person who was not intoxicated at the relevant time.[524]

Medical or hygienic purposes

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section*.]

According to the law, the accused has not committed the offence of compelled rape if he/she/they caused the sexual penetration in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object or body part*] by NOC into NOA's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, before you can find NOA guilty of rape the prosecution must prove to you beyond reasonable doubt:

One – that NOA intentionally caused NOC to sexually penetrate him/her/them; and

Two – that NOC did not consent to that sexual penetration; and

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[523] When a party seeks this direction *Jury Directions Act 2015* s 47(4) specifies good reasons for not giving this direction. See Rape for guidance.

[524] This direction will need to be modified if the intoxication is not self–induced. See *Jury Directions Act 2015* s 47(3)(b)(ii) and Charge: Statutory Intoxication (Self–induced) for guidance.

Three – that at the time of the sexual penetration NOA did not reasonably believe that NOC was consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of compelled rape.

Last updated: 13 October 2023

7.3.2.7 Charge: Compelled Rape (1/1/08–30/6/15)

Click here to obtain a Word version of this document for adaptation

This charge can be used for trials of compelled rape offences alleged to have been committed on or after 1/1/08.

The Elements

I must now direct you about the crime of rape. The law says that rape can be committed in a number of different ways. In this case rape means forcing a person to have sex with the [accused/another person]. To prove this crime, the prosecution must prove the following five elements beyond reasonable doubt:

One – the complainant sexually penetrated the [accused/another person].

Two – the accused compelled the complainant to sexually penetrate [him/her/the other person].

Three – the accused intended to compel the complainant to sexually penetrate [him/her/the other person].

Four – the complainant did not consent to the sexual penetration.

Five – at the time of the sexual penetration the accused either:

- was aware that the complainant was not or might not be consenting; or
- was not giving any thought to whether the complainant was not or might not be consenting.

I will now explain each of these elements in more detail.

Sexual Penetration

The first element relates to what the complainant did. S/he must have sexually penetrated the [accused/another person].

Sexual penetration can include a number of different acts. In this case, sexual penetration means the introduction of NOC's [penis/body part/name of object] into the [vagina/anus/mouth] of [NOA/name of other person].[525]

[*If a surgically constructed vagina is involved, add the following shaded section.*]

The word vagina includes a surgically constructed vagina.

NOC's [penis/body part/name of object] does not need to have gone all the way into [NOA's/the other person's vagina/anus/mouth]. Even slight penetration is enough. However, there must have been penetration to some extent.

[*In the case of penetration of a vagina, add the following shaded section.*]

[525] Rape does not include the penetration of the mouth by a body part or object, other than the penis.

This includes penetration of the external genitalia – that is the external lips of the vagina.

[*Where emission of semen is a potential issue, add the following shaded section.*]

The law also says that there does not need to have been any emission of semen for sexual penetration to have occurred.

Compulsion

The second element that the prosecution must prove is that the complainant was compelled by the accused to sexually penetrate the [other person/accused].

The law says that the word "compel" means making someone do something by force or otherwise. In this case, NOA must have made NOC sexually penetrate [him/her/name of other person].

The prosecution alleged that NOA compelled NOC to sexually penetrate [him/her/name of other person] by [*insert relevant evidence*]. The defence responded [*insert relevant evidence*].

For this second element of rape to be met, you must be satisfied that the prosecution has proven, beyond reasonable doubt, that NOC was compelled by NOA to sexually penetrate [him/her/name of other person].

Intention

The third element that the prosecution must prove is that the accused intended to compel the complainant to sexually penetrate [him/her/the other person]. That is, you must be satisfied that the accused's compulsion of the complainant was deliberate and not accidental. NOA must have intended to make NOC sexually penetrate [him/her/name of other person].

Consent

The fourth element that the prosecution must prove is that the complainant did not consent to sexually penetrate the [other person/accused]. Whether or not the [other person/accused] consented to being sexually penetrated is not relevant here. The relevant consent is the consent of the complainant, NOC.

Consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the sexual penetration if [he/she] did not freely agree to perform such an act.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because she or he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence the complainant did not indicate agreement, add the shaded section if relevant.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

In determining whether NOC did not freely agree to sexually penetrate the [other person/accused], you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about his/her state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged penetration.

In this case, the prosecution alleged that NOC did not consent. [*Refer to evidence supporting the prosecution case.*] The defence responded [*insert relevant evidence*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this fourth element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

State of Mind of the Accused

The fifth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused:

- was aware that the complainant was not or might not be consenting; or
- was not giving any thought to whether the complainant was not or might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.[526]

Belief in Consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

[526] If the accused's state of mind is not in issue, this section of the charge will need to be modified.

Summary

To summarise, before you can find NOA guilty of rape in the way alleged, the prosecution must prove to you beyond reasonable doubt:

One – that NOC sexually penetrated [name of other person/NOA]; and

Two – that NOC was compelled by NOA to sexually penetrate [name of other person/NOA]; and

Three – that NOA intended to compel NOC to sexually penetrate [name of other person/him/her]; and

Four – that NOC did not consent to sexually penetrating [name of other person/NOA]; and

Five – that at the time of the sexual penetration NOA either:

- was aware that the complainant was not or might not be consenting; or
- was not giving any thought to whether the complainant was not or might not be consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of rape.

Last updated: 3 December 2012

7.3.2.8 Checklist: Rape Compulsion to Penetrate the Accused (1/1/08–30/6/15)

Click here to obtain a Word version of this document

This checklist can be used where the offence is alleged to have been committed between 1 January 2008 and 30 June 2015, regardless of the date the trial commenced.

Five elements the prosecution must prove beyond reasonable doubt:

1. The complainant sexually penetrated the accused; and
2. The accused compelled the complainant to sexually penetrate him/her; and
3. The accused intended to compel the complainant to sexually penetrate him/her; and
4. The complainant did not consent to the sexual penetration; and
5. The accused was aware that the complainant was not consenting or might not be consenting or was not giving any thought to whether the complainant was not or might not be consenting.

Sexual Penetration

1. Did the complainant sexually penetrate the accused?

If Yes then go to 2

If No, then the accused is not guilty of rape

Compulsion

2. Did the accused compel the complainant to sexually penetrate him/her?

If Yes then go to 3

If No, then the accused is not guilty of rape

Intention

3. Did the accused intend to compel the complainant to sexually penetrate him/her?

If Yes then go to 4

If No, then the accused is not guilty of rape

Consent

4. Did the sexual penetration occur without the complainant's consent?

If Yes to go 5

If No, then the accused is not guilty of rape

The Accused's State of Mind

5. At the time of sexual penetration:

5.1 Was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes then the accused is guilty of Rape (as long as you have answered yes to Questions 1, 2, 3 and 4)

If No, then go to 5.2

5.2 Was the accused giving any thought to whether or not the complainant was consenting?

If Yes, then the accused is not guilty of rape

If No then the accused is guilty of Rape (as long as you have answered yes to Questions 1, 2, 3 and 4)

Last updated: 22 June 2016

7.3.2.9 Checklist: Rape Compulsion to Penetrate Another Person (1/1/08–30/6/15)

Click here to obtain a Word version of this document for adaptation

This checklist can be used where the offence is alleged to have been committed between 1 January 2008 and 30 June 2015, regardless of the date the trial commenced.

Five elements the prosecution must prove beyond reasonable doubt:

1. The complainant sexually penetrated a person; and
2. The accused compelled the complainant to sexually penetrate that person; and
3. The accused intended to compel the complainant to sexually penetrate that person; and
4. The complainant did not consent to the sexual penetration; and

5. The accused was aware that the complainant was not consenting or might not be consenting or was not giving any thought to whether the complainant was not or might not be consenting.

Sexual Penetration

1. Did the complainant sexually penetrate a person?

If Yes then go to 2

If No, then the accused is not guilty of rape

Compulsion

2. Did the accused compel the complainant to sexually penetrate that person?

If Yes then go to 3

If No, then the accused is not guilty of rape

Intention

3. Did the accused intend to compel the complainant to sexually penetrate that person?

If Yes then go to 4

If No, then the accused is not guilty of rape

Consent

4. Did the sexual penetration occur without the complainant's consent?

If Yes to go 5

If No, then the accused is not guilty of rape

The Accused's State of Mind

5. At the time of sexual penetration:

5.1 Was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes then the accused is guilty of Rape (as long as you have answered yes to Questions 1, 2, 3 and 4)

If No, then go to 5.2

5.2 Was the accused giving any thought to whether or not the complainant was consenting?

If Yes, then the accused is not guilty of Rape

If No then the accused is guilty of Rape (as long as you have answered yes to Questions 1, 2, 3 and 4)

Last updated: 22 June 2016

7.3.2.10 Charge: Compelled Rape (1/12/06–31/12/07)

Click here to obtain a Word version of this document for adaptation

This charge can be used for trials commenced on or after 1/1/08 involving compelled rape offences alleged to have been committed between 1/12/06 and 31/12/07.

The Elements

I must now direct you about the crime of rape. The law says that rape can be committed in a number of different ways. In this case rape means forcing a person to have sex with the [accused/another person]. To prove this crime, the prosecution must prove the following five elements beyond reasonable doubt:

One – the complainant sexually penetrated the [accused/another person].

Two – the accused compelled the complainant to sexually penetrate [him/her/the other person].

Three – the accused intended to compel the complainant to sexually penetrate [him/her/the other person].

Four – the complainant did not consent to the sexual penetration.

Five – at the time of the sexual penetration the accused was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

I will now explain each of these elements in more detail.

Sexual Penetration

The first element relates to what the complainant did. S/he must have sexually penetrated the [accused/another person].

Sexual penetration can include a number of different acts. In this case, sexual penetration means the introduction of NOC's [penis/body part/name of object] into the [vagina/anus/mouth] of [NOA/name of other person].[527]

[*If a surgically constructed vagina is involved, add the following shaded section*.]

The word vagina includes a surgically constructed vagina.

NOC's [penis/body part/name of object] does not need to have gone all the way into [NOA's/the other person's vagina/anus/mouth]. Even slight penetration is enough. However, there must have been penetration to some extent.

[*In the case of penetration of a vagina, add the following shaded section.*]

[527] Rape does not include the penetration of the mouth by a body part or object, other than the penis.

This includes penetration of the external genitalia – that is the external lips of the vagina.

[*Where emission of semen is a potential issue, add the following shaded section.*]

The law also says that there does not need to have been any emission of semen for sexual penetration to have occurred.

Compulsion

The second element that the prosecution must prove is that the complainant was compelled by the accused to sexually penetrate the [other person/accused].

The law says that the word "compel" means making someone do something by force or otherwise. In this case, NOA must have made NOC sexually penetrate [him/her/name of other person].

The prosecution alleged that NOA compelled NOC to sexually penetrate [him/her/name of other person] by [*insert relevant evidence*]. The defence responded [*insert relevant evidence*].

For this second element of rape to be met, you must be satisfied that the prosecution has proven, beyond reasonable doubt, that NOC was compelled by NOA to sexually penetrate [him/her/name of other person].

Intention

The third element that the prosecution must prove is that the accused intended to compel the complainant to sexually penetrate [him/her/the other person]. That is, you must be satisfied that the accused's compulsion of the complainant was deliberate and not accidental. NOA must have intended to make NOC sexually penetrate [him/her/name of other person].

Consent

The fourth element that the prosecution must prove is that the complainant did not consent to sexually penetrate the [other person/accused]. Whether or not the [other person/accused] consented to being sexually penetrated is not relevant here. The relevant consent is the consent of the complainant, NOC.

Consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the sexual penetration if [he/she] did not freely agree to perform such an act.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because she or he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence the complainant did not indicate agreement, add the shaded section if relevant.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

In determining whether NOC did not freely agree to sexually penetrate the [other person/accused], you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about his/her state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged penetration.

In this case, the prosecution alleged that NOC did not consent. [*Refer to evidence supporting the prosecution case.*] The defence responded [*insert relevant evidence*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this fourth element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

State of Mind of the Accused

The fifth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.[528]

Belief in Consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

[528] If the accused's state of mind is not in issue, this section of the charge will need to be modified.

Summary

To summarise, before you can find NOA guilty of rape in the way alleged, the prosecution must prove to you beyond reasonable doubt:

One – that NOC sexually penetrated [name of other person/NOA]; and

Two – that NOC was compelled by NOA to sexually penetrate [name of other person/NOA]; and

Three – that NOA intended to compel NOC to sexually penetrate [name of other person/him/her]; and

Four – that NOC did not consent to sexually penetrating [name of other person/NOA]; and

Five – that at the time of the sexual penetration NOA was either:

- aware that NOC was not consenting; or
- aware that NOC might not be consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of rape.

Last updated: 30 July 2023

7.3.2.11 Charge: Compelled Rape (Pre-1/12/06)

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This charge can be used for trials commenced on or after 1/1/08 involving compelled rape offences alleged to have been committed between 22/11/2000 and 30/11/2006.

The Elements

I must now direct you about the crime of rape. The law says that rape can be committed in a number of different ways. In this case rape means forcing a male person to have sex with the [accused/another person]. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the complainant sexually penetrated the [accused/another person] with his penis.

Two – the accused compelled the complainant to sexually penetrate [him/her/the other person].

Three – the accused intended to compel the complainant to sexually penetrate [him/her/the other person].

Four – the complainant did not consent to the sexual penetration.

Five – at the time of the sexual penetration the accused was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

I will now explain each of these elements in more detail.

Sexual Penetration

The first element relates to what the complainant did. He must have sexually penetrated the [accused/another person] with his penis.

In this case sexual penetration means the insertion of NOC's penis into the [anus/vagina/mouth] of [NOA/name of other person].

[*If a surgically constructed vagina is involved, add the following shaded section.*]

The word vagina includes a surgically constructed vagina.

NOC's penis does not need to have gone all the way into [NOA's/the other person's vagina/anus/mouth]. Even slight penetration is enough. However, there must have been penetration to some extent.

[*In the case of penetration of a vagina, add the following shaded section.*]

This includes penetration of the external genitalia – that is the external lips of the vagina.

The law also says that there does not need to have been any emission of semen for sexual penetration to have occurred.

Compulsion

The second element that the prosecution must prove is that the complainant was compelled by the accused to sexually penetrate the [other person/accused].

The law says that the word "compel" means making someone do something by force or otherwise. In this case, NOA must have made NOC sexually penetrate [him/her/name of other person].

The prosecution alleged that NOA compelled NOC to sexually penetrate [him/her/name of other person] by [*insert relevant evidence*]. The defence responded [*insert relevant evidence*].

For this second element of rape to be met, you must be satisfied that the prosecution has proven, beyond reasonable doubt, that NOC was compelled by NOA to sexually penetrate [him/her/name of other person].

Intention

The third element that the prosecution must prove is that the accused intended to compel the complainant to sexually penetrate [him/her/the other person]. That is, you must be satisfied that the accused's compulsion of the complainant was deliberate and not accidental. NOA must have intended to make NOC sexually penetrate [him/her/name of other person].

Consent

The fourth element that the prosecution must prove is that the complainant did not consent to sexually penetrate the [other person/accused]. Whether or not the [other person/accused] consented to being sexually penetrated is not relevant here. The relevant consent is the consent of the complainant, NOC.

Consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the sexual penetration if s/he did not freely agree to perform such an act.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence the complainant did not indicate agreement, add the shaded section if relevant.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that he did not consent to that act.

In determining whether NOC did not freely agree to sexually penetrate the [other person/accused], you must consider all of the relevant evidence, including what he is alleged to have said and done at the time of the alleged penetration, as well as the evidence he gave in court about his state of mind at that time. You can also consider what he did not say or do at the time of the alleged penetration.

In this case, the prosecution alleged that NOC did not consent. [*Refer to evidence supporting the prosecution case.*] The defence responded [*insert relevant evidence*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this fourth element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

State of Mind of the Accused

The fifth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.[529]

Belief in Consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

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[529] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

Summary

To summarise, before you can find NOA guilty of rape in the way alleged, the prosecution must prove to you beyond reasonable doubt:

One – that NOC sexually penetrated [name of other person/NOA]; and

Two – that NOC was compelled by NOA to sexually penetrate [name of other person/NOA]; and

Three – that NOA intended to compel NOC to sexually penetrate [name of other person/him/her]; and

Four – that NOC did not consent to sexually penetrating [name of other person/NOA]; and

Five – that at the time of the sexual penetration NOA was either:

- aware that NOC was not consenting; or
- aware that NOC might not be consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of rape.

Last updated: 30 July 2023

7.3.2.12 Checklist: Rape Compulsion to Penetrate the Accused (Pre-1/1/08)

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Rape: Compulsion to Penetrate the Accused

This checklist can be used where the offence is alleged to have been committed before 1 January 2008, regardless of the date the trial commenced.

Five elements the prosecution must prove beyond reasonable doubt:

1. The complainant sexually penetrated the accused; and
2. The accused compelled the complainant to sexually penetrate him/her; and
3. The accused intended to compel the complainant to sexually penetrate him/her; and
4. The complainant did not consent to the sexual penetration; and
5. The accused was aware that the complainant was not consenting or might not be consenting or was not giving any thought to whether the complainant was not or might not be consenting.

Sexual Penetration

1. Did the complainant sexually penetrate the accused?

If Yes then go to 2

If No, then the accused is not guilty of rape

Compulsion

2. Did the accused compel the complainant to sexually penetrate him/her?

If Yes then go to 3

If No, then the accused is not guilty of rape

Intention

3. Did the accused intend to compel the complainant to sexually penetrate him/her?

If Yes then go to 4

If No, then the accused is not guilty of rape

Consent

4. Did the sexual penetration occur without the complainant's consent?

If Yes to go 5

If No, then the accused is not guilty of rape

The Accused's State of Mind

5. At the time of sexual penetration:

5.1 Was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes then the accused is guilty of Rape (as long as you have answered yes to Questions 1, 2, 3 and 4)

If No, then go to 5.2

5.2 Was the accused giving any thought to whether or not the complainant was consenting?

If Yes, then the accused is not guilty of rape

If No then the accused is guilty of Rape (as long as you have answered yes to Questions 1, 2, 3 and 4)

Last updated: 18 March 2007

7.3.2.13 Checklist: Rape Compulsion to Penetrate Another Person (Pre-1/1/08)

Click here to obtain a Word version of this document for adaptation

This checklist can be used where the offence is alleged to have been committed before 1 January 2008, regardless of the date the trial commenced.

Five elements the prosecution must prove beyond reasonable doubt:

1. The complainant sexually penetrated a person; and

2. The accused compelled the complainant to sexually penetrate that person; and

3. The accused intended to compel the complainant to sexually penetrate that person; and

4. The complainant did not consent to the sexual penetration; and

5. The accused was aware that the complainant was not consenting or might not be consenting.

Sexual Penetration

1. Did the complainant sexually penetrate a person?

If Yes then go to 2

If No, then the accused is not guilty of rape

Compulsion

2. Did the accused compel the complainant to sexually penetrate that person?

If Yes then go to 3

If No, then the accused is not guilty of rape

Intention

3. Did the accused intend to compel the complainant to sexually penetrate that person?

If Yes then go to 4

If No, then the accused is not guilty of rape

Consent

4. Did the sexual penetration occur without the complainant's consent?

If Yes to go 5

If No, then the accused is not guilty of rape

The Accused's State of Mind

5. At the time of sexual penetration:

5.1 Was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes then the accused is guilty of Rape (as long as you have answered yes to Questions 1, 2, 3 and 4)

If No, then go to 5.2

5.2 Was the accused giving any thought to whether or not the complainant was consenting?

If Yes, then the accused is not guilty of rape

If No then the accused is guilty of Rape (as long as you have answered yes to Questions 1, 2, 3 and 4)

7.3.3 Rape and Aggravated Rape (Pre-1/1/92)

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Overview

1. The offence of rape has changed significantly over time:
    - Prior to 1 March 1981, rape was governed by the common law;
    - In 1981 the definition of rape was expanded by legislation. The new definition applied to acts committed between 1 March 1981 and 4 August 1991;
    - In 1991 the definition of rape was modified again. The revised definition applied to acts committed between 5 August 1991 and 31 December 1991;
    - From 1 January 1992, rape became a statutory offence.
2. The offence of rape with aggravating circumstances existed between 1 March 1981 and 31 December 1991.
3. This topic examines the directions a judge must give when:
    - A person is charged with rape or aggravated rape on or after 1 January 2010; and
    - The offence is alleged to have been committed before 1 January 1992.
4. Use 7.3.2 Rape (From 1/1/92) for offences alleged to have been committed on or after 1 January 1992.

Elements of Rape

5. Prior to 1992, a person committed rape if he or she:

    i) Sexually penetrated another person;

    ii) Intentionally;

    iii) Without that person's consent;

    iv) While being aware that the person was not consenting or might not be consenting.

6. Judges should take care not to run these elements together when directing the jury. In particular, judges should not instruct the jury that the fourth element relates to "the guilty mind of the accused", or that the prosecution must prove that the accused "intended to commit the crime of rape in the sense that, at the time of sexual penetration, he [or she] realized that the complainant was not consenting or might not be consenting" (*R v Soldo* [2005] VSCA 136; *R v Zilm* (2006) 14 VR 11; [2006] VSCA 72 (Callaway JA)).

"Sexual Penetration"

7. The meaning of "sexual penetration" for the purpose of this offence has been significantly modified over time.

Offences Committed Before 1 March 1981

8. The common law definition of "sexual penetration" applies to offences committed before 1 March 1981.

9. At common law, "sexual penetration" only consisted of penetration of a vagina by a penis. Other forms of sexual penetration were considered to be incidents of indecent assault, rather than rape (see *R v Daly* [1968] VR 257; *R v Hornbuckle* [1945] VLR 281).

10. This element was met when there was any penetration of the complainant's labia by the penis (*R v Lines* (1844) 1 Car & K 393; *Randall v R* (1991) 55 SASR 447).

11. From 5 August 1991, the *Crimes Act 1958* defined vagina to include a surgically constructed vagina. It is unclear whether the common law recognised penetration of an artificially constructed sexual organ as sexual penetration (see *R v Cogley* [1989] VR 799; *R v Harris & McGuiness* (1988) 17 NSWLR 158).

12. This element was met by penetration "to any extent". Consequently:

    - The penetration only needed to be slight or fleeting; and
    - It was not necessary for the prosecution to prove that semen was emitted (see *Randall v R* (1991) 55 SASR 447; *Anderson v R* [2010] VSCA 108; *R v Pryor* [2001] QCA 341).

13. It is not sufficient for the relevant body part to have simply been touched. It must have been penetrated to some extent (*Anderson v R* [2010] VSCA 108).

14. It is unclear whether this element will be met where:

    - The complainant stops consenting, and the accused fails to cease the penetration; or
    - The accused becomes aware that the complainant is not consenting, but fails to cease the penetration (see *Salmon v R* [1969] SASR 76; *Saraswati v R* (1991) 172 CLR 1 (Dawson J); *R v Murphy* (1988) 52 SASR 186; *R v Mayberry* [1973] Qd R 211; *Richardson v R* [1978] Tas SR 178; *Kaitamaki v R* [1985] AC 147).

Offences Committed 1 March 1981 – 4 August 1991

15. From 1 March 1981 to 4 August 1991, the definition of rape was expanded to also include:

    - The introduction (to any extent) of a person's penis into the anus or mouth of another person of either sex; and
    - The introduction (to any extent) of an object that is not part of the body, and which was manipulated by a person of either sex, into the vagina or anus of another person of either sex (*Crimes Act 1958* s 2A).

16. This definition removed the gendered nature of the offence, which previously could only be committed by a male against a female. Under this definition:

    - Both males and females can be the victim of the offence; and
    - Both males and females can commit the offence, by using an object that is not part of the body.

17. It is unclear whether the expanded definition uses the medical meaning of "vagina" (being the membranous passage or channel leading from the uterus to the vulva), or whether it should be interpreted in a manner consistent with the common law understanding of "sexual penetration" (which includes penetration of the external genitalia) (compare *R v Lines* (1844) 1 Car & K 393 and *Holland v R* (1993) 117 ALR 193. See also *Randall v R* (1991) 55 SASR 447 and *R v AG* (1997) 129 ACTR 1).[530] In cases where this is relevant, judges will need to engage in a process of statutory construction and will need to consider principles concerning the interpretation of ambiguous penal statutes and the interference with fundamental rights (see *Coco v R* (1994) 179 CLR 427; *Bropho v State of Western Australia* (1990) 171 CLR 1; *Beckwith v R* (1976) 135 CLR 569).

18. As was the case at common law, under the expanded definition:

    - The penetration only needed to be slight or fleeting (penetration "to any extent") (*Randall v R* (1991) 55 SASR 447; *Anderson v R* [2010] VSCA 108);
    - The prosecution did not need to prove the emission of semen (*Crimes Act 1958* s 2A);
    - It is unclear whether this element is met where the accused failed to cease sexual penetration upon withdrawal of consent, or upon becoming aware that the complainant was not consenting (see *Salmon v R* [1969] SASR 76; *Saraswati v R* (1991) 172 CLR 1 (Dawson J); *R v Murphy* (1988) 52 SASR 186; *R v Mayberry* [1973] Qd R 211; *Richardson v R* [1978] Tas SR 178; *Kaitamaki v R* [1985] AC 147).

19. The purpose of the penetration is irrelevant. It need not have been committed for the purposes of sexual gratification (*R v Dunn* 15/4/1992 CA NSW).

Offences Committed 5 August 1991–31 December 1991

20. From 5 August 1991 to 31 December 1991, the definition of rape was further expanded, to include:

    - The introduction of a part of the body other than the penis into the vagina or anus of another person; and
    - Failing to cease sexual penetration on becoming aware that the other person was not consenting, or upon realising that the other person might not be consenting (*Crimes Act 1958* s 36).

Directing the Jury About the Meaning of "Vagina"

21. The common law definition of vagina (and possibly the statutory definitions: see above) includes "the external genitalia". It has been held that this phrase is not within ordinary usage and needs more explanation (*R v AJS* (2005) 12 VR 563; *Anderson v R* [2010] VSCA 108; *R v MG* (2010) 29 VR 305).

22. Consequently, where penetration is in issue, the judge should explain to the jury in precise and simple terms, what would constitute penetration of the vagina, and summarise the evidence that relates to that issue (*R v AJS* (2005) 12 VR 563. See also *Randall v R* (1991) 55 SASR 447; *Anderson v R* [2010] VSCA 108; *R v MG* (2010) 29 VR 305).

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[530] If the legislation uses the medical definition, cases in which only the external genitalia have been penetrated will need to be charged as indecent assault instead.

Identifying the Penetrative Act

23. While in most cases the prosecution will be able to particularise the method of penetration (e.g. the complainant was penetrated by a penis), in some cases this will not be possible. In such cases, it will be sufficient for the prosecution to particularise the method of penetration by reference to the relevant possibilities (e.g. the complainant was penetrated by a penis, a bodily part *or* some other object) (*R v Castles (Ruling No.1)* (2007) 17 VR 329).

24. Where alternative possible methods of penetration are left to the jury, they do not need to unanimously agree about which of those methods was used. They only need to unanimously agree that penetration took place (*R v Castles (Ruling No.1)* (2007) 17 VR 329).

Lack of Consent

25. The third element the prosecution must prove is that the complainant did not consent to sexual penetration (*R v Saragozza* [1984] VR 187).

26. While the statutory definition of consent in *Crimes Act 1958* s 36 was introduced on 1 January 1992 by the *Crimes (Rape) Act 1991*, the transitional provisions for that Act state that it applies to proceedings that occur after the commencement of the legislation, regardless of when the alleged offence was committed (*Crimes (Rape) Act 1991* s 9).

27. Similarly, the amendments to the statutory directions on consent and awareness of the absence of consent introduced by the *Crimes (Rape) Act* 2007 also operate retrospectively (*Crimes Act 1958* s 609).

28. While there is an argument that s 36 is incapable of applying to rape before prior to 1 January 1991, as the section is limited to offences under Subdivisions (8A) to (8D), the better view appears to be that, in light of the transitional provisions of the *Crimes (Rape) Act 1991*, the section does operate retrospectively and judges must direct juries on the contemporary meaning of consent, even for historical offences.

29. For information on the meaning of consent under s 36 and the statutory directions on consent, see 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15).

Awareness of Non-Consent

30. The fourth element the prosecution must prove is that the accused was aware that the complainant was not consenting to the sexual penetration, or realised that the complainant might not be consenting to the sexual penetration (*R v Flannery & Prendergast* [1969] VR 31; *R v Hornbuckle* [1945] VLR 281; *R v Daly* [1968] VR 257; *R v Morgan* [1976] AC 182; *Banditt v R* (2005) 224 CLR 262; *R v Saragozza* [1984] VR 187).

31. The prosecution does not need to prove that the accused realised that the complainant *probably* was not consenting. It is sufficient to prove that the accused realised the complainant *might not* be consenting (*R v Hemsley* (1988) 36 A Crim R 334. See also *R v Morgan* [1976] AC 182; *R v Daly* [1968] VR 257).

32. The reasonableness of an accused's asserted belief in consent is relevant only to the question of whether the belief was held. The law does not treat an unreasonable belief as non-existent or irrelevant (*R v Saragozza* [1984] VR 187; *R v Morgan* [1976] AC 182).

33. The existence of a belief in consent (whether reasonable or unreasonable) is necessarily inconsistent with an awareness that the complainant is not consenting or might not be consenting (*R v Flannery & Prendergast* [1969] VR 31; *R v Saragozza* [1984] VR 187; *R v Morgan* [1976] AC 182).

34. For more information on this element, see 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/1/15).

Non-Advertence

35. Some cases have suggested that this element will be satisfied, both at common law and under subsequent statutory schemes, where a person did not give any thought to whether the complainant consented (see *R v Morgan* [1976] AC 182; *R v Tolmie* (1995) 37 NSWLR 660).

36. However, the *Crimes Amendment (Rape) Act 2007* was enacted on the basis that an offence would not be committed where the accused did not advert to the issue. The transitional provisions limit the operation of the statutory fault element of non-advertence to offences committed after the commencement of the amending legislation (see Attorney-General Rob Hulls, Second Reading Speech, *Crimes Amendment (Rape) Bill 2007*. See also *Neal v R* (2011) 32 VR 454).

37. The charges in the Charge Book reflect the latter view (i.e., that this element cannot be proven by establishing non-advertence). If this position is considered to be incorrect, the charges will need to be modified accordingly.

Rape with Aggravating Circumstances

38. The offence of rape with aggravating circumstances existed between 1 March 1981 and 31 December 1991.

39. The accused can be found guilty of this offence in two ways:

    - The jury can convict him or her of rape with aggravating circumstances, if they are satisfied that all of the elements of that offence have been met; or
    - The judge can direct that the accused is deemed to have been found guilty of rape with aggravating circumstances, if he or she is satisfied that the accused has previously been convicted of a specified offence.

Jury Determination

40. "Rape with aggravating circumstances" is a separate offence from "rape". If the prosecution charges the accused with the aggravated offence, the judge must direct the jury about its elements (subject to the power of the judge to direct a verdict of rape with aggravating circumstances: see below) (*Crimes Act 1958* s 45).

41. The offence consists of all the elements of rape, along with an additional element that the offence was committed in one of the following aggravating circumstances:

    (a) During the commission of the offence, or immediately before or after it, and at or in the vicinity of the place where the offence was committed, the offender inflicted serious personal violence on the victim or another person;

    (b) The offender had an offensive weapon with him or her;

    (c) During the commission of the offence, or immediately before or after it, the offender did an act which was likely to seriously and substantially degrade or humiliate the victim; or

    (d) During the commission of the offence, or immediately before or after it, the offender was aided or abetted by another person who was present at, or in the vicinity of, the place where the offence was committed (Crimes Act 1958 ss 45, 46).

42. The term "offensive weapon" means an offensive weapon, firearm, imitation firearm, explosive or imitation explosive, as defined in s 77 of the Act (*Crimes Act 1958* ss 45, 46).

43. See 7.5.5 Aggravated Burglary for further information concerning the meaning of "offensive weapon", as well as the requirement that the accused had the weapon "with" him or her.

Directed Verdict

44. Where the accused is found guilty of rape, the judge may direct that he or she is deemed to have been found guilty of rape with aggravating circumstances if the judge is satisfied that the accused has previously been convicted of one of the following offences:
    - Rape (with or without aggravating circumstances);
    - Rape with mitigating circumstances;[531]
    - Attempted rape (with or without aggravating circumstances);
    - Assault with intent to rape (with or without aggravating circumstances);
    - Indecent assault (with or without aggravating circumstances) (*Crimes Act 1958* s 46).
45. The power to direct a deemed verdict of rape with aggravating circumstances applies even if the accused pleaded guilty. It is not limited to a finding of guilt following a trial (*R v Symons* [1981] VR 297; *R v Snabel*, VSC, 2/12/1982).

Rape with Mitigating Circumstances

46. Prior to 1 March 1981, s 44(2) of the *Crimes Act 1958* allowed the jury on a charge of rape to return a verdict of rape with mitigating circumstances, if satisfied that the accused committed the offence, but that there were circumstances connected with the commission of the offence which mitigate the offence.
47. It is unclear whether the repeal of this provision by the *Crimes (Sexual Offences) Act 1980* removed the availability of the verdict of rape with mitigating circumstances. Where the parties raise this issue, the judge will need to consider whether this verdict is available for offences committed before 1 March 1981 and what assistance the judge should give the jury on the meaning of "mitigating circumstances". However, it may be difficult to reconcile the existence of this provision with the operation of *Crimes Act 1958* ss 37A and 37B.[532]
48. This Charge Book does not provide a model direction on leaving a verdict of rape with mitigating circumstances.

Other Relevant Statutory Provisions

Crimes Act 1958 s 61 (Delayed Complaint)

49. Section 61 of the *Crimes Act 1958* contains a number of jury warnings that are relevant to trials for sexual offences. This section applies to trials "for an offence under Subdivision (8A), (8B), (8C), (8D) or (8E) or under any corresponding previous enactment...".
50. As rape was an offence against s 45 of the *Crimes Act 1958* between 1 March 1981 and 31 December 1991, s 61 applies to offences committed between those dates. See the documents in Delayed Complaint for further information.
51. It is unclear whether s 61 also applies to offences committed before 1 March 1981, as there was no "corresponding previous enactment" at that time (rape was purely a common law offence).

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[531] Prior to 1 March 1981, s 44(2) of the *Crimes Act 1958* allowed the jury on a charge of rape to return a verdict of rape with mitigating circumstances, if satisfied that the accused committed the offence in circumstances of mitigation.

[532] By *Crimes Act 1958* s 606A(1), the guiding principles provisions in ss 37A and 37B apply to any trial commenced after 1 December 2006, regardless of when the offence was allegedly committed.

52. If s 61 does not apply to offences committed before 1 March 1981, then in relevant cases the judge will need to direct the jury about the effect of delayed complaint in accordance with the common law. See 7.3.1.4 Effect of delayed complaint on credit.

Evidence Act 2008

53. Judges will also need to consider the operation of the *Evidence Act 2008*, which applies to all hearings commenced on or after 1 January 2010 (*Evidence Act 2008* Schedule 2).

54. For information on the effect of the *Evidence Act 2008*, see especially:

    - Delay Causing Forensic Disadvantage; and
    - Corroboration (General Principles).

Crimthreat was toes Act 1958 s 62 (Presumption of Consent)

55. Section 62 of the *Crimes Act 1958* abolished two presumptions thought to exist at common law:

    - The presumption of impotence of a male under the age of 14; and
    - The presumption of consent to sexual intercourse within a marriage.

56. This provision only applies to offences committed on or after 1 March 1981 (*Crimes (Sexual Offences) Act 1980* s 2).

57. However, recent cases have questioned whether the common law actually recognised a presumption of consent within marriage. Depending on the resolution of this issue, the abolition of that presumption by s 62(2) may be redundant (see *R v L* (1991) 174 CLR 379; *R v P, GA* (2010) 109 SASR 1 (special leave to appeal granted)).

Last updated: 5 March 2012

7.3.3.1 Charge: Rape (1/3/81–31/12/91)

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This charge can be used for rapes alleged to have been committed between 1/3/1981 and 31/12/1991.

There are some minor differences between offences committed before 5/8/1991, and offences committed or on or after that date. See 7.3.3 Rape and Aggravated Rape (Pre-1/1/92) for information concerning these differences.

This charge can be adapted where the accused is charged with rape with aggravating circumstances. See 7.3.3 Rape and Aggravated Rape (Pre-1/1/92) for guidance.

The Elements

I must now direct you about the crime of rape. To prove this crime, the prosecution must prove the following four elements beyond reasonable doubt.

One – the accused sexually penetrated the complainant in the way alleged.[533]

[533] This charge will need to be adapted if the prosecution case relies on a failure to withdraw. See 7.3.3 Rape and Aggravated Rape (Pre–1/1/92) for information on when the law may allow such a case to be put to the jury.

Two – the accused did this intentionally.

Three – the complainant did not consent to the sexual penetration.

Four – the accused was aware either that the complainant was not consenting, or that the complainant might not be consenting.

I will now explain each of these elements in more detail.[534]

Sexual Penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused sexually penetrated the complainant in the way alleged. [*If in issue, add*: The prosecution must also prove that the accused did this act consciously, voluntarily, and deliberately.[535]]

Act of sexual penetration

The law defines the term sexual penetration to include a number of different acts. In this case the prosecution must prove that NOA introduced [*identify item or body part, e.g.* "his penis"] to any extent into NOC's [vagina/anus/mouth].[536]

[*If relevant add:*

- NOA's [*identify item or body part*] does not need to have gone all the way into NOC's [vagina/anus/mouth]. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation.]

In this case [*insert relevant evidence or competing arguments about proof of sexual penetration*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed voluntariness in issue, add the shaded section.*]

As I have directed you, the prosecution must prove that the accused sexually penetrated the complainant consciously, voluntarily, and deliberately.

This requirement is in issue here because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.*"NOA was conscious and not asleep and dreaming at the

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[534] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[535] Described in the instructions within this charge as the "voluntariness" requirement.

[536] Penetration by a part of the body other than the penis only falls within the definition of "sexual penetration" for offences committed between 5 August 1991 and 31 December 1991.

time of the penetration"].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the sexual penetration was intentional.[537]

[*If intention is not in issue, add the shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.* "The accused admits that s/he intentionally penetrated the complainant. If you are satisfied that the accused [consciously, voluntarily and deliberately] penetrated the complainant, you should have no trouble finding that s/he did so intentionally".]

Consent

The third element that the prosecution must prove is that the complainant was not consenting at the time to the sexual penetration.

The law says that consent means free agreement. So the prosecution must prove that NOC did not freely agree to being sexually penetrated by NOA [at the time in question].

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because she or he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence the complainant did not indicate agreement, add the shaded section if relevant.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without

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[537] Because rape is an offence of basic intent (the intent to commit the physical act of penetrating the complainant) proof of the intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Instead, mental state issues related to the act of penetration should generally be addressed by voluntariness directions. This will be the case if the issue is negation of intent by involuntariness, unconsciousness or accident. If different "intention" issues arise, this charge should be adapted.

that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

In determining whether NOC did not freely agree to be sexually penetrated, you must consider all of the relevant evidence, including what s/he is alleged to have said and done, or not said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about his/her state of mind at that time.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this third element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

State of Mind of the Accused

The fourth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.[538]

Belief in consent

[*If evidence is led or an assertion is made that the accused believed the complainant was consenting, add a suitably modified direction from* 7.3.1.3.1 Charge: Belief in consent.]

Application of law to evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of rape the prosecution must prove to you beyond reasonable doubt:

One – that NOA sexually penetrated NOC; and

Two – that NOA intended to sexually penetrate NOC; and

Three – that NOC did not consent to the sexual penetration; and

Four – that at the time of the sexual penetration NOA was either:

- aware that the complainant was not consenting; or

[538] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

- aware that the complainant might not be consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of rape.

Last updated: 30 July 2023

7.3.3.2 Charge: Rape (Pre-1/3/81)

Click here to obtain a Word version of this document for adaptation

This charge can be used for rapes alleged to have been committed prior to 1/3/1981.

The Elements

I must now direct you about the crime of rape. To prove this crime, the prosecution must prove the following four elements beyond reasonable doubt.

One – the accused sexually penetrated the complainant in the way alleged.

Two – the accused did this intentionally.

Three – the complainant did not consent to the sexual penetration.

Four – the accused was aware either that the complainant was not consenting, or that the complainant might not be consenting.

I will now explain each of these elements in more detail.[539]

Sexual Penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused sexually penetrated the complainant in the way alleged. [*If in issue, add*: The prosecution must also prove that the accused did this act consciously, voluntarily, and deliberately.[540]]

Act of sexual penetration

To prove an act of sexual penetration, the prosecution must prove that NOA introduced his penis to any extent into NOC's vagina.

The law says that sexual penetration includes penetration of the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced his penis to any extent between the outer lips of NOC's vagina.

[*If relevant add:*

- NOA's penis does not need to have gone all the way into NOC's vagina. Even slight penetration is enough.

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[539] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[540] Described in the instructions within this charge as the "voluntariness" requirement.

- There must have been actual penetration. Mere touching of the penis to the outer surface of the external lips of the vagina is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation.]

In this case [*insert relevant evidence or competing arguments about proof of sexual penetration*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed voluntariness in issue, add the following shaded section.*]

As I have directed you, the prosecution must prove that the accused sexually penetrated the complainant consciously, voluntarily, and deliberately.

This requirement is in issue here because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA was conscious and not asleep and dreaming at the time of the penetration"].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the sexual penetration was intentional.[541]

[*If intention is not in issue, add the shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.* The accused admits that s/he intentionally penetrated the complainant. If you are satisfied that the accused [consciously, voluntarily and deliberately] penetrated the complainant, you should have no trouble finding that s/he did so intentionally.]

Consent

The third element that the prosecution must prove is that the complainant was not consenting at the time to the sexual penetration.

The law says that consent means free agreement. So the prosecution must prove that NOC did not freely agree to being sexually penetrated by NOA [at the time in question].

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because she or he is unlawfully detained;

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[541] Because rape is an offence of basic intent (the intent to commit the physical act of penetrating the complainant) proof of the intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Instead, mental state issues related to the act of penetration should generally be addressed by voluntariness directions. This will be the case if the issue is negation of intent by involuntariness, unconsciousness or accident. If different "intention" issues arise, this charge should be adapted.

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence the complainant did not indicate agreement, add the shaded section if relevant.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

In determining whether NOC did not freely agree to be sexually penetrated, you must consider all of the relevant evidence, including what s/he is alleged to have said and done, or not said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about his/her state of mind at that time.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this third element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

State of Mind of the Accused

The fourth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.[542]

Belief in consent

[*If evidence is led or an assertion is made that the accused believed the complainant was consenting, add a suitably modified direction from* 7.3.1.3.1 Charge: Belief in consent.]

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[542] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

Application of law to evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of rape the prosecution must prove to you beyond reasonable doubt:

One – that NOA sexually penetrated NOC; and

Two – that NOA intended to sexually penetrate NOC; and

Three – that NOC did not consent to the sexual penetration; and

Four – that at the time of the sexual penetration NOA was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of rape.

Last updated: 30 July 2023

7.3.3.3 Checklist: Rape (Pre-1/1/92)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused sexually penetrated the complainant; and

2. The accused sexually penetrated the complainant intentionally; and

3. The complainant did not consent to the sexual penetration; and

4. The accused was aware either that the complainant was not consenting or that the complainant might not be consenting.

Sexual penetration

1. Did the accused sexually penetrate the complainant in the way alleged?

If yes, then go to 2

If no, then the accused is not guilty of rape

Intention

2. Did the accused intend to sexually penetrate the complainant?

If yes, then go to 3

If no, then the accused is not guilty of rape

Lack of Consent

3. Did the sexual penetration occur **without the complainant's consent**?

If yes, then go to 4.1

If no, then the accused is not guilty of rape

Accused's Awareness of Lack of Consent

4.1 Was that accused aware that the complainant was not consenting to the sexual penetration?

If yes, then the accused is guilty of rape (as long as you also answered yes to questions 1, 2 and 3)

If no, then go to 4.2

4.2 Was the accused aware that the complainant might not be consenting to the sexual penetration?

If yes, then the accused is guilty of rape (as long as you also answered yes to questions 1, 2 and 3)

If no, then the accused is not guilty of rape

Last updated: 30 May 2014

7.3.3A Assault with Intent to Commit a Sexual Offence (From 1/7/15)

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This topic relates to assaults with intent to commit a sexual offence committed on or after 1 July 2015. Before that date, the equivalent offence only applied to assaults with intent to commit rape. See Assault with Intent to Rape (Pre-1/7/15)

1. *Crimes Act 1958* s 42 creates the offence of assault with intent to commit a sexual offence. The offence has four elements which the prosecution must prove beyond reasonable doubt. These are:
   i) The accused intentionally applied force to another person;
   ii) The other person did not consent to that application of force;
   iii) At the time of applying force, the accused intended that the other person take part in a sexual act;
   iv) The accused did not reasonably believe that the other person would consent to taking part in that sexual act.
2. This is a hybrid offence, which draws on elements of assault and sexual offences.
3. Section 42 provides that force may be applied directly or indirectly, or to the body, clothing or equipment worn by the other person (*Crimes Act 1958* s 42(4)).
4. Application of force includes application of heat, light, electric current or other forms of energy, or the application of solid, liquid or gaseous matter (*Crimes Act 1958* s 42(5)).
5. A person takes part in a sexual act if the person:
   i) is sexually penetrated or sexually touched by another person or by an animal; or
   ii) sexually penetrates or sexually touches another person, themselves or an animal (Crimes Act 1958 s 35C).
6. Sexual penetration is defined in s 35A, and is discussed in 7.3.2 Rape (From 1/1/92). Sexual touching is defined in s 35B and is discussed in 7.3.5 Sexual Assault (From 1/7/15).

7. This offence replaced the offence of assault with intent to rape. Under the previous offence, it was recognised that the offence prohibited conduct that was more remote than a charge of attempted rape (see *R v Worland* [1964] VR 607).
8. It was also established in relation to the previous offence that the criminality came from the assault and the intent to commit rape and it did not matter if the intended rape was factually impossible (*R v Cogley* [1989] VR 799, 807).

Last updated: 26 April 2021

7.3.3A.1A Charge: Assault with Intent to Commit a Sexual Offence (From 30/7/23)

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I must now direct you about the crime of assault with intent to commit a sexual offence. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt.

One – The accused intentionally applied force to the complainant;

Two – The complainant did not consent to that application of force;

Three – At the time of applying force, the accused intended that the complainant would take part in a sexual act;

Four – The accused did not reasonably believe the complainant would consent to taking part in that sexual act.

I will now explain each of these elements in more detail.

Assault

The first element relates to what the accused did.

The prosecution must prove the accused intentionally applied force to the complainant.

For the purpose of this offence, force can be applied directly or indirectly to the complainant's body, or to clothing or equipment the complainant was wearing.

It does not matter how much force was applied, or for how long. The prosecution does not need to prove that the application of force harmed the complainant. Even the slightest touch is enough.

[*If relevant, add*: The application of force can involve the application of heat, light or electric current to the complainant, or the application of any substance, including liquids or gases].

[*If relevant, add*: For this element, the prosecution does not need to show that NOC realised that NOA was applying force to [his/her] [body/clothing or equipment [he/she] was wearing].

[*Refer to relevant evidence and arguments.*]

Absence of consent

The second element relates to the complainant's state of mind.

The prosecution must prove that the complainant did not consent to the application of force.

Consent is a state of mind. The law says that consent means free and voluntary agreement. So the prosecution must prove that NOC did not freely and voluntarily agree to the accused [*identify relevant application of force*].

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs.*]

The law says that a person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

The law says that where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this second element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent to the alleged assault.

[*Refer to relevant evidence and arguments.*]

Intention to take part in a sexual act

The third element relates to the accused's intentions.

The prosecution must prove that the accused assaulted the complainant with the intention that the complainant would take part in a sexual act. In other words, the prosecution must prove why the accused's assaulted the complainant.

In this case, the prosecution argues that the accused intended to [*identify alleged sexual act*]. If you are satisfied beyond reasonable doubt that this is what NOA intended to do when s/he assaulted NOC, then you can find this element proved.[543]

[*Refer to relevant evidence and arguments.*]

No reasonable belief complainant would consent

The fourth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of the assault the accused did not reasonably believe that the complainant would consent to the intended sexual act.

This fourth element will be met in any of the following circumstances [*insert relevant section(s) from the following and apply to the evidence*:

- The accused believed that the complainant would not consent to the intended sexual act.
- The accused gave no thought to whether the complainant would consent to the intended sexual act.
- Even if the accused may have believed that the complainant would consent, this belief was not reasonable in the circumstances.]

The prosecution only needs to prove one of these three states of mind. If the prosecution does not prove to you beyond reasonable doubt that NOA had any of these states of mind about whether the complainant would consent to the intended sexual act, then you must not find this element proven, and you must not find NOA guilty of this offence.

In this case, [evidence has been led/the defence argue] that at the time of the alleged assault NOA reasonably believed that NOC would consent to the intended sexual act. [*Briefly summarise relevant prosecution and defence evidence and arguments.*]

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[543] If the prosecution has not provided sufficient particulars about the nature of the intended sexual act, or if it is necessary to direct the jury about the meaning of taking part in a sexual penetration, then the judge will need to direct the jury about the meaning of sexual penetration or sexual touching. See 7.3.2.1 Charge: Rape (From 1/07/15) or 7.3.5.1 Charge: Sexual Assault (From 1/7/15) for directions about sexual penetration or sexual touching, respectively.

[*If a party requests a direction on the relevance of knowledge of a deemed non-consent circumstance under s 34C(2) or s 36, add the shaded section.*]

If you find that [*describe relevant* Crimes Act 1958 *s 36AA circumstance(s)*], you must consider whether the accused knew or believed that [*describe relevant* Crimes Act 1958 *s 36AA circumstance(s)*]. If you find that NOA knew or believed that [*describe relevant* Crimes Act 1958 *s 36AA circumstance(s)*], that is enough to show that NOA did not reasonably believe that NOA would consent and you may find this element proved.

A belief will be reasonable if there are reasonable grounds for a person in the position of the accused to hold that belief. You must also consider all the circumstances when deciding whether a belief in consent was reasonable.

[*Refer to competing prosecution and defence evidence and arguments on reasonable belief in consent*.]

A belief in consent is not reasonable unless the accused said or did something a reasonable time before the sexual act to find out whether the other person consented to that act.[544]

[*If a party requests a direction about the relevance of community expectations to whether a belief is reasonable, add the following shaded section.*]

When you are considering whether a belief in consent is unreasonable, you must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent. As members of the community, you have the best idea of what the community would reasonably expect of NOA in the circumstances in forming a reasonable belief in consent.[545]

[*If a party requests a direction about the accused's personal attributes, characteristics or circumstances, add the following shaded section.*]

In deciding whether the prosecution has proved that the accused did not have a reasonable belief in consent you may take into account any personal attributes or characteristics of the accused, or the circumstances of the accused. In this case, this would include [*identify relevant attributes, characteristics and circumstances*].[546]

[*If it is alleged that the accused was intoxicated at the relevant time, add the shaded section.*]

If you find that NOA was intoxicated, you must not take this into account when assessing whether he/she reasonably believed that NOC would consent.

The law requires you to consider whether a belief that NOC would consent would have been reasonable for a person who was not intoxicated at the relevant time.

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[544] This direction must be modified if the accused seeks to invoke *Crimes Act 1958* s 36A(3), to claim that they have a cognitive impairment or mental illness which was a substantial cause of not saying or doing anything to find out whether the complainant consented. Depending on whether the prosecution is contesting the issue, the judge may need to direct the jury about the basic rule that a person must say or do something to ascertain consent, the exception in the case of a mental illness or cognitive impairment, the onus on the accused to establish the exception, and the fact that the basic rule will apply if the accused fails to establish the exception on the balance of probabilities.

[545] When a party seeks this direction *Jury Directions Act 2015* s 47(4) specifies good reasons for not giving this direction. See 7.3.1.1 Consent and Reasonable Belief in Consent (From 1/7/15) for guidance.

[546] This direction will need to be modified if the intoxication is not self–induced. See *Jury Directions Act 2015* s 47(3)(b)(ii) and 8.5 Statutory intoxication (from 1/11/14) for guidance.

Summary

To summarise, before you can find NOA guilty of assault with intent to commit a sexual offence, the prosecution must prove each of the following elements to you beyond reasonable doubt:

One – that NOA intentionally applied force to NOC;

Two – that NOC did not consent to that application of force;

Three – at the time of applying force, NOA intended that NOC would take part in a sexual act;

Four – NOA did not reasonably believe that NOC would consent to taking part in that sexual act.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of assault with intent to commit a sexual offence.

Last updated: 30 July 2023

7.3.3A.1 Charge: Assault with Intent to Commit a Sexual Offence

Click here for a Word version of this document for adaptation

I must now direct you about the crime of assault with intent to commit a sexual offence. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt.

One – The accused intentionally applied force to the complainant;

Two – The complainant did not consent to that application of force;

Three – At the time of applying force, the accused intended that the complainant would take part in a sexual act;

Four – The accused did not reasonably believe the complainant would consent to taking part in that sexual act.

I will now explain each of these elements in more detail.

Assault

The first element relates to what the accused did.

The prosecution must prove the accused intentionally applied force to the complainant.

For the purpose of this offence, force can be applied directly or indirectly to the complainant's body, or to clothing or equipment the complainant was wearing.

It does not matter how much force was applied, or for how long. The prosecution does not need to prove that the application of force harmed the complainant. Even the slightest touch is enough.

[*If relevant, add*: The application of force can involve the application of heat, light or electric current to the complainant, or the application of any substance, including liquids or gases].

[*If relevant, add*: For this element, the prosecution does not need to show that NOC realised that NOA was applying force to [his/her] [body/clothing or equipment] [he/she] was wearing].

[*Refer to relevant evidence and arguments.*]

Absence of consent

The second element relates to the complainant's state of mind.

The prosecution must prove that the complainant did not consent to the application of force.

Consent is a state of mind. The law says that consent means free agreement. So the prosecution must prove that NOC did not freely agree to the accused [*identify relevant application of force*].

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs.*]

The law says that a person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

The law says that where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this second element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent to the alleged assault.

[*Refer to relevant evidence and arguments.*]

Intention to take part in a sexual act

The third element relates to the accused's intentions.

The prosecution must prove that the accused assaulted the complainant with the intention that the complainant would take part in a sexual act. In other words, the prosecution must prove why the accused's assaulted the complainant.

In this case, the prosecution argues that the accused intended to [*identify alleged sexual act*]. If you are satisfied beyond reasonable doubt that this is what NOA intended to do when s/he assaulted NOC, then you can find this element proved.[547]

[*Refer to relevant evidence and arguments.*]

No reasonable belief complainant would consent

The fourth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of the assault the accused did not reasonably believe that the complainant would consent to the intended sexual act.

This fourth element will be met in any of the following circumstances [*insert relevant section(s) from the following and apply to the evidence*:

- The accused believed that the complainant would not consent to the intended sexual act.
- The accused gave no thought to whether the complainant would consent to the intended sexual act.
- Even if the accused may have believed that the complainant would consent, this belief was not reasonable in the circumstances.]

[547] If the prosecution has not provided sufficient particulars about the nature of the intended sexual act, or if it is necessary to direct the jury about the meaning of taking part in a sexual penetration, then the judge will need to direct the jury about the meaning of sexual penetration or sexual touching. See 7.3.2.1 Charge: Rape (From 1/07/15) or 7.3.5.1 Charge: Sexual Assault (From 1/7/15) for directions about sexual penetration or sexual touching, respectively.

The prosecution only needs to prove one of these three states of mind. If the prosecution does not prove to you beyond reasonable doubt that NOA had any of these states of mind about whether the complainant would consent to the intended sexual act, then you must not find this element proven, and you must not find NOA guilty of this offence.

In this case, [evidence has been led/the defence argue] that at the time of the alleged assault NOA reasonably believed that NOC would consent to the intended sexual act. [*Briefly summarise relevant prosecution and defence evidence and arguments.*]

[*If a party requests a direction on the relevance of knowledge of a deemed non-consent circumstance under s 34C(2) or s 36, add the shaded section.*]

If you find that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*], you must consider whether the accused knew or believed that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*]. If you find that NOA knew or believed that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*], that is enough to show that NOA did not reasonably believe that NOA would consent and you may find this element proved.

A belief will be reasonable if there are reasonable grounds for a person in the position of the accused to hold that belief. You must also consider all the circumstances when deciding whether a belief in consent was reasonable.

[*Refer to competing prosecution and defence evidence and arguments on reasonable belief in consent.*]

In looking at the evidence, you should consider whether the accused took any steps to find out whether the complainant would consent and, if so, the nature of those steps. In this case [*identify any evidence and/or competing arguments about the steps taken by the accused*].

[*If a party requests a direction about the relevance of community expectations to whether a belief is reasonable, add the following shaded section.*]

When you are considering whether a belief in consent is unreasonable, you must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent. As members of the community, you have the best idea of what the community would reasonably expect of NOA in the circumstances in forming a reasonable belief in consent.

[*If a party requests a direction about the accused's personal attributes, characteristics or circumstances, add the following shaded section.*]

In deciding whether the prosecution has proved that the accused did not have a reasonable belief in consent you may take into account any personal attributes or characteristics of the accused, or the circumstances of the accused. In this case, this would include [*identify relevant attributes, characteristics and circumstances*].[548]

[*If it is alleged that the accused was intoxicated at the relevant time, add the shaded section.*]

If you find that NOA was intoxicated, you must not take this into account when assessing whether he/she reasonably believed that NOC would consent.

The law requires you to consider whether a belief that NOC would consent would have been

[548] When a party seeks this direction *Jury Directions Act 2015* s 47(4) specifies good reasons for not giving this direction. See 7.3.1.1 Consent and Reasonable Belief in Consent (From 1/07/15) for guidance.

reasonable for a person who was not intoxicated at the relevant time.[549]

Summary

To summarise, before you can find NOA guilty of assault with intent to commit a sexual offence, the prosecution must prove each of the following elements to you beyond reasonable doubt:

One – that NOA intentionally applied force to NOC;

Two – that NOC did not consent to that application of force;

Three – at the time of applying force, NOA intended that NOC would take part in a sexual act;

Four – NOA did not reasonably believe that NOC would consent to taking part in that sexual act.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of assault with intent to commit a sexual offence.

Last updated: 30 July 2023

7.3.4 Assault with Intent to Rape (Pre-1/7/15)

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1. The offence of assault with intent to rape is set out under s 40 of the *Crimes Act 1958.* The section states that a person must not assault or threaten to assault another person with intent to commit rape. The section specifies that the relevant definition of "assault" is that contained in s 31(2) of the *Crimes Act 1958*.
2. The section was inserted in 1993 and applies to offences alleged to have been committed on or after 15 August 1993 and before 1 July 2015.
3. On 1 July 2015, the offence was repealed and replaced by two new offences – Assault with intent to commit a sexual offence (*Crimes Act 1958* s 42) and Threat to commit a sexual offence (*Crimes Act 1958* s 43).
4. Assault with intent to rape differs from attempted rape in that it can involve an act which is more remote from the commission of rape. The elements of the offence will be satisfied, as long as the assault was committed with the relevant intent. Attempted rape, by comparison, requires the act to be so proximate to the vital element of penetration that nothing remains to be done but to commit the crime (*R v Worland* [1964] VR 607).
5. The criminality of the offence of assault with intent to rape comes from the assault and the intent to commit the crime of rape. The intent must be with respect to a real and not an imaginary crime (*R v Cogley* [1989] VR 798).
6. Unless consent is in issue, evidence of the complainant's belief about the intent of the accused will generally be irrelevant and inadmissible (*R v Cahill* [1998] 4 VR 1).
7. Although ordinarily "assault" under s 31(2) requires proof that the accused intended to inflict (or was reckless as to the infliction of) bodily injury, pain, discomfort, damage, insult or deprivation of liberty, it is not necessary to prove these matters as a separate element in relation to assault with intent to rape. This is because a finding that the accused intended to rape the complainant would necessarily involve a finding that the accused had the intention to inflict one of these detriments (*R v Saffoury* 25/8/1998 Vic CA).
8. For further information on the statutory definition of assault see 7.4.9 Statutory Assault.

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[549] This direction will need to be modified if the intoxication is not self–induced. See *Jury Directions Act 2015* s 47(3)(b)(ii) and 8.5 Statutory intoxication (From 1/11/14) for guidance.

9. For further information on Rape see 7.3.2 Rape (From 1/1/92).

Last updated: 22 June 2016

7.3.4.1 Charge: Assault with Intent to Rape (1/1/08–30/6/15)

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This charge can be used for assault with intent to rape trials where the offence is alleged to have been committed on or after 1/1/2008 and before 1/7/2015. For cases before 1/1/2008, see 7.3.4.3 Charge: Assault with Intent to Rape (Pre-1/1/08).

I must now direct you about the crime of assault with intent to rape. To prove that crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused [applied force to the body of the complainant/threatened to apply force to the body[550] of the complainant].

Two – the accused acted with the intention to rape the complainant.

Three – the accused's actions resulted in the complainant being [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, caused damage, insulted *or* deprived of liberty].

I will now explain each of these elements in detail.

Application of Force

The first element relates to what the accused did. The accused must have [applied force to the body of the complainant/threatened to apply force to the body of the complainant].

It does not matter [how the force was applied/what type of force was threatened]. It could involve any type of physical contact, [*if relevant, add*: such as kicking or punching, pushing or hitting with an object].

[*If relevant, add*: The application of force could also involve an application of heat, light or electric current to the body of the complainant, or the application of any substance, including liquids or gases.]

It also does not matter how much force was [applied/threatened]. Even a slight touch is enough for this element to be satisfied.

In this case, the prosecution argued that NOA [applied force/threatened to apply force] to NOC when [*insert evidence*]. In response, the defence argued [*insert evidence*].

Intention to Rape

The second element relates to the accused person's state of mind. The prosecution must prove that the accused acted with the intention to rape the complainant. An intention to rape has two parts.

First, the prosecution must prove that at the time the accused [applied force/threatened to apply force] to the complainant's body, [he/she] had an intention to sexually penetrate the complainant.

[550] Section 31(2) of the Crimes Act 1958 provides that the application of force can also be to clothes or equipment worn by the complainant. In cases involving such an application of force, the wording of the charge will need to be modified accordingly.

Under the law, sexual penetration is defined as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth. So for this part of the second element to be satisfied, the prosecution must prove that NOA intended to commit one of these acts upon NOC.

Secondly, the prosecution must prove that at the time of the assault, NOA either:

- was aware that the complainant was not or might not be consenting; or
- was not giving any thought to whether the complainant was not or might not be consenting.

In this case there is no suggestion that the accused believed that the complainant was consenting to any sexual penetration by the accused, so you should have no difficulty finding that aspect of the offence proven.[551]

[*Insert evidence and arguments relevant to this element.*]

Result of the Accused's Acts

The third element relates to the results of the accused's actions. The prosecution must prove that the accused's actions [*insert one or more of the following as relevant:* injured the complainant, inflicted pain, caused discomfort, caused damage, caused insult *or* deprived the complainant of liberty].

In this case, the prosecution argued [*insert evidence*]. In response, the defence argued [*insert evidence*].

Summary

To summarise, before you can find NOA guilty of assault with intent to rape, the prosecution must prove to you beyond reasonable doubt:

One – that NOA [applied force/threatened to apply force] to NOC's body; and

Two – that NOA [applied force/threatened to apply force] to NOC with the intention to rape [him/her]; and

Three – that NOA's actions resulted in NOC being [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of assault with intent to rape.

Last updated: 22 June 2016

7.3.4.2 Checklist: Assault with Intent to Rape (1/1/08–30/6/15)

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This checklist can be used where the offence is alleged to have been committed between 1 January 2008 and 1 July 2015, regardless of the date the trial commenced.

This checklist is based on an assault involving the application of force where no lawful excuse is raised. If the assault in issue involved a threat to apply force, or lawful excuse is open on the evidence, it will need to be amended as necessary.

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[551] If consent or the accused's awareness of the complainant's state of consent is in issue this charge will need to be adapted to include directions in the terms required by *Crimes Act 1958* ss 37, 37AAA and 37AA. See further 7.3.2.3 Charge: Rape (1/1/08 – 30/06/15) and 7.3.1.3 Consent and Awareness of Non-Consent.

Three elements that the prosecution must prove beyond reasonable doubt:

1. The accused applied force to the complainant's body; and
2. The accused applied force to the complainant's body with the intention of raping him or her; and
3. The accused's actions resulted in the complainant being [*insert one or more of the following:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty].

Application of Force

1. Did the accused apply force to complainant's body?

If Yes, then go to 2

If No, then the accused is not guilty of assault with intent to rape

Intention to Rape

2.1 Did the accused apply that force with the intention of sexually penetrating the complainant?

If Yes, then go to 2.2

If No, then the accused is not guilty of assault with intent to rape

Consider – ***Sexual penetration is defined as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.***

2.2 Was the accused giving any thought to whether or not the complainant was consenting to being sexually penetrated?

If Yes, then go to 2.3

If No, go to 3

2.3 Was the accused aware that the complainant was not consenting or that s/he might not be consenting to being sexually penetrated?

If Yes, then go to 3

If No, then the accused is not guilty of assault with intent to rape

Result of Accused's Actions

3. Did the actions of the accused result in the complainant being [*insert one or more of the following:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty]?

If Yes, then the accused is guilty of assault with intent to rape (as long as no answers to the earlier questions indicate that the accused is not guilty)

If No, then the accused is not guilty of assault with intent to rape

Last updated: 22 June 2016

7.3.4.3 Charge: Assault with Intent to Rape (Pre-1/1/08)

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This charge can be used for assault with intent to rape trials where the offence is alleged to have been committed before 1/1/08. For other cases see 7.3.4.1 Charge: Assault with Intent to Rape (1/1/08–30/6/15).

I must now direct you about the crime of assault with intent to rape is a crime. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused [applied force to the body[552] of the complainant/threatened to apply force to the body of the complainant].

Two – the accused intended to sexually penetrate the complainant, either without their consent or whether or not they were consenting.

Three – the accused's actions resulted in the complainant being [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, caused damage, insulted *or* deprived of liberty].

I will now explain each of these elements in detail.

Application of Force

The first element relates to what the accused did. The accused must have [applied force to the body of the complainant/threatened to apply force to the body of the complainant].

It does not matter [how the force was applied/what type of force was threatened]. It could involve any type of physical contact, [*if relevant, add*: such as kicking or punching, pushing or hitting with an object].

[*If relevant, add*: The application of force could also involve an application of heat, light or electric current to the body of the complainant, or the application of any substance, including liquids or gases.]

It also does not matter how much force was [applied/threatened]. Even a slight touch is enough for this element to be satisfied.

In this case, the prosecution argued that NOA [applied force/threatened to apply force] to NOC when [*insert evidence*]. In response, the defence argued [*insert evidence*].

Intention to Rape

The second element that the prosecution must prove relates to the accused person's state of mind. The accused must have had an intention to rape the complainant.

In order to prove that the accused intended to rape the complainant, the prosecution must prove that at the time the accused [applied force/threatened to apply force] to the complainant's body, [he/she] had an intention to sexually penetrate the complainant either without [his/her] consent or regardless of whether or not [he/she] was consenting.

[552] Section 31(2) of the Crimes Act 1958 provides that the application of force can also be to clothes or equipment worn by the complainant. In cases involving such an application of force, the wording of the charge will need to be modified accordingly.

Under the law, sexual penetration is defined as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth. So for this second element to be satisfied, the prosecution must prove that NOA intended to commit one of these acts, without NOC's consent or regardless of whether or not [he/she] was consenting.

In this case, the prosecution argued [*insert evidence*]. The defence responded [*insert evidence*].

Result of the Accused's Acts

The third element relates to the results of the accused's actions. The prosecution must prove that the accused's actions [*insert one or more of the following as relevant:* injured the complainant, inflicted pain, caused discomfort, caused damage, caused insult *or* deprived the complainant of liberty].

In this case, the prosecution argued [*insert evidence*]. In response, the defence argued [*insert evidence*].

Summary

To summarise, before you can find NOA guilty of assault with intent to rape, the prosecution must prove to you beyond reasonable doubt:

One – that NOA [applied force/threatened to apply force] to NOC's body; and

Two – that NOA [applied force/threatened to apply force] NOC with the intention to sexually penetrate [him/her] either without [his/her] consent, or whether or not [he/she] was consenting; and

Three – that NOA's actions resulted in NOC being [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of assault with intent to rape.

Last updated: 3 December 2012

7.3.4.4 Checklist: Assault with Intent to Rape (Pre-1/1/08)

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This checklist can be used where the offence is alleged to have been committed before 1 January 2008, regardless of the date the trial commenced.

This checklist is based on an assault involving the application of force where no lawful excuse is raised. If the assault in issue involved a threat to apply force, or lawful excuse is open on the evidence, it will need to be amended as necessary.

Three elements that the prosecution must prove beyond reasonable doubt:

1. The accused applied force to the complainant's body; and
2. The accused applied force to the complainant's body with the intention of sexually penetrating them either without their consent, or regardless of whether or not they were consenting; and
3. The accused's actions resulted in the complainant being [*insert one or more of the following:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty].

Application of Force

1. Did the accused apply force to complainant's body?

If Yes, then go to 2

If No, then the accused is not guilty of assault with intent to rape

Intention to Rape

2. Did the accused apply force with the intention of sexually penetrating the complainant either without their consent, or regardless of whether or not they were consenting?

Consider – ***Sexual penetration is defined as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.***

If Yes, go to 3

If No, then the accused is not guilty of assault with intent to rape

Result of Accused's Actions

3. Did the actions of the accused result in the complainant being [*insert one or more of the following:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty]?

If Yes, then the accused is guilty of assault with intent to rape (as long as you have answered yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of assault with intent to rape

Last updated: 18 March 2008

7.3.5 Sexual Assault (From 1/7/15)

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This topic relates to sexual assault offences committed on or after 1 July 2015. For indecent assault offences committed before 1 July 2015, see 7.3.6 Indecent Assault (1/1/92–30/6/15).

Elements

1. Sexual assault is an offence under Crimes Act 1958 s 40.
2. The offence has the following four elements that the prosecution must prove beyond reasonable doubt. A person (A) commits the offence of sexual assault if he or she:
   i) Intentionally touches another person (B);
   ii) The touching is sexual;
   iii) B does not consent to the touching; and
   iv) A does not reasonably believe that B consents to the touching.
3. Compelled sexual assault is a separate offence under s 41. Many of the elements of sexual assault are also relevant to compelled sexual assault, including the meanings of sexual touching, consent and reasonable belief in consent. See "Compelled Sexual Assault" below.

Commencement information

4. The offence of sexual assault in *Crimes Act 1958* s 40 commenced operation on 1 July 2015. As a new offence, it only applies to conduct committed on or after 1 July.
5. Prior to 1 July 2015, similar conduct was covered by the offence of indecent assault (see *Crimes Act 1958* s 39)

Intentional Touching

6. The first element that the prosecution must prove is that the accused intentionally touched another person. The term "touching" is defined in *Crimes Act 1958* s 35B as touching that may be done:

   (a) with any part of the body; or

   (b) with anything else; or

   (c) through anything, including anything worn by the person doing the touching or by the person touched.

7. Before 1 July 2015, the offence of indecent assault relied on the common law definition of "assault". Assault was defined as any act done with the intention to cause the victim to apprehend immediate or unlawful violence (*R v Venna* [1976] QB 421; *Fagan v Metropolitan Police* [1969] 1 QB 439; *R v Court* [1989] AC 28).

8. The exact intention required in relation to indecent assault was somewhat unclear – whether there must merely have been an intention to assault, or whether an intention to commit an indecent assault was required.

9. In relation to common law indecent assault, it had been held that the accused must have had an intention to commit an indecent assault (*R v Court* [1989] AC 28).

10. However, "assault" forms no part of the elements of the current offence.

11. As a result, the fault element for the first element is basic or general intention. Where relevant, the prosecution must prove that the touching was intentional in the sense that it was deliberate rather than inadvertent or accidental.

Sexual touching

12. Touching may be "sexual" because of:

    (a) the area of the body that is touched or used in the touching, including (but not limited to) the genital or anal region, the buttocks or, in the case of a female, or a person who identifies as female, the breasts; or

    (b) the fact that the person doing the touching seeks or gets sexual arousal or sexual gratification from the touching; or

    (c) any other aspect of the touching, including the circumstances in which it is done (*Crimes Act 1958* s 35B(2)).

13. This provision does not provide a definition of "sexual" for the purpose of touching, or an exhaustive test for when touching will be sexual. Treating satisfaction of any of the clauses of s 35B(2) as automatically sexual does not pay due regard to the text and structure of the section. Instead, s 35B(2) should be read as if it provided a series of matters which a jury may consider in deciding whether touching is sexual. For this purpose, the three limbs of s 35B(2) can operate cumulatively and the prosecution may rely on more than one limb (*AB v Paulet* [2022] VSC 414, [217]–[234]).

14. In addition to the factors in s 35B(2), "common understandings of social behaviour may inform whether an instance of touching is sexual". This does not reintroduce a "public morals" or "contemporary standards of modesty and decency" test which the legislature discarded when enacting the current form of s 40 in 2015 (*AB v Paulet* [2022] VSC 414, [248]–[249]).

15. Something more is required than bare satisfaction of one or more of the limbs of s 35B(2). It is, however, difficult to provide a definitive statement of what that 'something more' involves, particularly at the margins (*AB v Paulet* [2022] VSC 414, [246]–[248]).

16. The first limb of s 35B(2) is consistent with the common law on the previous offence of indecent assault, which held that an act may have had a sexual connotation due to the body area used by the accused (e.g. genitals, anus, breasts), or due to the accused's motive (*R v Harkin* (1989) 38 A Crim R 296; *Sabet v R* [2011] VSCA 124; *Curtis v R* [2011] VSCA 102).

17. In determining whether an act had a sexual connotation, at common law the jury could consider a range of factors including:

    - The relationship of the accused to victim (e.g. were they relatives, friends or complete strangers);
    - How the accused had come to embark on this conduct; and
    - Why the accused was behaving in that way (*R v Court* [1989] AC 28).

18. These principles may continue to be relevant in determining whether touching was "sexual" for the purposes of s 40 sexual assault.

19. At common law, there was a distinction between acts supposedly incapable of having a sexual connotation (e.g. removing a person's shoe) and acts equivocal in the sense that they may or may not have a sexual connotation (e.g. a kiss on the cheek), depending on the accused's motive. While s 35B(2)(b) makes the accused's motivation for the touching relevant to whether the touching is sexual, innocuous touching combined with a sexual interest is likely not enough, by itself, to render the touching sexual (*AB v Paulet* [2022] VSC 414, [266]. On the common law distinction, see *R v George* [1956] Crim LR 52; *R v Court* [1989] AC 28; cf *Sabet v R* [2011] VSCA 124; *Curtis v R* [2011] VSCA 102; *R v RL* [2009] VSCA 95).

20. The jury must assess whether touching is sexual objectively, though subjective factors may be relevant. Evidence that the accused intended, or did not intend, sexual gratification from the touching is relevant but not determinative when characterising the touching (*AB v Paulet* [2022] VSC 414, [250]–[257]).

21. The complainant's subjective characterisation of the touching as sexual is not relevant. However, a complainant may be allowed to describe touching as "caressing" or "intimate" as a form of lay opinion within the meaning of Evidence Act 2008 s 78, where necessary to describe the physical act of touching (*AB v Paulet* [2022] VSC 414, [258]–[259]).

22. The jury may also consider the history and relationship between the parties, and how the conduct was undertaken, and is not limited to the immediate circumstances of the touching. Despite this, in most cases, the immediate circumstances of the touching are likely to be more important in characterising the touching than more report circumstances (*AB v Paulet* [2022] VSC 414, [272]–[273]).

23. As with the earlier offence of indecent assault, there is no requirement that the touching involved any "hostility" over and above sexual nature of the touching (*Boughey v R* (1986) 161 CLR 10; *Fitzgerald v Kennard* (1995) 84 A Crim R 333).

Honest and Reasonable Mistake

24. The Act states that it is no defence that the accused had an honest and reasonable belief that the touching was not sexual (*Crimes Act 1958* s 48B). This excludes the general criminal defence of honest and reasonable mistake of fact with respect to the sexual nature of the touching.

25. The effect of this provision appears to be that the accused's belief can make a touching sexual (such as where he or she seeks or gets sexual gratification from the touching), but the accused's belief is not capable of operating in an exculpatory manner.

Without Consent

26. "Consent" is defined in s 36 of the *Crimes Act 1958* to mean "free agreement".

27. This definition of consent is relevant both to the question of whether the complainant consented to the conduct (the third element), and the accused's mental state in respect of that consent (the fourth element).

28. Section 36(2) of the *Crimes Act 1958* lists situations in which a person is regarded as not having given free agreement. This is not an exhaustive list.

29. Section 36(2) is not expressly drafted as a "deeming provision", but it is relatively clear that it must now be treated this way. This interpretation is supported by *Jury Directions Act 2015* s 46(4)(b) which require juries to be directed about the effect of s 36(2) in terms that assume that it is a deeming provision.

30. For a full discussion of this topic see 7.3.1.2 Consent and reasonable belief in consent (From 1/07/15).

No Reasonable Belief in Consent

31. The fourth element is that the accused "does not reasonably believe that [the complainant] consents to taking part in the sexual act" (*Crimes Act 1958*, s 40(1)(d)).

32. This fault element will be satisfied by any one of the following mental states:

    i) The accused believed that the complainant was not consenting.

    ii) The accused did not believe the complainant was consenting. This includes circumstances where the accused gave no thought as to whether the complainant was consenting.

    iii) The accused believed the complainant was consenting, but his/her belief was not reasonable in the circumstances.

33. This element introduces objectivity into the fault criteria for sexual assault (Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 Explanatory Memo).

34. This element is explained in more detail in 7.3.1.2 Consent and reasonable belief in consent (From 1/07/15).

Compelled Sexual Assault

35. "Sexual assault by compelling sexual touching" (compelled sexual assault) is a separate offence contained in s 41.

36. The elements of compelled sexual assault are as follows (s 41(1)):

(a) The accused (A) intentionally causes another person (B) –

(i) To touch A; or

(ii) To touch themselves, or

(iii) To touch another person (C) or an animal, or

(iv) To be touched by C or by an animal; and

(b) The touching is sexual; and

(c) B does not consent to the touching; and

(d) A does not reasonably believe that B consents to the touching.

37. The elements of the offence are similar to those of sexual assault, but rather than the accused intentionally touching the complainant, the accused intentionally causes the complainant to sexually touch either the accused, the complainant him/herself, a third person, or an animal, or be touched by a third person or an animal (s 41(1)(a)).

38. The accused will have committed the offence of compelled sexual assault in relation to the person who s/he causes to do the touching, not the person touched. Where the accused causes the complainant to touch a third person, the accused may also have committed sexual assault simpliciter of that third person, assuming the other elements of that offence are met (s 35B(2)).

Last updated: 13 October 2023

7.3.5.1A Charge: Sexual Assault (From 30/7/23)

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Warning! This charge contains many optional directions which may be requested by a party. Judges must take care to ensure that requested directions are appropriate to the circumstances of the case. Judges should also consider whether to repeat any of the directions specified in 7.3.1.1.1 Statutory directions on consent and 7.3.1.1.2 Statutory direction on belief in consent.

I must now direct you about the crime of sexual assault. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused intentionally touched the complainant in the way alleged.

Two – the touching was sexual.

Three – the complainant did not consent to the touching.

Four – the accused did not reasonably believe that the complainant consented to the touching.

I will now explain each of these elements in more detail.

Touching

The first element relates to what the accused did. S/he must have intentionally touched the complainant. [*If in issue, add*: The prosecution must also prove that the accused did this act consciously, voluntarily and deliberately.[553]]

[553] Described in the instructions within this charge as the "voluntariness" requirement.

[*Add any parts of the shaded section, as relevant.*]

The touching does not need to be violent, or to cause any physical harm or injury. Any touching, no matter how slight, is enough.

The touching can be done with any part of the accused's body, or with anything else.

The touching can be done through anything, including anything the accused or the complainant was wearing.

The law says that if the accused causes another person or an animal to touch the complainant, then the accused is the person who did the touching.

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed intention or voluntariness in issue, add the shaded section.*]

The prosecution must prove that the accused touched the complainant consciously, voluntarily and deliberately.

This requirement is in issue here because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstances of the case, e.g.* "NOA touched NOC on the breasts deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time he touched NOC on the breasts"].

Sexual

The second element that the prosecution must prove is that the touching was sexual.

The law says that touching can be sexual because of the area of the body involved, of either the person being touched or the person doing the touching, such as the genital or anal area, or the buttocks or breasts.

Or the touching can be sexual because the person doing the touching wants to get or gets sexual gratification from the touching.

Finally, any other aspect of the touching, including the circumstances in which it happened, can also make the touching sexual.

The question of whether or not the touching was sexual is for you to decide.

In this case, the prosecution alleged that the touching was sexual because [*insert evidence and arguments*]. [*If relevant add*: The defence responded [*insert evidence and arguments*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's touching of NOC was sexual.

Lack of consent

The third element that the prosecution must prove is that the touching happened without the complainant's consent.

Consent is a state of mind. The law says that consent means free and voluntary agreement. So the prosecution must prove that NOC did not freely and voluntarily agree to being touched by NOA at the time.[554]

[*Where a party requests a direction about the meaning of consent, add the following shaded section as relevant to the facts in issue.*]

The law says that a person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

The law says that where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following shaded section.*]

In some circumstances the law says that the complainant did not freely agree, or consent, to be touched. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person does not say or do anything to indicate consent to the act;
(b) the person submits to the act because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal, regardless of-
  (i) when the force, harm or conduct giving rise to the fear occurs; and
  (ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;
(c) the person submits to the act because of coercion or intimidation-
  (i) regardless of when the coercion or intimidation occurs; and
  (ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;
(d) the person submits to the act because the person is unlawfully detained;
(e) the person submits to the act because the person is overborne by the abuse of a relationship of authority or trust;
(f) the person is asleep or unconscious;
(g) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;
(h) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;
(i) the person is incapable of understanding the sexual nature of the act;
(j) the person is mistaken about the sexual nature of the act;
(k) the person is mistaken about the identity of any other person involved in the act;
(l) the person mistakenly believes that the act is for medical or hygienic purposes;
(m) the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid;
(n) if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes;
(o) the person engages in the act on the basis that a condom is used and either-
  (i) before or during the act, any other person involved in the act intentionally removes the condom or tampers with the condom; or
  (ii) the person who was to use the condom intentionally does not use it;
(p) having given consent to the act, the person later withdraws consent to the act taking place or continuing.

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting.

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[554] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this third element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

No reasonable belief in consent

The fourth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of the touching the accused did not reasonably believe that the complainant was consenting.[555]

This fourth element will be met in any of the following circumstances [*insert relevant section(s) from the following and apply to the evidence*:

- The accused believed that the complainant was not consenting.
- The accused gave no thought to whether the complainant was consenting.
- Even if the accused may have believed that the complainant was consenting, this belief was not reasonable in the circumstances.]

The prosecution only needs to prove one of these three states of mind. If the prosecution does not prove to you beyond reasonable doubt that NOA had any of these states of mind about the complainant's consent, then you must not find this element proven, and you must not find NOA guilty of this offence.

In this case, [evidence has been led/the defence argue] that at the time of the sexual touching NOA reasonably believed that NOC was consenting to the touching. [*Briefly summarise relevant prosecution and defence evidence and arguments*].

[*If a party requests a direction on the relevance of knowledge of a deemed non-consent circumstance under s 34C(2) or s 36, add the shaded section.*]

If you find that [*describe relevant Crimes Act 1958 s 36AA circumstance(s)*], you must consider whether the accused knew or believed that [*describe relevant Crimes Act 1958 s 36AA circumstance(s)*]. If you find that NOA knew or believed that [*describe relevant Crimes Act 1958 s 36AA circumstance(s)*], that is enough to show that NOA did not reasonably believe that NOA was consenting and you may find this element proved.

A belief will be reasonable if there are reasonable grounds for a person in the position of the accused to hold that belief. You must also consider all the circumstances when deciding whether a belief in consent was reasonable.

[*Refer to competing prosecution and defence evidence and arguments on reasonable belief in consent*.]

[555] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

A belief in consent is not reasonable unless the accused said or did something a reasonable time before the sexual act to find out whether the other person consented to that act.[556]

[*If a party requests a direction about the relevance of community expectations to whether a belief is reasonable, add the following shaded section.*]

When you are considering whether a belief in consent is unreasonable, you must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent. As members of the community, you have the best idea of what the community would reasonably expect of NOA in the circumstances in forming a reasonable belief in consent.

[*If a party requests a direction about the accused's personal attributes, characteristics or circumstances, add the following shaded section.*]

In deciding whether the prosecution has proved that the accused did not have a reasonable belief in consent you may take into account any personal attributes or characteristics of the accused, or the circumstances of the accused. In this case, this would include [*identify relevant attributes, characteristics and circumstances*].[557]

[*If it is alleged that the accused was intoxicated at the relevant time, add the shaded section.*]

If you find that NOA was intoxicated, you must not take this into account when assessing whether he/she reasonably believed that NOC was consenting.

The law requires you to consider whether the belief in NOC's consent would have been reasonable to a person who was not intoxicated at the relevant time.[558]

Medical or hygienic purposes

[*In cases involving alleged sexual touching in the context of a medical procedure or hygienic purposes add the following shaded section.*]

According to the law, the accused has not committed the offence of sexual assault if the sexual touching was done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the [*describe alleged sexual touching*], was not done in good faith for [medical/hygienic] purposes.

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

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[556] This direction must be modified if the accused seeks to invoke Crimes Act 1958 s 36A(3), to claim that they have a cognitive impairment or mental illness which was a substantial cause of not saying or doing anything to find out whether the complainant consented. Depending on whether the prosecution is contesting the issue, the judge may need to direct the jury about the basic rule that a person must say or do something to ascertain consent, the exception in the case of a mental illness or cognitive impairment, the onus on the accused to establish the exception, and the fact that the basic rule will apply if the accused fails to establish the exception on the balance of probabilities.

[557] When a party seeks this direction Jury Directions Act 2015 s 47(4) specifies good reasons for not giving this direction. See Consent and Reasonable Belief in Consent (From 1/07/15) for guidance.

[558] This direction will need to be modified if the intoxication is not self–induced. See Jury Directions Act 2015 s 47(3)(b)(ii) and Charge: Self–induced intoxication for guidance.

Summary

To summarise, before you can find NOA guilty of sexual assault the prosecution must prove each of the following elements to you beyond reasonable doubt:

One – that NOA intentionally touched NOC in the way alleged; and

Two – that the touching was sexual.

Three – that NOC did not consent to the touching; and

Four – that at the time of the touching NOA did not reasonably believe that NOC was consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual assault.

Last updated: 30 July 2023

7.3.5.1 Charge: Sexual Assault (1/7/15 – 29/7/23)

Click here for a Word version of this document for adaptation

When to use this charge

This charge can be used for cases involving sexual assault alleged to have been committed on or after 1/7/2015.

Warning! This charge contains many optional directions which may be requested by a party. Judges must take care to ensure that requested directions are appropriate to the circumstances of the case.

The elements

I must now direct you about the crime of sexual assault.

To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused intentionally touched the complainant in the way alleged.

Two – the touching was sexual.

Three – the complainant did not consent to the touching.

Four – the accused did not reasonably believe that the complainant consented to the touching.

I will now explain each of these elements in more detail.

Touching

The first element relates to what the accused did. S/he must have intentionally touched the complainant. [*If in issue, add:* The prosecution must also prove that the accused did this act consciously, voluntarily and deliberately.[559]]

[*Add any parts of the shaded section, as relevant.*]

The touching does not need to be violent, or to cause any physical harm or injury. Any touching, no

[559] Described in the instructions within this charge as the "voluntariness" requirement.

matter how slight, is enough.

The touching can be done with any part of the accused's body, or with anything else.

The touching can be done through anything, including anything the accused or the complainant was wearing.

The law says that if the accused causes another person or an animal to touch the complainant, then the accused is the person who did the touching.

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed intention or voluntariness in issue, add the shaded section.*]

The prosecution must prove that the accused touched the complainant consciously, voluntarily and deliberately. This requirement is in issue here because [*describe the evidence or arguments that place voluntariness in issue*]. You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstances of the case, e.g.* "NOA touched NOC on the breasts deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time he touched NOC on the breasts"].

Sexual

The second element that the prosecution must prove is that the touching was sexual.

The law says that touching can be sexual because of the area of the body involved, of either the person being touched or the person doing the touching, such as the genital or anal area, or the buttocks or breasts.

Or the touching can be sexual because the person doing the touching wants to get or gets sexual gratification from the touching.

Finally, any other aspect of the touching, including the circumstances in which it happened, can also make the touching sexual.

The question of whether or not the touching was sexual is for you to decide.

In this case, the prosecution alleged that the touching was sexual because [*insert evidence and arguments*]. [*If relevant add*: The defence responded [*insert evidence and arguments*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's touching of NOC was sexual.

Lack of consent

The third element that the prosecution must prove is that the touching happened without the complainant's consent.

Consent is a state of mind. The law says that consent means free agreement. So the prosecution must prove that NOC did not freely agree to being touched by NOA at the time.[560]

[*Where a party requests a direction about the meaning of consent, add the following shaded section as relevant to the facts in issue.*]

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[560] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

The law says that a person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

The law says that where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following shaded section.*]

In some circumstances the law says that the complainant did not freely agree, or consent, to be touched. These circumstances include [*insert relevant section(s) from the following and apply to the evidence*:

(a) the person submits to the act because of force or the fear of force, whether to that person or someone else;

(b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;

(c) the person submits to the act because the person is unlawfully detained;

(d) the person is asleep or unconscious;

(e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;

(f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

(g) the person is incapable of understanding the sexual nature of the act;

(h) the person is mistaken about the sexual nature of the act;

(i) the person is mistaken about the identity of any other person involved in the act;

(j) the person mistakenly believes that the act is for medical or hygienic purposes;

(k) if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes

(l) the person does not say or do anything to indicate consent to the act;

(m) having initially given consent to the act, the person later withdraws consent to the act taking place or continuing.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting.

However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this third element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

No reasonable belief in consent

The fourth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of the touching the accused did not reasonably believe that the complainant was consenting.[561]

This fourth element will be met in any of the following circumstances [*insert relevant section(s) from the following and apply to the evidence*:

- The accused believed that the complainant was not consenting.
- The accused gave no thought to whether the complainant was consenting.
- Even if the accused may have believed that the complainant was consenting, this belief was not reasonable in the circumstances.]

The prosecution only needs to prove one of these three states of mind. If the prosecution does not prove to you beyond reasonable doubt that NOA had any of these states of mind about the complainant's consent, then you must not find this element proven, and you must not find NOA guilty of this offence.

In this case, [evidence has been led/the defence argue] that at the time of the sexual touching NOA reasonably believed that NOC was consenting to the touching. [*Briefly summarise relevant prosecution and defence evidence and arguments.*]

[*If a party requests a direction on the relevance of knowledge of a deemed non-consent circumstance under s 34C(2) or s 36, add the shaded section.*]

If you find that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*], you must consider whether the accused knew or believed that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*]. If you find that NOA knew or believed that [*describe relevant Crimes Act 1958 section 34C(2) or 36 circumstance(s)*], that is enough to show that NOA did not reasonably believe that NOA was consenting and you may find this element proved.

A belief will be reasonable if there are reasonable grounds for a person in the position of the accused to hold that belief. You must also consider all the circumstances when deciding whether a belief in consent was reasonable.

[*Refer to competing prosecution and defence evidence and arguments on reasonable belief in consent*.]

In looking at the evidence, you should consider whether the accused took any steps to find out whether the complainant was consenting or might not be consenting and, if so, the nature of those steps. In this case [*identify any evidence and/or competing arguments about the steps taken by the accused*].

[*If a party requests a direction about the relevance of community expectations to whether a belief is reasonable, add the following shaded section*.]

When you are considering whether a belief in consent is unreasonable, you must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent. As members of the community, you have the best idea of what the community would reasonably expect of NOA in the circumstances in forming a reasonable belief in consent.

[*If a party requests a direction about the accused's personal attributes, characteristics or circumstances, add the following shaded section.*]

In deciding whether the prosecution has proved that the accused did not have a reasonable belief in consent you may take into account any personal attributes or characteristics of the accused, or the

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[561] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

circumstances of the accused. In this case, this would include [*identify relevant attributes, characteristics and circumstances*].[562]

[*If it is alleged that the accused was intoxicated at the relevant time, add the shaded section.*]

If you find that NOA was intoxicated, you must not take this into account when assessing whether he/she reasonably believed that NOC was consenting.

The law requires you to consider whether the belief in NOC's consent would have been reasonable to a person who was not intoxicated at the relevant time.[563]

Medical or hygienic purposes

[*In cases involving alleged sexual touching in the context of a medical procedure or hygienic purposes add the following shaded section.*]

According to the law, the accused has not committed the offence of sexual assault if the sexual touching was done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the [*describe alleged sexual touching*], was not done in good faith for [medical/hygienic] purposes.

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of sexual assault the prosecution must prove each of the following elements to you beyond reasonable doubt:

One – that NOA intentionally touched NOC in the way alleged; and

Two – that the touching was sexual;

Three – that NOC did not consent to the touching; and

Four – that at the time of the touching NOA did not reasonably believe that NOC was consenting.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual assault.

Last updated: 30 July 2023

7.3.5.2 Checklist: Sexual Assault (From 1/7/15)

Click here to obtain a Word version of this document for adaptation

This checklist can be used for a charge of sexual assault allegedly committed on or after 1 July 2015.

Four elements the prosecution must prove beyond reasonable doubt:

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[562] When a party seeks this direction *Jury Directions Act 2015* s 47(4) specifies good reasons for not giving this direction. See 7.3.1.2 Consent and Reasonable Belief in Consent (From 1/07/15) for guidance.

[563] This direction will need to be modified if the intoxication is not self–induced. See *Jury Directions Act 2015* s 47(3)(b)(ii) and 8.5.1 Charge: Statutory intoxication (self-induced contested) for guidance.

1. The accused intentionally touched the complainant; and
2. The touching was sexual; and
3. The complainant did not consent to the touching; and
4. The accused did not reasonably believe that the complainant consented to the touching.

Touching

1. Did the accused intentionally touch the complainant?

If Yes then go to 2

If No, then the accused is not guilty of Sexual Assault

Sexual

2. Was the touching sexual?

Consider – What was the area of the body touched, did the accused get sexual gratification from the touching or did other circumstances make the touching sexual

If Yes then go to 3

If No, then the accused is not guilty of Sexual Assault

Sexual Assault Consent

3. Did the touching occur without the complainant's consent?

If Yes then go to 4

If No, then the accused is not guilty of Sexual Assault

The Accused's State of Mind

4. At the time of sexual touching, did the accused reasonably believe that the complainant was consenting?

4.1 Did the accused believe that the complainant was not consenting?

If Yes, then the accused is guilty of Sexual Assault (as long as you have answered yes to Questions 1, 2 and 3)

If No, go to 4.2

4.2 Did the accused not hold a belief that the complainant was consenting?

If Yes then the accused is guilty of Sexual Assault (as long as you have answered yes to Questions 1, 2 and 3)

If No, go to 4.3

4.3 Are you satisfied that even if the accused may have believed that the complainant was consenting, that this belief was not reasonable in the circumstances?

If Yes then the accused is guilty of Sexual Assault (as long as you have answered yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of Sexual Assault

Last updated: 30 November 2015

7.3.6 Indecent Assault (1/1/92–30/6/15)

Click here to obtain a Word version of this document

Elements

1. Indecent assault is an offence under *Crimes Act 1958* s 39.
2. The offence has the following five elements that the prosecution must prove beyond reasonable doubt. A person commits indecent assault if he or she:
   i) Assaults another person;
   ii) Intentionally;
   iii) Without lawful justification;
   iv) While being aware that the person is not consenting or might not be consenting or while not giving any thought to whether the person is not consenting or might not be consenting;
   v) In indecent circumstances.

"Assault"

3. The first element that the prosecution must prove is that the accused *assaulted* another person. The term "assaults" is not defined for the purposes of s 39. These charges are based on the assumption that s 39 relies on the common law definition of assault.
4. At common law, assault is defined as any act done with the intention to cause the victim to apprehend immediate or unlawful violence (*R v Venna* [1976] QB 421; *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; *R v Court* [1989] AC 28).
5. In practice, the term assault is now often used synonymously with battery, which is the intentional application of force to another, either directly or indirectly (*R v Holzer* [1968] VR 481; *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439).
6. The force used need not be violent, and can be as slight as a mere touch (*Collins v Wilcock* [1984] 1 WLR 1172).
7. In the context of indecent assault involving an actual touching, it is not necessary to establish any "hostility" over and above the actual circumstances of the indecency (*Boughey v R* (1986) 161 CLR 10*; Fitzgerald v Kennard* (1995) 38 NSWLR 184).

Threats to assault

8. It is unclear whether indecent assault under s 39 includes threats to indecently assault, in the same way that common law assault includes threats to assault.

9. The common law definition of assault includes threats to apply force, so long as those threats cause the victim to apprehend immediate or unlawful violence (*R v Venna* [1976] QB 421; *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439).

10. In New South Wales, it has been held that common law indecent assault includes threats to indecently assault (*Fitzgerald v Kennard* (1995) 38 NSWLR 184).

11. If threats to indecently assault are held to constitute an offence, these charges will need to be modified in appropriate cases.

Intention

12. It is somewhat unclear what intention is required in relation to indecent assault – whether there must merely be an intention to assault, or if there must be an intention to commit an indecent assault.

13. In relation to common law indecent assault, it has been held that the accused must have an intention to commit an indecent assault (*R v Court* [1989] AC 28).

14. However, the wording of s 39(2) states that a person commits an indecent assault if they "assault another person in indecent circumstances". This could be interpreted to mean that there need only be an intention to assault – so long as that assault occurred in the relevant circumstances. This is the interpretation used in this charge.

Lawful justification

15. Consent is the most commonly relevant justification for indecent touching. However, other justifications relevant to common law assault may also be relied upon in unusual circumstances. See 7.4.8 Common Law Assault.

Consent

16. "Consent" is defined in s 36 of the *Crimes Act 1958* to mean "free agreement". This definition of consent applies to all of the provisions in Subdivisions 8A to 8D of the *Crimes Act* (ss 38–52).

17. In relation to s 39, this definition of consent is relevant both to the question of whether the complainant "consented" to the conduct (thus providing a lawful justification for that conduct – the third element), and the accused's mental state in respect of that "consent" (the fourth element).

18. Section 36 of the *Crimes Act 1958* lists situations in which a person is regarded as not having given free agreement. This is not an exhaustive list.

19. Section 36 is not expressly drafted as a "deeming provision", but it is relatively clear that it must now be treated this way. This interpretation is supported for trials commenced on or after 1 January 2008 by ss 37AAA(b) and (c) which require juries to be directed about the effect of s 36 in terms that assume that s 36 is a deeming provision.

20. Section 36(a) states that submission in circumstances of "force or fear of force" is not consent. The only degree of force necessary is whatever is necessary to achieve the touching (see *R v Bourke* [1915] VLR 289; *R v Burles* [1947] VLR 392).

21. Section 36(b) states that submission because of "the fear of harm of any type to that person or someone else" is not consent. The section provides no assistance as to the nature of the harm contemplated. It may extend beyond physical or psychological injury, but that has not yet been determined.

22. Section 36(d) requires that a person is "so affected" by drugs or alcohol as to be incapable of free agreement. Mere impairment of judgement or reduction of inhibitions does not negate free agreement (*R v Wrigley* 9/2/1995 CA Vic). Note that intoxication can also be relevant to the issues of intention and mistaken belief (see 8.7 Common Law Intoxication).

23. Section 36(e) states that a person does not consent if they are incapable of understanding the sexual nature of the act. The complainant's understanding of the moral significance of the act is not relevant to this issue (*R v Mobilio* [1991] 1 VR 339*; R v Eastwood* [1998] VSCA 42*).*

24. Section 36(e) relates to the complainant's intellectual capacity. But "capacity to understand the sexual nature of the act" is not the only basis upon which a cognitive impairment may be relevant to consent. A person who understands the sexual nature of an act may be nevertheless incapable of freely agreeing to it, if that person is intellectually unable to make a refusal of consent or unable to understand his or her right to refuse consent (*R v Mobilio* [1991] 1 VR 339*; R v Eastwood* [1998] VSCA 42).

25. In deciding whether a complainant who knew the nature and character of an act of sexual intercourse had the capacity to give real consent to it, the jury could have regard to such things as the complainant's capacity to appreciate:

    - that most of the community draw a distinction in quality between sexual acts and other acts of intimacy; and
    - that a decision to consent or not involves questions of the morality or social acceptability of the conduct (*R v Mobilio* [1991] 1 VR 339*; R v Eastwood* [1998] VSCA 42*)*.

26. Section 36(g) says that a person does not consent where they have a mistaken belief that the sexual act was for either a medical or hygienic purpose. This section changed the pre-existing common law, which held that mistake as to the purpose of the act did not deprive consent of reality (*R v Mobilio* [1991] 1 VR 339. Note that the law stated in *Mobilio* as to capacity to consent is still correct).

27. There is nothing in s 36 to deal with a situation where a woman is mistaken as to one of the characteristics of the accused, and it is this characteristic which leads her to consent. The common law holds that consent in such circumstances does not make the act unlawful (*Papadimitropoulos v R* (1957) 98 CLR 249).

28. The fact that a man has agreed to pay a specified sum in return for sexual contact and leaves without paying does not mean that consent was vitiated by fraud (*R v Linekar* [1995] 3 ALL ER 69).

Jury directions on consent

29. Sections 37 and 37AAA of the *Crimes Act 1958* provide a framework of directions in respect of the complainant's consent. These directions are mandatory where relevant to the facts in issue in a proceeding (*Crimes Act 1958* s 37(1)).

30. For a full discussion of this topic see 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15).

31. Where the alleged indecent assault is the immediate forerunner to an alleged rape, and the jury is to be directed on consent in relation to the alleged rape, they should also be directed about consent in relation to the alleged indecent assault (*Paton v R* [2011] VSCA 72).

The Accused's Awareness

32. The awareness element can be constituted by any one of three different mental states on the part of the accused:

    i) An awareness that the complainant was not consenting (s 39(2)(a));

    ii) An awareness that the complainant might not be consenting (s 39(2)(a));

    iii) A failure to give any thought to whether or not the complainant was consenting

("inadvertence") (s 39(2)(b)).

Awareness of the real possibility of non-consent

33. The word "might" in the phrase "might not be consenting" suggests a test based on the "possibility" of non-consent. It does not suggest that the accused must have been aware that it was "probable" that the complainant was not consenting. However, the possibility of non-consent must be a real possibility, not just a theoretical possibility (*R v Ev Costa* 2/4/1997 CA Vic).

Inadvertence

34. For offences committed after 1 January 2008 it is no defence for accused persons to assert that they were not aware that the complainant might not have been consenting to the sexual act because they had not given any thought to whether or not the complainant was consenting (*Crimes Act 1958* ss 38(2)(a)(ii), 38(4)(b)(ii)).

35. Prior to this amendment it was uncertain whether or not "inadvertence" did provide a defence. On one view, inadvertence was a culpable state under the common law, and this continued for the statutory offences of rape and indecent assault – see *DPP v Morgan* [1976] AC 182 and *R v Tolmie* (1995) 37 NSWLR 660. However, the *Crimes Amendment (Rape) Bill 2007* was enacted on the basis that this mental state was not previously culpable (see Attorney-General Rob Hulls, Second Reading Speech, *Crimes Amendment (Rape) Bill 2007*). The charge–book charges reflect this view. If non-advertence was a culpable mental state even prior to the amendment, and it is an issue in a pre-amendment case, the charge will need to be modified.

Jury directions on the accused's awareness

36. Sections 37 and 37AA of the *Crimes Act 1958* provide a framework of directions in respect of the accused's awareness of the complainant's state of consent. These directions are mandatory where relevant to the facts in issue in a proceeding (*Crimes Act 1958* s 37(1)).

37. For a full discussion of this topic see 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15).

"Indecent Circumstances"

38. "Indecent" has been held to be an ordinary word in the English language. It is for the jury to decide whether the facts of a case amount to indecency (*R v Nazif* [1987] NZLR 122; *Curtis v R* [2011] VSCA 102).

39. The issue of whether an assault occurred in "indecent circumstances" is an objective one, to be assessed according to community standards. "Indecent" conduct is conduct which would be considered indecent by "right minded people", or which is "so offensive to contemporary standards of modesty or decency as to be indecent" (*R v Court* [1989] AC 28; *Curtis v R* [2011] VSCA 102).[564]

40. There must be a "sexual connotation" for an act to be considered indecent (*R v Court* [1989] AC 28; *R v RL* [2009] VSCA 95; *Sabet v R* [2011] VSCA 124).

[564] Other ways in which this requirement has been expressed include "unbecoming or offensive to common propriety", "an affront to modesty" or "offending the modesty of the average person" (see *Sabet v R* [2011] VSCA 124)

41. An act may have a sexual connotation due to the body area used by the accused (e.g. genitals, anus, breasts). In certain circumstances, an act that does not invovle one of these body areas may also come to have a sexual connotation due to the accused's motive (*R v Harkin* (1989) 38 A Crim R 296; *Sabet v R* [2011] VSCA 124; *Curtis v R* [2011] VSCA 102).

Relevance of the accused's motive to "indecency"

42. If an act has a *clear sexual connotation* due to the involvement of the genitals, anus or breasts, the accused's motive will be irrelevant in determining whether the assault occurred in indecent circumstances. A clearly indecent act cannot become decent due to a decent motive (*R v Harkin* (1989) 38 A Crim R 296; *Sabet v R* [2011] VSCA 124. But cf. *R v Court* [1989] AC 28).
43. Similarly, where an act is *incapable* of having a sexual connotation (e.g. removing a person's shoe), the accused's motive is irrelevant. An indecent motive cannot turn an innocuous act into an indecent assault (*R v George* [1956] Crim LR 52; *R v Court* [1989] AC 28).
44. However, where the alleged act is equivocal, in the sense that it may or may not have a sexual connotation (e.g. a kiss on the cheek), the accused's motive may be relevant to determining whether it had such a connotation (*Sabet v R* [2011] VSCA 124; *Curtis v R* [2011] VSCA 102; *R v RL* [2009] VSCA 95; *R v Court* [1989] AC 28).
45. Such an act will have a sexual connotation if it was committed for the purpose of obtaining sexual gratification (*Sabet v R* [2011] VSCA 124; *R v RL* [2009] VSCA 95; *R v Court* [1989] AC 28).
46. Where it is not clear whether an assault occurred in indecent circumstances or not, then it must be shown that the accused intended it to have a sexual connotation. Proof of the accused's motive is relevant in determining this issue (*R v Court* [1989] AC 28).
47. In determining whether an act has a sexual connotation, the jury may consider a range of factors including:
    - The relationship of the accused to victim (e.g. were they relatives, friends or complete strangers);
    - How the accused had come to embark on this conduct; and
    - Why the accused was behaving in that way (*R v Court* [1989] AC 28).

Concurrency of Elements

48. The assault must have been indecent at the time it was committed (*Sabet v R* [2011] VSCA 124).
49. Consequently, the prosecution must prove that when the assault was committed, it ws directly accompanied by either:
    - A sexual connotation; or
    - An intention to obtain sexual gratification (*Sabet v R* [2011] VSCA 124. See also *R v Court* [1989] AC 28).
50. It is not necessary that there be an assault as well as an independent act of indecency. Any assault which is itself an act of indecency, or that is of such a character as to involve an act of indecency, is sufficient (*Fitzgerald v Kennard* (1995) 38 NSWLR 184).

Last updated: 1 December 2011

7.3.6.1 Charge: Indecent Assault (1/1/08–30/6/15)

Click here to obtain a Word version of this document for adaptation

This charge can be used for cases involving indecent assault alleged to have been committed between 1/1/2008 and 30/6/2015.

The Elements

I must now direct you about the crime of indecent assault. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – that the accused touched the complainant in the way alleged.[565]

Two – that the touching was intentional.

Three – that the touching occurred in indecent circumstances.

Four – that there was no lawful justification for the touching, such as the consent of the complainant.[566]

Five – that at the time of the touching the accused either:

- was aware that the complainant was not or might not be consenting; or
- was not giving any thought to whether the complainant was not or might not be consenting.

I will now explain each of these elements in more detail.

Application of Force/Touching

The first element relates to what the accused did. S/he must have touched the complainant.

The touching does not need to be violent, or to cause any physical harm or injury. Any touching, no matter how slight, is enough.

In this case, the prosecution alleged that NOA touched NOC when s/he [*insert relevant evidence*]. The defence responded [*insert relevant evidence*].

For this first element to be met, you must be satisfied, beyond reasonable doubt, that NOA touched NOC in the way alleged by the prosecution.

Intention

The second element that the prosecution must prove is that the touching was intentional. That is, you must be satisfied that the accused touched the complainant deliberately, not accidentally.[567]

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[565] As most cases of indecent assault involve touching, this charge has been drafted accordingly. The offence can, however, be constituted by any direct or indirect application of force. In cases not involving touching, the wording should be modified appropriately.

A threat to indecently assault may also constitute an indecent assault: see 7.3.6 Indecent Assault (1/1/92–30/6/15). If this is the case, this charge will need to be modified in trials involving such threats.

[566] This charge only includes the lawful justification of consent. Directions should also be given on any other lawful justifications that are in issue.

[567] This charge has been drafted based on the assumption that there need only be an intention to assault, not an intention to indecently assault: see 7.3.6 Indecent Assault (1/1/92–30/6/15).

The touching does not need to have been done with any hostile or aggressive intent,[568] and it is not necessary that the accused intended to cause some kind of harm to the complainant.

[*If relevant add the following:* It is also not necessary that the purpose of the touching was for the accused's sexual gratification.]

For this second element to be met, you need only find that the accused intended to touch the complainant in the way alleged by the prosecution.

Indecent circumstances

The third element that the prosecution must prove is that the touching occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body that was touched, from the part of the accused's body that was used for the touching, or from the circumstances surrounding the touching. Beyond that requirement, the question of whether or not the circumstances were indecent is for you to decide.

It is possible for the touching itself to be indecent – for example, because of the area of the body touched by the accused. In such a case, there may be no need to find any additional indecent circumstances – the elements of touching and indecency may both be satisfied by the one act.

In this case, the prosecution alleged that the touching was indecent because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that the circumstances in which NOA touched NOC were indecent.

Lack of Consent (Lawful Justification)

The fourth element that must be proven by the prosecution is that the touching occurred without any lawful justification. In this case, that means that the complainant was touched without his/her consent.

Consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the touching if s/he did not freely agree to be touched.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to be touched. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because he or she is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

---

[568] In relation to indecent assaults involving an actual touching, it is not necessary to establish any hostility over and above the actual circumstances of the indecency. In other circumstances (e.g. a threat to indecently assault) it may be necessary to show hostility.

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence the complainant did not indicate agreement, add the shaded section if relevant.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to be touched at the time of that act, you may find on that basis that s/he did not consent to that act.

In determining whether NOC did not freely agree to be touched, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of the alleged touching, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged touching.

In this case, the prosecution alleged that NOC did not consent. [*Refer to evidence supporting the prosecution case*]. The defence responded [*insert relevant evidence*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

State of Mind of the Accused

The fifth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of the touching the accused:

- was aware that the complainant was not or might not be consenting; or
- was not giving any thought to whether the complainant was not or might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.[569]

Belief in Consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

[569] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

Summary

To summarise, before you can find NOA guilty of indecent assault the prosecution must prove each of the following elements to you beyond reasonable doubt:

One – that NOA touched NOC in the way alleged; and

Two – that NOA intended to touch NOC; and

Three – that the touching occurred in indecent circumstances.

Four – that NOC did not consent to the touching; and

Five – that at the time of the touching NOA either:

- was aware that the complainant was not or might not be consenting; or
- was not giving any thought to whether the complainant was not or might not be consenting; and

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of indecent assault.

Last updated: 30 July 2023

7.3.6.2 Checklist: Indecent Assault (1/1/08–30/6/15)

Click here to obtain a Word version of this document for adaptation

This checklist can be used where indecent assault is alleged to have been committed between 1 January 2008 and 30 June 2015.

Five elements the prosecution must prove beyond reasonable doubt:

1. The accused touched the complainant; and
2. The accused intended to touch the complainant; and
3. The touching occurred in indecent circumstances; and
4. The complainant did not consent to the touching; and
5. The accused was aware that the complainant was not or might not be consenting or was not giving any thought to whether the complainant was not or might not be consenting.

Assault

1. Did the accused touch the complainant?

If Yes then go to 2

If No, then the accused is not guilty of indecent assault

Intention

2. Did the accused intend to touch the complainant?

If Yes then go to 3

If No, then the accused is not guilty of indecent assault

Indecent Circumstances

3. Did the accused touch the complainant in indecent circumstances?

Consider – Indecent circumstances requires a sexual connotation

If Yes then go to 4

If No, then the accused is not guilty of indecent assault

Consent

4. Did the touching occur without the complainant's consent?

If Yes then go to 5

If No, then the accused is not guilty of indecent assault

The Accused's State of Mind

5. At the time of the assault:

5.1 Was the accused giving any thought to whether or not the complainant was consenting?

If Yes, then go to 5.2

If No, then the accused is guilty of indecent assault (as long as you have answered yes to Questions 1, 2, 3 and 4)

5.2 Was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes, then the accused is guilty of indecent assault (as long as you have answered yes to Questions 1, 2, 3 and 4)

If No, then the accused is not guilty of indecent assault

Last updated: 12 September 2019

7.3.6.3 Charge: Indecent Assault (1/1/92–31/12/07)

Click here to obtain a Word version of this document for adaptation

This charge can be used for indecent assault offences alleged to have been committed between 1/1/1992 and 1/1/2008.

The Elements

I must now direct you about the crime of indecent assault. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – that the accused touched the complainant in the way alleged.[570]

Two – that the touching was intentional.

Three – that the touching occurred in indecent circumstances.

Four – that there was no lawful justification for the touching, such as the consent of the complainant.[571]

Five – that at the time of the touching the accused was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

I will now explain each of these elements in more detail.

Application of Force/Touching

The first element relates to what the accused did. S/he must have touched the complainant.

The touching does not need to be violent, or to cause any physical harm or injury. Any touching, no matter how slight, is enough.

In this case, the prosecution alleged that NOA touched NOC when s/he [*insert relevant evidence*]. The defence responded [*insert relevant evidence*].

For this first element to be met, you must be satisfied, beyond reasonable doubt, that NOA touched NOC in the way alleged by the prosecution.

Intention

The second element that the prosecution must prove is that the touching was intentional. That is, you must be satisfied that the accused touched the complainant deliberately, not accidentally.[572]

The touching does not need to have been done with any hostile or aggressive intent,[573] and it is not necessary that the accused intended to cause some kind of harm to the complainant.

[*If relevant add the following:* It is also not necessary that the purpose of the touching was for the accused's sexual gratification.]

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[570] As most cases of indecent assault involve touching, this charge has been drafted accordingly. The offence can, however, be constituted by any direct or indirect application of force. In cases not involving touching, the wording should be modified appropriately.

A threat to indecently assault may also constitute an indecent assault: see 7.3.6 Indecent Assault (1/1/92–30/6/15). If this is the case, this charge will need to be modified in trials involving such threats.

[571] This charge only includes the lawful justification of consent. Directions should also be given on any other lawful justifications that are in issue.

[572] This charge has been drafted based on the assumption that there need only be an intention to assault, not an intention to indecently assault: see 7.3.6 Indecent Assault (1/1/92–30/6/15).

[573] In relation to indecent assaults involving an actual touching, it is not necessary to establish any hostility over and above the actual circumstances of the indecency. In other circumstances (e.g. a threat to indecently assault) it may be necessary to show hostility.

For this second element to be met, you need only find that the accused intended to touch the complainant in the way alleged by the prosecution.

Indecent circumstances

The third element that the prosecution must prove is that the touching occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body that was touched, from the part of the accused's body that was used for the touching, or from the circumstances surrounding the touching. Beyond that requirement, the question of whether or not the circumstances were indecent is for you to decide.

It is possible for the touching itself to be indecent – for example, because of the area of the body touched by the accused. In such a case, there may be no need to find any additional indecent circumstances – the elements of touching and indecency may both be satisfied by the one act.

In this case, the prosecution alleged that the touching was indecent because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that the circumstances in which NOA touched NOC were indecent.

Lack of Consent (Lawful Justification)

The fourth element that must be proven by the prosecution is that the touching occurred without any lawful justification. In this case, that means that the complainant was touched without his/her consent.

Consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the touching if s/he did not freely agree to be touched.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to be touched. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because he or she is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence the complainant did not indicate agreement, add the shaded section if relevant.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to be touched at the time of that act, you may find on that basis that s/he did not consent to that act.

In determining whether NOC did not freely agree to be touched, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of the alleged touching, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged touching.

In this case, the prosecution alleged that NOC did not consent. [*Refer to evidence supporting the prosecution case*]. The defence responded [*insert relevant evidence*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

State of Mind of the Accused

The fifth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of the touching the accused was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.[574]

Belief in Consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Summary

To summarise, before you can find NOA guilty of indecent assault the prosecution must prove each of the following elements to you beyond reasonable doubt:

One – that NOA touched NOC in the way alleged; and

Two – that NOA intended to touch NOC; and

Three – that the touching occurred in indecent circumstances.

Four – that NOC did not consent to the touching; and

Five – that at the time of the touching NOA was either:

- aware that NOC was not consenting; or
- aware that NOC might not be consenting; and

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of indecent assault.

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[574] If the accused's state of mind is not in issue, this section of the charge will need to be modified.

Last updated: 30 July 2023

7.3.6.4 Checklist: Indecent Assault (1/1/92–31/12/07)

Click here to obtain a Word version of this document for adaptation

This checklist can be used where indecent assault is alleged to have been committed between 1/1/1992 and 1/1/2008.

Five elements the prosecution must prove beyond reasonable doubt:

1. The accused touched the complainant; and
2. The accused intended to touch the complainant; and
3. The touching occurred in indecent circumstances; and
4. The complainant did not consent to the touching; and
5. The accused was aware that the complainant was not consenting or that the complainant might not be consenting.

Assault

1. Did the accused touch the complainant?

If Yes then go to 2

If No, then the accused is not guilty of indecent assault

Intention

2. Did the accused intend to touch the complainant?

If Yes then go to 3

If No, then the accused is not guilty of indecent assault

Indecent Circumstances

3. Did the accused touch the complainant in indecent circumstances?

Consider – Indecent circumstances requires a sexual connotation

If Yes then go to 4

If No, then the accused is not guilty of indecent assault

Consent

4. Did the touching occur without the complainant's consent?

If Yes then go to 5

If No, then the accused is not guilty of indecent assault

The **Accused's State of Mind**

5. At the time of the assault, was the accused aware that the complainant was not consenting, or was the accused aware that the complainant might not be consenting?

If Yes then the accused is guilty of indecent assault (as long as you have answered yes to Questions 1, 2, 3 and 4)

If No, then the accused is not guilty of indecent assault

Last updated: 12 September 2019

7.3.7 Indecent Assault (Pre-1/1/92)

Click here to obtain a Word version of this document

Overview

1. This topic concerns the offence of indecent assault as it existed before 1 January 1992.
2. This topic should be read in conjunction with 7.3.6 Indecent assault (1/1/92 – 30/6/15), which describe the offence as in force from 1 January 1992 onwards. The focus of this topic is on the differences that applied at various times to the offence of indecent assault.
3. Prior to 1 March 1981, indecent assault could only be committed on a woman or girl (*Crimes Act 1958* s 55, as in force before 1 March 1981).
4. From 1 March 1981, the offence became gender-neutral. In addition, an aggravated form of offence was introduced (*Crimes Act 1958* ss 44, 46 as in force from 1 March 1981 to 4 August 1991; *Crimes Act 1958* ss 38, 42, 43, as in force from 5 August 1991 to 31 December 1991).

Consent

5. Before 1 March 1981, the *Crimes Act 1958* specified that for a person under 16, consent is not a defence to indecent assault (*Crimes Act 1958* s 55(2), as in force before 1 March 1981).
6. From 1 March 1981, the *Crimes Act 1958* provided that consent was no defence unless:

   (a) the accused was, or believed on reasonable grounds that he was, married to the person;

   (b) the accused believed on reasonable grounds that the person was of or above the age of sixteen years; or

   (c) the accused was not more than two years older than the person (*Crimes Act 1958* s 44(3), as in force from 1 March 1981 to 8 August 1991).
7. Without these provisions, consent is a defence to a charge of indecent assault, as it would be in a charge of common assault (*R v Williamson* [1969] VR 696, 968).
8. These provisions also have the effect that, where consent is excluded, common assault is not available as an alternative verdict to a charge of indecent assault (*R v Williamson* [1969] VR 696, 698).
9. Where consent is an element of indecent assault, the prosecution must also prove that the accused was aware that the complainant was not consenting or realised that the complainant might not be consenting (see *Frank v The King* [2024] VSCA 37, [33]-[34]; *R v Whelan* [1973] VR 268; *R v Trotter*, Unreported, Supreme Court of Victoria Court of Criminal Appeal, 5 December 1985). For further information about awareness of non-consent at common law, see Rape and Aggravated Rape (Pre-1/1/92).

10. In the case of a complainant under 16 and a charge alleging an offence from 1 March 1981 to 4 August 1991, the accused has an evidentiary burden to raise the issue of one of the three limbs of s 44(3). Once that evidentiary burden is met, the onus is on the prosecution to prove that the complainant did not consent and the accused knew that the complainant was not, or believed that the complainant might not be, consenting (see *R v Deblasis & Deblasis* (2007) 19 VR 128; c.f. *R v Trotter*, Unreported, Supreme Court of Victoria Court of Criminal Appeal, 5 December 1985).
11. For offences committed between 5 August 1991 and 31 December 1991, the general offence of indecent assault did not contain a clause excluding consent as a defence. Instead, the provision excluding consent is found in the specific offences of sexual offences against children, including the offence of committing an indecent act with or in the presence of a child under 16 (*Crimes Act 1958* s 47, as in force between 5 August 1991 and 31 December 1991).

Interaction between rape and indecent assault

12. Changes in the definition of sexual penetration for the purposes of rape over time have affected whether conduct can be charged as rape or indecent assault.
13. Before 1 March 1981, sexual penetration for the purpose of rape only consisted of penetration of a vagina by a penis. Other conduct that is now treated as sexual penetration, including digital-vaginal, digital-anal, penile–anal and penile–oral penetration, could only be charged as indecent assault, buggery or gross indecency (see *R v Daly* [1968] VR 257; *R v Hornbuckle* [1945] VLR 281).
14. Between 1 March 1981 and 4 August 1991, the definition of rape was expanded to include:
    - The introduction (to any extent) of a person's penis into the anus or mouth of another person of either sex; and
    - The introduction (to any extent) of an object that is not part of the body, and which was manipulated by a person of either sex, into the vagina or anus of another person of either sex (*Crimes Act 1958* s 2A, as in force between 1 March 1981 and 4 August 1991).
15. The definition of rape was further expanded from 5 August 1991 to 31 December 1991 to include the introduction of a part of the body other than the penis into the vagina or anus of another person (*Crimes Act 1958* s 36, as in force between 5 August 1991 and 31 December 1991).
16. These expansions to the definition of rape have correspondingly narrowed the range of conduct that should be charged as indecent assault. See 7.3.3 Rape and Aggravated Rape (Pre-1/1/92) for more information on the changing definition of rape and sexual penetration.

Application of the Jury Directions Act 2015

17. The majority of the *Jury Directions Act 2015* applies to trials for historical indecent assault (*Jury Directions Act 2015*, Schedule 1, clause 1(1)).
18. However, the provisions in Division 1 of Part 5, which contain directions on consent and belief in consent, only apply to offences alleged to have been committed on or after the commencement of that Division (*Jury Directions Act 2015*, Schedule 1, clause 1(2)). Those provisions will therefore not apply to trials for historical indecent assault.

Indecent assault with aggravating circumstances

19. The offence of indecent assault with aggravating circumstances existed between 1 March 1981 and 31 December 1991.
20. The accused can be found guilty of this offence in two ways:
    - The jury can convict the accused of indecent assault with aggravating circumstances if they are satisfied that all of the elements of that offence have been met; or

- The judge can direct that the accused is deemed to have been found guilty of indecent assault with aggravating circumstances, if the judge is satisfied that the accused has previously been convicted of a specified offence.

Jury Determination

21. "Indecent assault with aggravating circumstances" is a separate offence from "indecent assault". If the prosecution charges the accused with the aggravated offence, the judge must direct the jury about its elements (subject to the power of the judge to direct a verdict of indecent assault with aggravating circumstances: see below) (*Crimes Act 1958* s 44).

22. The offence consists of all the elements of indecent assault, along with an additional element that the offence was committed in one of the following aggravating circumstances:

    (a) During the commission of the offence, or immediately before or after it, and at or in the vicinity of the place where the offence was committed, the offender inflicted serious personal violence on the victim or another person;

    (b) The offender had an offensive weapon with him or her;

    (c) During the commission of the offence, or immediately before or after it, the offender did an act which was likely to seriously and substantially degrade or humiliate the victim; or

    (d) During the commission of the offence, or immediately before or after it, the offender was aided or abetted by another person who was present at, or in the vicinity of, the place where the offence was committed (Crimes Act 1958 ss 45, 46).

23. The term "offensive weapon" means an offensive weapon, firearm, imitation firearm, explosive or imitation explosive, as defined in s 77 of the Act (*Crimes Act 1958* ss 45, 46).

24. See 7.5.5 Aggravated Burglary for further information concerning the meaning of "offensive weapon", as well as the requirement that the accused had the weapon "with" him or her.

Directed Verdict

25. Where the accused is found guilty of indecent assault, the judge may direct that he or she is deemed to have been found guilty of indecent assault with aggravating circumstances if the judge is satisfied that the accused has previously been convicted of one of the following offences:

    - Rape (with or without aggravating circumstances);
    - Rape with mitigating circumstances;[575]
    - Attempted rape (with or without aggravating circumstances);
    - Assault with intent to rape (with or without aggravating circumstances);
    - Indecent assault (with or without aggravating circumstances) (*Crimes Act 1958* s 46).

26. The power to direct a deemed verdict of indecent assault with aggravating circumstances applies even if the accused pleaded guilty. It is not limited to a finding of guilt following a trial (*R v Symons* [1981] VR 297; *R v Snabel*, VSC, 2/12/1982).

Last updated: 17 April 2024

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[575] Prior to 1 March 1981, s 44(2) of the *Crimes Act 1958* allowed the jury on a charge of rape to return a verdict of rape with mitigating circumstances, if satisfied that the accused committed the offence in circumstances of mitigation.

7.3.7.1 Charge: Indecent Assault (Pre-1/1/92) Consent Not in Issue

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This charge is designed for cases where consent is not available as a defence. Where consent is available, use 7.3.7.3 Charge: Indecent Assault (Pre-1/1/92) – Consent in issue.

See 7.3.7 Indecent Assault (Pre-1/1/92) for information on when consent is not available as a defence.

This charge can be adapted where the accused is charged with indecent assault with aggravating circumstances. See 7.3.7 Indecent Assault (Pre-1/1/92) for guidance.

The Elements

I must now direct you about the crime of indecent assault. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – that the accused touched[576] the complainant in the way alleged.

Two – that the touching was intentional.

Three – that the touching occurred in indecent circumstances.[577]

To protect children under the age of 16, Parliament has created a number of offences where consent is not relevant. This is one of those offences, so you do not need to consider the issue of whether or not NOC agreed to be touched in the way alleged.

I will now explain each of these elements in more detail.

Application of Force/Touching

The first element relates to what the accused did. S/he must have touched the complainant.

The touching does not need to be violent, or to cause any physical harm or injury. Any touching, no matter how slight, is enough.

In this case, the prosecution alleged that NOA touched NOC when s/he [*insert relevant evidence*]. The defence responded [*insert relevant evidence*].

For this first element to be met, you must be satisfied, beyond reasonable doubt, that NOA touched NOC in the way alleged by the prosecution.

Intention

The second element that the prosecution must prove is that the touching was intentional. That is, you must be satisfied that the accused touched the complainant deliberately, not accidentally.[578]

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[576] As most cases of indecent assault involve touching, this charge has been drafted accordingly. The offence can, however, be constituted by any direct or indirect application of force. In cases not involving touching, the wording should be modified appropriately.

[577] If a lawful excuse other than consent is raised, this matter should be identified for the jury, added to the list of elements as a matter the prosecution must disprove, and the charge adapted to include directions on that defence.

[578] This charge has been drafted based on the assumption that there need only be an intention to assault, not an intention to *indecently assault*.

The touching does not need to have been done with any hostile or aggressive intent,[579] and it is not necessary that the accused intended to cause some kind of harm to the complainant.

[*If relevant add the following:* It is also not necessary that the purpose of the touching was for the accused's sexual gratification.]

For this second element to be met, you need only find that the accused intended to touch the complainant in the way alleged by the prosecution.

Indecent circumstances

The third element that the prosecution must prove is that the touching occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body that was touched, from the part of the accused's body that was used for the touching, or from the circumstances surrounding the touching. Beyond that requirement, the question of whether or not the circumstances were indecent is for you to decide.

It is possible for the touching itself to be indecent – for example, because of the area of the body touched by the accused. In such a case, there may be no need to find any additional indecent circumstances – the elements of touching and indecency may both be satisfied by the one act.

In this case, the prosecution alleged that the touching was indecent because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that the circumstances in which NOA touched NOC were indecent.

Summary

To summarise, before you can find NOA guilty of indecent assault the prosecution must prove each of the following elements to you beyond reasonable doubt:

One – that NOA touched NOC in the way alleged; and

Two – that NOA intended to touch NOC; and

Three – that the touching occurred in indecent circumstances.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of indecent assault.

Last updated: 12 April 2018

7.3.7.2 Checklist: Indecent Assault (Pre-1/1/92) Consent Not in Issue

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Three elements the prosecution must prove beyond reasonable doubt:

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[579] In relation to indecent assaults involving an actual touching, it is not necessary to establish any hostility over and above the actual circumstances of the indecency. In other circumstances (e.g. a threat to indecently assault) it may be necessary to show hostility.

1. The accused touched the complainant in the way alleged; and

2. The touching was intention; and

3. The touching occurred in indecent circumstances.

Assault

1. Did the accused touch the complainant in the way alleged?

If Yes, then go to 2

If No, then the accused is not guilty of indecent assault

Intention

2. Did the accused intend to touch the complainant in the way alleged?

If Yes, then go to 3

If No, then the accused is not guilty of indecent assault

Indecent circumstances

3. Did the touching occur in indecent circumstances?

Consider – Indecent circumstances requires a sexual connotation

If Yes, then the accused is guilty of indecent assault (as long as you answered yes to question 1 and 2)

If No, then the accused is not guilty of indecent assault

Last updated: 12 September 2019

7.3.7.3 Charge: Indecent Assault (Pre-1/1/92) Consent in Issue

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This charge is designed for cases where consent is available as a defence. Where consent is not available, use 7.3.7.1 Charge: Indecent Assault (Pre-1/1/92) – Consent not in issue.

See 7.3.7 Indecent Assault (Pre-1/1/92) for information on when consent is not available as a defence.

This charge can be adapted where the accused is charged with indecent assault with aggravating circumstances. See 7.3.7 Indecent Assault (Pre-1/1/92) for guidance.

The Elements

I must now direct you about the crime of indecent assault. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – that the accused touched[580] the complainant in the way alleged.

Two – that the touching was intentional.

Three – that the touching occurred in indecent circumstances.

Four – that there was no lawful justification for the touching, such as the consent of the complainant.[581]

Five – that at the time of the touching the accused was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

I will now explain each of these elements in more detail.

Application of Force/Touching

The first element relates to what the accused did. S/he must have touched the complainant.

The touching does not need to be violent, or to cause any physical harm or injury. Any touching, no matter how slight, is enough.

In this case, the prosecution alleged that NOA touched NOC when s/he [*insert relevant evidence*]. The defence responded [*insert relevant evidence*].

For this first element to be met, you must be satisfied, beyond reasonable doubt, that NOA touched NOC in the way alleged by the prosecution.

Intention

The second element that the prosecution must prove is that the touching was intentional. That is, you must be satisfied that the accused touched the complainant deliberately, not accidentally.[582]

The touching does not need to have been done with any hostile or aggressive intent,[583] and it is not necessary that the accused intended to cause some kind of harm to the complainant.

[*If relevant add the following:* It is also not necessary that the purpose of the touching was for the accused's sexual gratification.]

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[580] As most cases of indecent assault involve touching, this charge has been drafted accordingly. The offence can, however, be constituted by any direct or indirect application of force. In cases not involving touching, the wording should be modified appropriately.

A threat to indecently assault may also constitute an indecent assault: see 7.3.6 Indecent Assault (1/1/92–30/6/15). If this is the case, this charge will need to be modified in trials involving such threats.

[581] This charge only includes the lawful justification of consent. Directions should also be given on any other lawful justifications that are in issue.

[582] This charge has been drafted based on the assumption that there need only be an intention to assault, not an intention to *indecently assault*.

[583] In relation to indecent assaults involving an actual touching, it is not necessary to establish any hostility over and above the actual circumstances of the indecency. In other circumstances (e.g. a threat to indecently assault) it may be necessary to show hostility.

For this second element to be met, you need only find that the accused intended to touch the complainant in the way alleged by the prosecution.

Indecent circumstances

The third element that the prosecution must prove is that the touching occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body that was touched, from the part of the accused's body that was used for the touching, or from the circumstances surrounding the touching. Beyond that requirement, the question of whether or not the circumstances were indecent is for you to decide.

It is possible for the touching itself to be indecent – for example, because of the area of the body touched by the accused. In such a case, there may be no need to find any additional indecent circumstances – the elements of touching and indecency may both be satisfied by the one act.

In this case, the prosecution alleged that the touching was indecent because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that the circumstances in which NOA touched NOC were indecent.

Lack of Consent (Lawful Justification)

The fourth element that must be proven by the prosecution is that the touching occurred without any lawful justification. In this case, that means that the complainant was touched without his/her consent.

Consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the touching if s/he did not freely agree to be touched.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to be touched. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because he or she is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence the complainant did not indicate agreement, add the shaded section if relevant.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to be touched at the time of that act, you may find on that basis that s/he did not consent to that act.

In determining whether NOC did not freely agree to be touched, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of the alleged touching, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged touching.

In this case, the prosecution alleged that NOC did not consent. [*Refer to evidence supporting the prosecution case*]. The defence responded [*insert relevant evidence*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. For this element to be satisfied, the prosecution must prove to you, beyond reasonable doubt, that the complainant did not consent.

State of Mind of the Accused

The fifth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of the touching the accused was either:

- aware that the complainant was not consenting; or
- aware that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.[584]

Belief in Consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Summary

To summarise, before you can find NOA guilty of indecent assault the prosecution must prove each of the following elements to you beyond reasonable doubt:

One – that NOA touched NOC in the way alleged; and

Two – that NOA intended to touch NOC; and

Three – that the touching occurred in indecent circumstances.

Four – that NOC did not consent to the touching; and

Five – that at the time of the touching NOA was either:

- aware that NOC was not consenting; or

[584] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

- aware that NOC might not be consenting; and

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of indecent assault.

Last updated: 30 July 2023

7.3.7.4 Checklist: Indecent Assault (Pre-1/1/92) Consent in Issue

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused touched the complainant in the way alleged; and

2. The touching was intention; and

3. The touching occurred in indecent circumstances; and

4. There was no lawful justification for the touching; and

5. The accused was aware that the complainant was not or may not have been consenting at the time of the touching.

Assault

1. Did the accused touch the complainant in the way alleged?

If Yes, then go to 2

If No, then the accused is not guilty of indecent assault

Intention

2. Did the accused intend to touch the complainant in the way alleged?

If Yes, then go to 3

If No, then the accused is not guilty of indecent assault

Indecent circumstances

3. Did the touching occur in indecent circumstances?

Consider – Indecent circumstances requires a sexual connotation

If Yes, then go to 4

If No, then the accused is not guilty of indecent assault

Consent

4. Did the touching occur without the complainant's consent?

If Yes, then go to 5

If No, then the accused is not guilty of indecent assault

The Accused's State of Mind

5. At the time of the assault:

5.1. Was the accused aware that the complainant was not consenting?

If Yes, then go to 5.2

If No, then the accused is guilty of indecent assault (as long as you have answered questions 1, 2, 3 and 4)

5.2. Was the accused aware that the complainant might not be consenting?

If Yes, then the accused is guilty of indecent assault (as long as you have answered questions 1, 2, 3 and 4)

If No, then the accused is not guilty of indecent assault

Last updated: 12 September 2019

7.3.8 Abduction or Detention for a Sexual Purpose

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1. *Crimes Act 1958* s 47 creates the offence of 'Abduction or detention for a sexual purpose'.
2. The offence consists of four elements:
   i) The accused:
      - Takes away or detains the complainant; or
      - Causes the complainant to be taken away or detained by a third party
   ii) The complainant does not consent to being taken away or detained
   iii) The accused knows that:
      - The complainant does not consent to being taken away or detained; or
      - The complainant probably does not consent to being taken away or detained
   iv) The accused intends that:
      - The complainant will take part in a sexual act with the accused, a third party or both
      - The accused or a third party will marry the complainant (whether or not the complainant consents to being married).
3. As explained in *R v Nguyen and Tran* [1998] 4 VR 394, 409 and *Davis v R* [2006] NSWCCA 392, [34]–[38], 'abduction' offences have long existed as a particular form of kidnapping.

Commencement information and previous forms of offence

4. Section 47 was introduced through the *Crimes Amendment (Sexual Offences) Act 2016*, and replaced the previous abduction or detention offence in *Crimes Act 1958* s 55. The current form of the offence applies to conduct committed on or after 1 July 2017.

5. The principal difference between the current s 47 offence and the previous s 55 offence is that the s 47 offence is broader, as it covers an intention that the complainant 'take part in a sexual act', whereas the s 55 offence only applied to an intention that the complainant would take part in an act of sexual penetration.

6. The offence also differs from the much earlier *Crimes Act 1958* s 62 (as in force in 1975), which required that the taking away or detention be accomplished 'by force' (as discussed by Mason J in *R v Storey* (1978) 140 CLR 364).

Takes away or detains

7. The first element contains four possible forms of conduct:

    - The accused takes away the complainant personally
    - The accused detains the complainant personally
    - The accused causes the complainant to be taken away
    - The accused causes the complainant to be detained.

8. The accused 'takes away' the complainant when their acts are the effective cause of the complainant accompanying the accused to another place (*R v Fetherston* [2006] VSCA 278, [55]. See also *R v Wellard* [1978] 1 WLR 921).

9. While there must be some movement, there is no strict rule regarding how far the accused must take the complainant from the complainant's previous location. The sufficiency of the distance travelled is a jury question to be decided on the facts of the case (*R v Wellard* [1978] 1 WLR 921; *Davis v The Queen* [2006] NSWCCA 392, [33]. See, for a further example, *R v Mathe* [2003] VSCA 165, where dragging the complainant into a ditch beside a footpath was sufficient for an abduction).

10. The offence is complete at the point when the accused takes away or detains the complainant (or causes the complainant to be taken away or detained), provided the relevant lack of consent, knowledge and intention existed at that time (see *R v Manwaring & Ors* [1983] 2 NSWLR 82, 84).

Absence of consent

11. The second element is that the complainant did not consent to being taken away or detained.

12. Unlike the offence of kidnapping (see 7.4.20 Kidnapping (Statutory)), it is explicitly required that the taking away or the detention is without the complainant's consent.

13. As an offence in Subdivision (8A) of Division 1 of Part 1 of the *Crimes Act 1958*, the definition of consent in *Crimes Act 1958* s 36 and the deemed non-consent circumstances in *Crimes Act 1958* s 36AA may apply to this element (see *Crimes Act 1958* s 35). While several of the provisions in ss 36 and 36AA are limited to consent to sexual acts, some of provisions are capable on their face of applying to non-sexual consent. In such cases, it will be a question of statutory interpretation for the trial judge to determine whether the general language used in s 35 must be read down so that consent, for the purpose of s 47, carries its ordinary meaning, or whether it carries the ss 36 and 36AA meaning.

Accused's knowledge of absence of consent

14. The third element is that the accused knew that the complainant did not consent, or probably did not consent, to being taken away or detained (*Crimes Act 1958* s 47(1)(c)).

Purpose of accused

15. The fourth element concerns the intention of the accused at the time of the abduction or detention.

16. Section 47 (1)(d) provides two possible purposes of the accused for the abduction or detention:

    - That the complainant will take part in a sexual act with the accused, a third person or both; or
    - That the accused or a third person will marry the complainant.

17. Section 35C identifies that a person 'takes part in a sexual act' when the person is sexually penetrated or sexually touched. See 7.3.2 Rape (From 1/1/92) for information on the meaning of sexual penetration and 7.3.5 Sexual Assault for information on the meaning of sexual touching.

18. While it has not been authoritatively determined, it is likely that for the current form of s 47, the prosecution can bring a single charge identifying a number of possible people with whom the accused intended the complainant to take part in a sexual act with, even if that group of people includes the accused. This is consistent with the concluding words 'or both' in s 47(1)(d)(i) (compare *R v Manwaring* [1983] 2 NSWLR 82 per Street CJ and Miles J (Begg J contra)). However, the earlier version of the offence in *Crimes Act 1958* s 55 contained discrete sections depending on whether it was intended that complainant take part in a sexual act with, or marry, the accused or a third party and did not contain the words 'or both'. For that version of the offence, it is likely that a charge could not allege an intention that the complainant take part in an act of sexual penetration with a mix of people which includes both the accused and third parties.

19. Section 47(1)(d)(ii) makes clear that the complainant's consent to marriage is not relevant, but there is no equivalent statement in relation to the accused's intent that the complainant take part in a sexual act. Despite this, it is suggested that there is no basis to read in an additional element that the complainant did not or would not consent to the intended sexual act. As a modern, carefully drafted provision with explicit attention to the physical and mental elements of the offence, it is suggested that if Parliament wanted to require the prosecution to prove something additional about the complainant's state of mind (that the complainant not only did not consent to the taking away or detention, but also the accused's ultimate purpose), it could have said so.

Last updated: 4 March 2024

7.3.8.1 Charge: Abduction for a Sexual Purpose

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Note: This charge has been written on the basis that:

1. The abduction is for a sexual purpose (and not for the purpose of marriage); and

2. The accused intends to personally take part in a sexual act with the complainant (as distinct from an intention that one or more third parties take part in a sexual act with the complainant).

The charge must be modified if the case involves different issues.

I must now direct you about the crime of abduction for a sexual purpose. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – The accused took another person away.

Two – The other person did not consent to being taken away.

Three – The accused knew the other person did not consent or probably did not consent to being taken away.

Four – The accused intended that the other person would take part in a sexual act with the accused.

I will now explain each element in more detail.[585]

Abduction

The first element that the prosecution must prove is that the accused took another person away.

This requires the prosecution to prove that NOA took NOC away from where he was/she was/they were to some other place.

[*If NOA only took NOC a short distance, add the following shaded section.*]

The law does not set a minimum distance that must be travelled before this element may be met. It is a matter for you to decide whether NOA took NOC far enough from where NOC wished to be that you can say the accused took NOC away.

[*Summarise evidence and/or arguments.*]

Absence of consent

The second element that the prosecution must prove is that the complainant did not consent to being taken away.

Consent is a state of mind. The law says that consent means free and voluntary agreement. For this element the prosecution must prove that NOC did not freely and voluntarily agree to being taken away by NOA at the time.

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs.*]

The law says that a person can consent to something only if they are capable of consenting, and free to choose whether or not to engage in or to allow that act.

The law says that where a person has given their consent to something, they may withdraw that consent before that act happens, or while it is happening.

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following shaded section.*[586]]

In some circumstances the law says that the complainant did not freely agree, or consent, to being taken away. These circumstances include [*insert relevant section(s) from the following and apply to the evidence*:

(a) the person does not say or do anything to indicate consent to being taken away;

(b) the person submits to being taken away because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal, regardless of—

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[585] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[586] Note: The circumstances specified below only apply to offences alleged to have been committed on or after 30 June 2023. For offences before that date, see the relevant provisions in the *Crimes Act 1958* on deemed non-consent.

(i) when the force, harm or conduct giving rise to the fear occurs; and

(ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

(c) the person submits to being taken away because of coercion or intimidation—

(i) regardless of when the coercion or intimidation occurs; and

(ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

(d) the person submits to being taken away because the person is unlawfully detained;

(e) the person submits to being taken away because the person is overborne by the abuse of a relationship of authority or trust;

(f) the person is asleep or unconscious;

(g) the person is so affected by alcohol or another drug as to be incapable of consenting to being taken away;

(h) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to being taken away;

...

(k) the person is mistaken about the identity of any other person involved in the act;

(l) the person mistakenly believes they are being taken away for medical or hygienic purposes;

...

(p) having given consent to being taken away, the person later withdraws consent to being taken away or continuing to be taken away, and the accused does not stop taking the person away.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that he was/she was/they were not consenting.

However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting to being taken away, then this element will be proven.

[*Summarise evidence and/or arguments*.]

Knowledge of non-consent

The third element that the prosecution must prove is that the accused knew that the other person did not consent to being taken away or probably did not consent to being taken away.

This requires you to draw a conclusion about NOA's state of mind. You can look at the circumstances of the alleged acts, and what NOA and NOC said and did at the time.

[*Summarise evidence and/or arguments*.]

Intention to take part in a sexual act

The fourth element that the prosecution must prove is that the accused intended that the complainant would take part in a sexual act with the accused.

This requires the prosecution to prove that the accused intended that NOC would be sexually penetrated or be sexually touched by the accused, or would sexually penetrate or sexually touch the accused.

In this case, the prosecution argues that NOA intended that NOC would [*identify relevant act*].

I direct you as a matter of law that this is a sexual act for the purpose of the law. If you are satisfied that NOA intended that NOC would [*identify relevant act*], then you may find this element proved.

[*Summarise evidence and/or arguments*.]

Summary

To summarise, before you can find NOA guilty of detention for a sexual purpose the prosecution must prove to you beyond reasonable doubt:

One – That NOA took NOC away.

Two – That NOC did not consent to being taken away.

Three – That NOA knew NOC did not consent or probably did not consent to being taken away.

Four – That NOA intended that NOC would take part in a sexual act with the accused.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of abduction for a sexual purpose.

Last updated: 4 March 2024

7.3.8.2 Charge: Detention for a Sexual Purpose

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Note: This charge has been written on the basis that:

1. The detention is for a sexual purpose (and not for the purpose of marriage); and

2. The accused intends to personally take part in a sexual act with the complainant (as distinct from an intention that one or more third parties take part in a sexual act with the complainant).

The charge must be modified if the case involves different issues.

I must now direct you about the crime of detention for a sexual purpose. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – The accused detained another person.

Two – The other person did not consent to being detained.

Three – The accused knew the other person did not consent or probably did not consent to being detained.

Four – The accused intended that the other person would take part in a sexual act with the accused.

I will now explain each element in more detail.[587]

Detention

The first element that the prosecution must prove is that the accused detained another person.

This requires the prosecution to prove that NOA prevented NOC from freely moving from one place to another.

[*If it is alleged that the complainant was deprived of his/her liberty by non-physical means, add the following shaded section*.]

NOA does not need to have physically prevented NOC from moving. A person can be detained by [*insert relevant example, e.g.* "threats or other intimidating conduct"].

[*If the reasonableness of any means of escape are in issue, add the following shaded section*.]

In deciding whether NOA detained NOC, you must consider whether NOC had a reasonable means of escape. A person who has a reasonable means of escape is not detained.

To determine whether a means of escape was reasonable, you must consider [*describe factors relevant to the reasonableness of escape, including risks to the victim, risks to property, distance and time required to escape and the legality of the means of escape*].

It is for the prosecution to prove, beyond reasonable doubt, that NOC had no reasonable means of escape. If they are unable to do so, then you must find NOA not guilty of this offence.

[*Summarise evidence and/or arguments*.]

Absence of consent

The second element that the prosecution must prove is that the complainant did not consent to being detained.

Consent is a state of mind. The law says that consent means free and voluntary agreement. For this element the prosecution must prove that NOC did not freely and voluntarily agree to being detained by NOA at the time.

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs.*]

The law says that a person can consent to something only if they are capable of consenting, and free to choose whether or not to engage in or to allow that act.

The law says that where a person has given their consent to something, they may withdraw that consent before that act happens, or while it is happening.

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[587] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following shaded section.*[588]]

In some circumstances the law says that the complainant did not freely agree, or consent, to being detained. These circumstances include [*insert relevant section(s) from the following and apply to the evidence*:

(a) the person does not say or do anything to indicate consent to being detained;

(b) the person submits to being detained because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal, regardless of—

(i) when the force, harm or conduct giving rise to the fear occurs; and

(ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

(c) the person submits to being detained because of coercion or intimidation—

(i) regardless of when the coercion or intimidation occurs; and

(ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

…

(e) the person submits to being detained because the person is overborne by the abuse of a relationship of authority or trust;

(f) the person is asleep or unconscious;

(g) the person is so affected by alcohol or another drug as to be incapable of consenting to being detained;

(h) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to being detained;

…

(k) the person is mistaken about the identity of any other person involved in the act;

(l) the person mistakenly believes they are being detained for medical or hygienic purposes;

…

(p) having given consent to being detained, the person later withdraws consent to being detained or continuing to be detained.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that he was/she was/they were not consenting.

However, you do not need to consider this question only by reference to these particular

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[588] Note: The circumstances specified below only apply to offences alleged to have been committed on or after 30 June 2023. For offences before that date, see the relevant provisions in the *Crimes Act 1958* on deemed non-consent.

circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting to being detained, then this element will be proven.

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

[*Summarise evidence and/or arguments*.]

Knowledge of non-consent

The third element that the prosecution must prove is that the accused knew that the other person did not consent to being detained or probably did not consent to being detained.

This requires you to draw a conclusion about NOA's state of mind. You can look at the circumstances of the alleged detention, and what NOA and NOC said and did at the time.

[*Summarise evidence and/or arguments*.]

Intention to take part in a sexual act

The fourth element that the prosecution must prove is that the accused intended that the complainant would take part in a sexual act with the accused.

This requires the prosecution to prove that the accused intended that NOC would be sexually penetrated or be sexually touched by the accused, or would sexually penetrate or sexually touch the accused.

In this case, the prosecution argues that NOA intended that NOC would [*identify relevant act*].

I direct you as a matter of law that this is a sexual act for the purpose of the law. If you are satisfied that NOA intended that NOC would [*identify relevant act*], then you may find this element proved.

[*Summarise evidence and/or arguments*.]

Summary

To summarise, before you can find NOA guilty of detention for a sexual purpose the prosecution must prove to you beyond reasonable doubt:

One – That NOA detained NOC.

Two – That NOC did not consent to being detained.

Three – That NOA knew NOC did not consent or probably did not consent to being detained.

Four – That NOA intended that NOC would take part in a sexual act with the accused.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of detention for a sexual purpose.

Last updated: 4 March 2024

7.3.9 Incest (From 1/7/17)

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Operational period

1. The current incest offences in *Crimes Act 1958* sections 50C–50F came into force on 1 July 2017, replacing the former incest offences previously in s 44. For information on incest committed between 5 August 1991 and 30 June 2017, see 7.3.10 Incest (Pre-1/7/17).

Overview

2. Subdivision (8C) of the *Crimes Act 1958* contains four separate incest offences depending on the relationship between the accused and the complainant. These are:
    - Sexual penetration of a child or lineal descendant (s 50C);
    - Sexual penetration of a step-child (s 50D);
    - Sexual penetration of a parent, lineal ancestor or step-parent (s 50E);
    - Sexual penetration of a sibling or half-sibling (s 50F).
3. This topic first discusses matters common to each offence, and then examines any details particular to individual offences.

Elements

4. All incest offences involve the following three elements:

    i) The accused intentionally sexually penetrated the complainant or intentionally caused or allowed the complainant to sexually penetrate the accused;

    ii) The accused and the complainant are in the prescribed family relationship;

    iii) The accused knew about that relationship (*Crimes Act 1958* ss 50C, 50D, 50E, 50F).

5. The offence of sexual penetration of a parent, lineal ancestor or step-parent (s 50E) contains an additional element that the accused is 18 years or over.

Intentional sexual penetration

6. "Sexual penetration" is defined in s 35A of the *Crimes Act 1958.* See 7.3.2 Rape (From 1/1/92) for information about this definition.
7. The definition of the incest offences covers both the situation where the accused intentionally sexually penetrates the complainant and where the accused intentionally causes or allows the complainant to sexually penetrate the accused.
8. Intention is a fundamental element of the offence. The prosecution must show that the sexual penetration was intentional, in the sense that it was willed and consciously performed (*R v MG* (2010) 29 VR 305, [21]; *R v AJS* (2005) 12 VR 563, [25]).
9. While intention will often not be in issue, it is of paramount importance to direct the jury about this element when it is in issue (*R v AJS* (2005) 12 VR 563, [25]).
10. Due to the nature of the element, it will often be difficult to separate issues of intention and voluntariness.
11. Where the question of voluntariness is in issue (e.g. where the accused alleges that he or she was asleep at the time the act was performed), the jury should also be instructed that the act of penetration must have been conscious, voluntary and deliberate (*R v MG* (2010) 29 VR 305). See 7.1.1 Voluntariness for further information.

Prescribed family members

12. The four family relationships prescribed by Subdivision (8C) are:

    i) The children or lineal descendants of the accused (s 50C);

    ii) The children or lineal descendants of the accused's spouse or domestic partner (s 50D);

iii) The parents, lineal ancestors or step-parents of the accused (s 50E);

iv) The siblings or half-siblings of the accused (s 50F).

13. Adopted children are deemed to be the children of both their natural parents and their adoptive parents for the purposes of Subdivision (8C) (s 50A; *Adoption Act 1984* s 53(2)).

14. Section 50A of the *Crimes Act 1958* provides definitions of the following terms:

- Child, being a child by birth, genetic child, by adoption or due to the *Status of Children Act 1974*;
- Half-sibling, being a person who shares a common parent;
- Lineal ancestor, being a lineal ancestor of the person's parent (e.g. grandparent or beyond);
- Lineal descendant, being a lineal descendant of the person's child (e.g. grandchild or beyond);
- Parent, being a parent by birth, genetic parent, parent by adoption or parent due to the *Status of Children Act 1974*;
- Sibling, being a person who has the same parents as the person;
- Step-parent, being the spouse or domestic partner of A's parent, where that person is not A's parent.

15. Section 35 of the Act defines 'domestic partner' as

(a) a person who is in a registered domestic relationship with the person; or

(b) a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender or gender identity)".

16. *Crimes Act 1958* s 35 also states:

> In determining whether persons who are not in a registered domestic relationship are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the *Relationships Act 2008* as may be relevant in a particular case.

17. *Relationships Act 2008* s 35(2) lists eight circumstances which may be taken into account to determine whether there is a domestic relationship:

(a) the degree of mutual commitment to a shared life;

(b) the duration of the relationship;

(c) the nature and extent of common residence;

(d) whether or not a sexual relationship exists;

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(f) the ownership, use and acquisition of property;

(g) the care and support of children;

(h) the reputation and public aspects of the relationship.

18. The Act provides a rebuttable presumption that people who are reputed to be related to each other in a particular way are in fact related in that way (*Crimes Act 1958* s 50B).

19. Prior to the commencement of s 50D (Sexual penetration of a step-chlid), the previous equivalent offence applied to the children, step-children and lineal descendants of the accused's "de facto spouse" (see *Crimes Act 1958* s 44(2), as in force before 1 July 2017). "De facto spouse" was defined as

> a person who is living with a person of the opposite sex *as if they were married* although they are not (*Crimes Act 1958* s 35, repealed 1 July 2017).

20. When assessing whether there was a de facto relationship, the jury was told to consider whether the accused exercises any parental responsibility for the children of the alleged de–facto spouse, including:

> (a) the role played, and responsibility assumed, by the accused with respect to the child(ren);
> (b) the authority exercised by the accused over the child(ren); and/or
> (c) the view which the child(ren) and the accused respectively had of the nature of the relationship between them (*Sutton v R* (2015) 47 VR 496, [36]).

21. However, under the previous provisions, it was generally undesirable for judges to expand on the statutory definition of "de–facto spouse" as the statutory definition called for the jury to apply its common sense and experience to evaluate the relationship of the parties and compare it to their understanding of marriage relationships. This allowed the jury to accommodate varied and even conflicting concepts of marriage–like relationships. Providing a list of factors relevant to assessing whether the relationship is marriage–like was thought to risk impermissibly interfering with the jury's assessment of what makes a relationship marriage–like (*Sutton v R* (2015) 47 VR 496, [53]. See also *King v R* (2011) 34 VR 106, [2]–[9] (Neave JA)).

22. The factors listed in *Relationships Act 2008* s 35(2) closely resemble the factors identified by Powell J in *D v McA* (1986) 11 Fam LR 214 as indicia of a de facto relationship. In *R v King* (2011) 34 VR 106, [30], Bongiorno JA observed in relation to the former incest offences that, depending on the issues, some of the *D v McA* factors may be of greater or lesser importance. In contrast, Neave JA stated that directions would be over-complicated if judges routinely had to refer to all of the *D v McA* factors. Later, in *Sutton v R* (2015) 47 VR 496, [34]–[37], Maxwell P and Redlich JA observed that evidence about the relationship between the accused and the partner's children will likely to carry more weight relative to other factors than it would in statutory regimes concerned with distribution of property.

23. In cases where the jury must determine whether two people were in a domestic relationship, judges should seek submissions on what directions are necessary in relation to the definition of domestic relationship in *Crimes Act 1958* s 35. Parties should identify whether all the *Relationship Act 2008* s 35(2) considerations are relevant, or whether the selection of factors depends on the fact that the question arises in the context of a prosecution for incest. If the selection of factors is limited, then, consistent with *R v King*, and *Sutton v R*, the jury will likely need to focus on the degree of mutual commitment to a shared life (s 35(2)(a)), the duration of the relationship (s 35(2)(b)) and the care and support of children (s 35(2)(g)).

Knowledge of the family relationship

24. The third common element is that the accused knows that they are related to the complainant in the way alleged (*Crimes Act 1958* ss 50C, 50D, 50E, 50F).

25. The accused is presumed to know that they are related to the other person in the way alleged. This presumption can be rebutted by evidence to the contrary (*Crimes Act 1958* s 50B).

26. However, there must be evidence of the particular prescribed relationship before the presumption in s 50B can be engaged. Evidence of a reputed relationship with one person which provides a basis for inferring another relationship may not be sufficient. For example, in *R v Umanski* [1961] VR 242 at 249, the Court held that admissions by A and B that they were married (and evidence from other witnesses that A and B were reputed to be married) were not sufficient to establish that A's daughter, C, was reputed to be B's step-daughter.

Additional element – Incest against a parent, lineal ancestor or step-parent

27. For alleged offences against s 50E (incest against a parent, lineal ancestor or step-parent) there is an additional element. The prosecution must prove that the accused was 18 years of age or more (*Crimes Act 1958* s 50E(1)(b)).

Marriage

28. Where it is necessary to prove that particular parties were married, there must be strict proof of the marriage. It is not sufficient to rely solely on admissions of the accused as to the marriage, or on evidence of co-habitation (*R v Umanski* [1961] VR 242).

Defences

Medical or hygienic purposes

29. For all incest offences, the accused does not commit the offence if the accused's conduct occurs in the course of a procedure carried out in good faith for medical or hygienic purposes (*Crimes Act 1958* s 50G).

Non consent of accused

30. For all incest offences, the accused does not commit the offence if he or she did not consent to the conduct constituting the offence (*Crimes Act 1958* s 50H).

31. Where this issue is raised on the evidence, the prosecution bears the onus of rebutting the defence.

32. This defence of consent replaces the previous defence of 'compulsion' (see *Crimes Act 1958* s 44(6) and (6A) as in force before 1 July 2017).

Exception for alleged incest against a step-child

33. In proceedings for a charge against s 50D (incest against a step-child), the accused does not commit the offence if at the time of the alleged offence:

    i) The complainant is 18 years of age or more;

    ii) The accused did not engage in sexual activity with the complainant when the complainant was under 18 years of age; and

    iii) The complainant has not at any time been under the accused's care, supervision or authority (*Crimes Act 1958* s 50I).

34. The term 'care, supervision or authority' is defined in *Crimes Act 1958* s 37. For information on this phrase, see 7.3.14 Sexual Penetration of a 16 or 17 Year Old Child (From 1/7/17).

35. Where this issue is raised on the evidence, the prosecution bears the onus of rebutting the defence.

Exceptions for alleged incest against parent, lineal ancestor or step-parent

36. In proceedings for a charge against s 50E (incest against a parent, lineal ancestor or step-parent), the accused does not commit the offence if at the time of the alleged offence:

    i) The complainant is the accused's step-parent; and

    ii) The accused has not at any time been under the complainant's care, supervision or authority (*Crimes Act 1958* s 50J(1)).

37. The *Crimes Act 1958* also provides that s 50E does not apply if the complainant had engaged in sexual activity with the accused when the accused was under 18 years of age (*Crimes Act 1958* s 50J(2)).

38. The effect of s 50J(2) is that continued sexual activity between a child and a parent, lineal ancestor or step-parent before and after the child turns 18 is not an offence by the child.

Consent of complainant not a defence

39. Consent of the complainant is not a defence to a charge of incest (s 50K).

Other Relevant Matters

40. Depending on the circumstances of the case, the trial judge may need to consider the following issues in relation to incest cases:

    - Indemnities;
    - Criminally concerned witness warnings (but see *R v Ware* (10/3/1994 SC Vic), in which Coldrey J held, after a review of the authorities, that it was not appropriate to class a complainant as an accomplice in an incest case);
    - Possible exemptions from being compelled to give evidence in a case involving certain family members (*Evidence Act 2008* s 18);
    - The privilege against self-incrimination.

41. In proceedings for a charge of incest, it is not appropriate for the prosecutor, the judge or a witness to describe the conduct as "rape". While it may not be practical to prevent a witness from using that term, the prosecutor and the judge should not adopt the same practice. Where a witness has used the term "rape" to describe sexual penetration, the judge should make clear to the jury that the term has been used inaccurately, that the charge is one of incest, not rape and that the jury should not be distracted by the use of that word (see *Packard v R* [2018] VSCA 45, [163]–[168] (Beach JA and Beale AJA), [108] (Priest JA)).

Last updated: 19 March 2018

7.3.9.1 Charge: Incest with Child or Lineal Descendant (From 1/7/17)

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This charge concerns acts of sexual penetration involving the accused and his or her child or lineal descendant (s 50C).

The elements

I must now direct you about the crime of incest. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused intentionally sexually penetrated NOC.[589]

Two – NOC is the accused's [*insert relevant family relationship*, e.g. son/daughter/grandson/granddaughter].

Three – the accused knew that NOC was [his/her] [*insert relevant family relationship*].

I will now explain each of these elements in more detail.

Sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant, NOC.

The prosecution seeks to prove this element by showing that NOA [*describe relevant form of penetration,* e.g. "put his finger into NOC's anus"]. I direct you as a matter of law that if you find that NOA did this, then the prosecution has proved this first element.

[*If relevant add:*

- [*Identify item or body part and actor*] does not need to have gone all the way into NOC's [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface,* e.g. "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[589] If the charge involves the accused causing or allowing the complainant to sexually penetrate the accused, these directions must be modified accordingly.

[*If the evidence or arguments have placed the intentional or voluntary nature of the acts in issue, add the following shaded section.*[590]]

For this element to be met, the act of [*describe relevant act of penetration, e.g.* "introducing his finger into NOC's anus"] must have been done intentionally.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves intention in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced [*identify body part or object*] to any extent between the outer lips of NOC's vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in the course of a procedure carried out in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in the course of a procedure carried out in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Relationship to the other participant

The second element that the prosecution must prove is that NOC is the accused's [*insert relevant family relationship*].

This matter is not in dispute and so you should have no difficulty finding that NOC is NOA's [*insert family relationship*].[591]

Knowledge of relationship

The third element that the prosecution must prove is that the accused knew that NOC was [his/her] [*insert relevant family relationship*].

It has not been disputed that NOA knew that NOC was [his/her] [*insert relevant relationship*]. You should therefore have no difficulty finding this element proved.[592]

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[590] Because of how the offence is defined, the issue of intention is likely inseparable from the question of voluntariness. Where the issue is raised, the judge should direct the jury on the specific matters the jury must consider to find that the accused's conduct was voluntary and intentional (e.g. disproof of accident or proof that the accused was conscious).

[591] If the relationship between the accused and NOC has been disputed, this section of the charge will need to be modified accordingly.

[592] If the accused's knowledge of their relationship to the other party has been disputed, this section of the charge will need to be modified accordingly.

Defences

Non-consent of accused

[*If the accused relies on the non-consent defence in Crimes Act 1958 s 50H, add the following shaded section.*]

In this case, there is an additional matter the prosecution must prove before you can find NOA guilty of incest.

The prosecution must prove that the accused consented to the sexual penetration. That is, the prosecution must show that NOA freely agreed to [*identify relevant conduct*].

[*If the evidence raises the possibility that one of the circumstances listed in Crimes Act 1958 s 36(2) exists, add the following darker shaded section.*]

In order to show that NOA freely agreed to sexually penetrate NOC, the prosecution must also show that NOA:

[*Insert the following statements as appropriate*:

(a) Did not submit to the act because of force or fear of force, whether to NOA or to someone else;

(b) Did not submit to the act because of fear of harm of any type, whether to NOA or someone else or an animal;

(c) Did not submit to the act because NOA was unlawfully detained;

(d) Was not asleep or unconscious;

(e) Was not so affected by alcohol or another drug as to be incapable of consenting to the act;

(f) Was not so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

(g) Was capable of understanding the sexual nature of the act;

(h) Was not mistaken about the sexual nature of the act;

(i) Was not mistaken about the identity of any other person involved in the act;

(j) Did not mistakenly believe that the act was for medical or hygienic purposes;

(k) Said or did something to indicate consent; and

(l) Having given consent to the act, did not later withdraw consent to the act taking place or continuing.

Remember though that even if you accept that [*refer to relevant s 36(2) circumstance, e.g.* "NOA was not asleep or unconscious"], you must still decide whether the prosecution has proved, beyond reasonable doubt, that NOA consented to the sexual penetration alleged. Finding that [*refer to relevant s 36(2) circumstance as described above*] only removes one barrier to finding that NOA consented.

[*Refer to relevant prosecution and defence evidence and arguments*].

Summary

To summarise, before you can find NOA guilty of incest, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA intentionally sexually penetrated NOC; and

- Two – that NOC is NOA's [*insert family relationship*]; and
- Three – that NOA knew that NOC was [his/her] [*insert family relationship*].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of Incest.

Last updated: 19 March 2018

7.3.9.2 Charge: Incest with Step-Child (From 1/7/17)

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This charge concerns acts of sexual penetration involving the accused and the step-child or lineal descendants of the accused's spouse or domestic partner (s 50D).

The elements

I must now direct you about the crime of incest. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused intentionally sexually penetrated NOC.[593]

Two – NOC is a [child/lineal descendant] of NOA's [spouse/domestic partner].

Three – NOA knew that NOC was a [child/lineal descendant] of [his/her] [spouse/domestic partner].

I will now explain each of these elements in more detail.

Sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant, NOC.

The prosecution seeks to prove this element by showing that NOA [*describe relevant form of penetration, e.g.* "put his finger into NOC's anus"]. I direct you as a matter of law that if you find that NOA did this, then the prosecution has proved this first element.

[If relevant add:

- [*Identify item or body part and actor*] does not need to have gone all the way into NOC's [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[593] If the charge involves the accused causing or allowing the complainant to sexually penetrate the accused, these directions must be modified accordingly.

[*If the evidence or arguments have placed the intentional or voluntary nature of the acts in issue, add the following shaded section.*[594]]

For this element to be met, the act of [*describe relevant act of penetration, e.g.* "introducing his finger into NOC's anus"] must have been done intentionally.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves intention in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced [*identify body part or object*] to any extent between the outer lips of NOC's vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in the course of a procedure carried out in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in the course of a procedure carried out in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Relationship to the other participant

The second element that the prosecution must prove is that NOC is the [child/lineal descendant] of NOA's [spouse/domestic partner].

[*If the parties are married or in a registered domestic relationship, add the following shaded section.*]

The law says that two people are [spouses/domestic partners] if they are [married/in a registered domestic relationship]. You have heard evidence that [*identify relevant evidence*]. You should therefore have no difficulty finding this element proved.

[*If the jury must determine whether NOA is the domestic partner of the child's parent or ancestor, add the following shaded section.*]

[Warning! The law on the relevance of the factors (a) to (h) below is uncertain. Judges should seek submissions on which factors are relevant. See Incest (From 1/7/17) for guidance.]

For this element, you must determine whether NOP[595] and NOA are domestic partners. The law says that two people are domestic partners when they are not married but are living together as a

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[594] Because of how the offence is defined, the issue of intention is likely inseparable from the question of voluntariness. Where the issue is raised, the judge should direct the jury on the specific matters the jury must consider to find that the accused's conduct was voluntary and intentional (e.g. disproof of accident or proof that the accused was conscious).

[595] Name of the complainant's parent or lineal ancestor.

couple on a genuine domestic basis [*if relevant, add*: regardless of gender or gender identity].

To determine whether two people are domestic partners, you must look at all the circumstances of their relationship. These include [*add the following as relevant in the context of the case:*

(a) the degree of mutual commitment to a shared life;

(b) the duration of the relationship;

(c) the nature and extent of common residence;

(d) whether or not a sexual relationship exists;

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(f) the ownership, use and acquisition of property;

(g) the care and support of children;

(h) the reputation and public aspects of the relationship.]

The prosecution argues that [*refer to relevant prosecution evidence and arguments*]. The defence dispute this, saying [*refer to relevant evidence and arguments*].

Knowledge of relationship

The third element that the prosecution must prove is that the accused knew that NOC was a [child/lineal descendant] of [his/her] [spouse/domestic partner].

[*If the prosecution argues that NOA is married or in a registered domestic relationship, add the following shaded section*.]

It has not been disputed that NOA knew that NOC was a [child/lineal descendant] of [his/her] [spouse/domestic partner]. You should therefore have no difficulty finding this element proved.[596]

[*If the prosecution argues that NOA is in an unregistered domestic relationship, add the following shaded section*.]

[Warning! The operation of this element is uncertain. Judges should seek submissions from the parties]

As you are aware, in this case the prosecution says that NOA and NOP were in an unregistered domestic relationship.

To prove this element, the prosecution must therefore prove that NOA knew that NOC was a [child/lineal descendant] of NOP and must know the facts that gave rise to NOA and NOP being in an unregistered domestic relationship.

You are not looking at whether NOA thought that NOP was [his/her] domestic partner. Your focus must be on whether NOA knew or was aware of the objective factors which meant that [s/he] and NOP were domestic partners. That is, did NOA know, or was NOA aware, of the factors which an outside observer would use to conclude that [s/he] and NOP were living together as a couple on a

[596] If the accused's knowledge of their relationship to the other party has been disputed, this section of the charge will need to be modified accordingly.

genuine domestic basis?

[*Refer to relevant evidence and arguments.*]

Defences

Non-consent of accused

[*If the accused relies on the non-consent defence in Crimes Act 1958 s 50H, add the following shaded section.*]

In this case, there is an additional matter the prosecution must prove before you can find NOA guilty of incest.

The prosecution must prove that the accused consented to the sexual penetration. That is, the prosecution must show that NOA freely agreed to [*identify relevant conduct*].

[*If the evidence raises the possibility that one of the circumstances listed in Crimes Act 1958 s 36(2) exists, add the following darker shaded section.*]

In order to show that NOA freely agreed to sexually penetrate NOC, the prosecution must also show that NOA:

[*Insert the following statements as appropriate*:

(a) Did not submit to the act because of force or fear of force, whether to NOA or to someone else;

(b) Did not submit to the act because of fear of harm of any type, whether to NOA or someone else or an animal;

(c) Did not submit to the act because NOA was unlawfully detained;

(d) Was not asleep or unconscious;

(e) Was not so affected by alcohol or another drug as to be incapable of consenting to the act;

(f) Was not so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

(g) Was capable of understanding the sexual nature of the act;

(h) Was not mistaken about the sexual nature of the act;

(i) Was not mistaken about the identity of any other person involved in the act;

(j) Did not mistakenly believe that the act was for medical or hygienic purposes;

(k) Said or did something to indicate consent; and

(l) Having given consent to the act, did not later withdraw consent to the act taking place or continuing.

Remember though that even if you accept that [*refer to relevant s 36(2) circumstance, e.g.* NOA was not asleep or unconscious], you must still decide whether the prosecution has proved, beyond reasonable doubt, that NOA consented to the sexual penetration alleged. Finding that [*refer to relevant s 36(2) circumstance as described above*] only removes one barrier to finding that NOA consented.

[*Refer to relevant prosecution and defence evidence and arguments*].

No history of care, supervision or authority

[*If the accused relies on the defence under Crimes Act 1958 s 50I, add the following shaded section.*]

For this offence, the law recognises a defence. There are three parts to this defence.

First, NOC was aged 18 years or more at the time of the relevant acts. There is no dispute about this.

Second, NOA must not have engaged in sexual activity with NOC when NOC was under 18 years of age. The prosecution disputes this.

Third, NOC must not, at any time, have been under NOA's care, supervision or authority. The prosecution also disputes this.

As I told you at the start of the trial, the prosecution must prove the accused's guilt. This means the prosecution must prove that the defence does not apply. In other words, the prosecution must either prove that NOA engaged in sexual activity with NOC when NOC was under 18 years of age or the prosecution must prove that at some time NOC was under NOA's care, supervision or authority.

[*Refer to relevant evidence and arguments regarding possible sexual activity between NOC and NOA before NOC turned 18 years of age.*]

[*If care, supervision or authority is in issue and the prosecution relies on a prescribed relationship, add the following darker shaded section.*]

Parliament has defined a number of relationships where a child is deemed to be under the care, supervision and authority of another person. This includes [*name relevant relationships from s 37 list*].

In this case the prosecution alleged that NOA had been NOC's [*describe relationship*]. [*Insert prosecution evidence.*] The defence responded [*insert relevant evidence and/or arguments*].

If you find beyond reasonable doubt that NOA had been NOC's [*identify relationship*] [*identify relevant time*], the prosecution has proved this defence does not apply. If the prosecution has also proved the three elements of the offence, then you may find NOA guilty of the charge of incest.

[*If care, supervision or authority* is in issue *and the prosecution does not rely on a prescribed relationship, add the following darker shaded section.*]

The words "care, supervision or authority" all describe different types of relationships where one person is in a position to exploit or take advantage of that relationship to influence a child to engage in an act of sexual penetration. You should take this into account when deciding whether the prosecution has proved that NOC was ever under NOA's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that NOA would take care of NOC. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add:* You do not need to find that the alleged act of penetration was actually connected with, or influenced by, the relationship of care, supervision or authority. It is sufficient if you are satisfied that at some time, NOC had been under NOA's care, supervision or authority.]

In this case the prosecution alleged that NOC had been under NOA's [care/supervision/authority]. [*Insert prosecution evidence.*] The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOC had been under NOA's care, supervision or authority at a time before the alleged offence. Unless the prosecution has proved that NOC had been under NOA's care, supervision or authority at an earlier time, you must find NOA not guilty of this offence.

[*If the accused may be unaware of the facts giving rise to a relationship of care, supervision or authority, add the following darker shaded section.*[597]]

The law states that NOA must know and be aware of the facts that gave rise to a relationship of care, supervision or authority. For example, if NOA did not recognise that NOC had been his/her [*describe relevant relationship*], then the prosecution could not prove the defence does not apply. In other words, the prosecution could not prove NOA's guilt.

[*Insert relevant prosecution and defence evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of incest, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA intentionally sexually penetrated NOC; and
- Two – that NOC is a [child/lineal descendant] of NOA's [spouse/domestic partner]; and
- Three – that NOA knew that NOC was a [child/lineal descendant] of [his/her] [spouse/domestic partner].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of Incest.

Last updated: 19 March 2018

7.3.9.3 Charge: Incest with Sibling or Half-Sibling (From 1/7/17)

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This charge concerns acts of sexual penetration involving the accused and the accused's sibling or step-sibling (s 50F).

The elements

I must now direct you about the crime of incest. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused intentionally sexually penetrated NOC.[598]

Two – NOC is NOA's [brother/sister/half-brother/half-sister].

Three – NOA knew that NOC was [his/her] [brother/sister/half-brother/half-sister].

I will now explain each of these elements in more detail.

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[597] Warning! Judges should seek submissions from parties as to whether this direction is required, as it is adapted from caselaw developed in a different context.

[598] If the charge involves the accused causing or allowing the complainant to sexually penetrate the accused, these directions must be modified accordingly.

Sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant, NOC.

The prosecution seeks to prove this element by showing that NOA [*describe relevant form of penetration, e.g.* "put his finger into NOC's anus"]. I direct you as a matter of law that if you find that NOA did this, then the prosecution has proved this first element.

[If relevant add:

- [*Identify item or body part and actor*] does not need to have gone all the way into NOC's [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the intentional or voluntary nature of the acts in issue, add the following shaded section.*[599]]

For this element to be met, the act of [*describe relevant act of penetration, e.g.* "introducing his finger into NOC's anus"] must have been done intentionally.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves intention in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced [*identify body part or object*] to any extent between the outer lips of NOC's vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in the course of a procedure carried out in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in the course of a procedure carried out in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

---

[599] Because of how the offence is defined, the issue of intention is likely inseparable from the question of voluntariness. Where the issue is raised, the judge should direct the jury on the specific matters the jury must consider to find that the accused's conduct was voluntary and intentional (e.g. disproof of accident or proof that the accused was conscious).

Relationship to the other participant

The second element that the prosecution must prove is that NOC is NOA's [brother/sister/half-brother/half-sister].

This matter is not in dispute and so you should have no difficulty finding that NOC is NOA's [*insert family relationship*].[600]

Knowledge of relationship

The third element that the prosecution must prove is that the accused knew that NOC was [his/her] [brother/sister/half-brother/half-sister].

It has not been disputed that NOA knew that NOC was [his/her] [*insert relevant relationship*]. You should therefore have no difficulty finding this element proved.[601]

Defences

Non-consent of accused

[*If the accused relies on the non-consent defence in Crimes Act 1958 s 50H, add the following shaded section.*]

In this case, there is an additional matter the prosecution must prove before you can find NOA guilty of incest.

The prosecution must prove that the accused consented to the sexual penetration. That is, the prosecution must show that NOA freely agreed to [*identify relevant conduct*].

[*If the evidence raises the possibility that one of the circumstances listed in Crimes Act 1958 s 36(2) exists, add the following darker shaded section.*]

In order to show that NOA freely agreed to sexually penetrate NOC, the prosecution must also show that NOA:

[*Insert the following statements as appropriate*:

(a) Did not submit to the act because of force or fear of force, whether to NOA or to someone else;

(b) Did not submit to the act because of fear of harm of any type, whether to NOA or someone else or an animal;

(c) Did not submit to the act because NOA was unlawfully detained;

(d) Was not asleep or unconscious;

(e) Was not so affected by alcohol or another drug as to be incapable of consenting to the act;

(f) Was not so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

---

[600] If the relationship between the accused and NOC has been disputed, this section of the charge will need to be modified accordingly.

[601] If the accused's knowledge of their relationship to the other party has been disputed, this section of the charge will need to be modified accordingly.

(g) Was capable of understanding the sexual nature of the act;

(h) Was not mistaken about the sexual nature of the act;

(i) Was not mistaken about the identity of any other person involved in the act;

(j) Did not mistakenly believe that the act was for medical or hygienic purposes;

(k) Said or did something to indicate consent; and

(l) Having given consent to the act, did not later withdraw consent to the act taking place or continuing.

Remember though that even if you accept that [*refer to relevant s 36(2) circumstance, e.g.* NOA was not asleep or unconscious], you must still decide whether the prosecution has proved, beyond reasonable doubt, that NOA consented to the sexual penetration alleged. Finding that [*refer to relevant s 36(2) circumstance as described above*] only removes one barrier to finding that NOA consented.

[*Refer to relevant prosecution and defence evidence and arguments*].

Summary

To summarise, before you can find NOA guilty of incest, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA intentionally sexually penetrated NOC; and
- Two – that NOC is NOA's [brother/sister/half-brother/half-sister]; and
- Three – that NOA knew that NOC was [his/her] [brother/sister/half-brother/half-sister].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of Incest.

Last updated: 19 March 2018

7.3.9.4 Checklist: Incest with Child, Lineal Descendant, Step-Child or Sibling (From 1/7/17)

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Three elements the prosecution must prove beyond reasonable doubt:

1.The accused intentionally sexually penetrated the complainant;[602] and

2.The complainant is the [*insert relevant family relationship*] of the accused; and

3.The accused knew that the complainant was [his/her] [*insert relevant family relationship*].

Accused's Acts

1. Did the accused intentionally sexually penetrate the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of Incest

[602] If the charge involves the accused causing or allowing the complaint to sexually penetrate the accused, the checklist must be modified accordingly.

Relationship between the Accused and the Complainant

2. Is the complainant the [*insert relevant family relationship*] of the accused?

If Yes, then go to 3

If No, then the accused is not guilty of Incest

Knowledge of the Accused

3. Did the accused know that the complainant was [his/her] [*insert relevant family relationship*]?

If Yes, then the accused is guilty of Incest (as long as you have also answered yes to questions 1 and 2)

If No, then the accused is not guilty of Incest

7.3.9.5 Charge: Incest with Parent, Lineal Ancestor or Step-Parent (From 1/7/17)

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This charge concerns acts of sexual penetration involving the accused and the accused's father, mother, step-father, step-mother or lineal ancestor (s 50E).

The elements

I must now direct you about the crime of incest. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt.

One – the accused intentionally sexually penetrated NOC.[603]

Two – NOC is the accused's [*insert relevant family relationship, i.e.* "father", "mother", "step-father", "step-mother", "grandfather" or "grandmother"].

Three – the accused knew that NOC was [his/her] [*insert relevant family relationship*].

Four – the accused was aged 18 or older at the time of sexual penetration.

I will now explain each of these elements in more detail.

Sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant, NOC.

The prosecution seeks to prove this element by showing that NOA [*describe relevant form of penetration, e.g.* "put his finger into NOC's anus"]. I direct you as a matter of law that if you find that NOA did this, then the prosecution has proved this first element.

[If relevant add:

[603] If the charge involves the accused causing or allowing the complainant to sexually penetrate the accused, these directions must be modified accordingly.

- [*Identify item or body part and actor*] does not need to have gone all the way into NOC's [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the intentional or voluntary nature of the acts in issue, add the following shaded section.*[604]]

For this element to be met, the act of [*describe relevant act of penetration, e.g.* "introducing his finger into NOC's anus"] must have been done intentionally.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves intention in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced [*identify body part or object*] to any extent between the outer lips of NOC's vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in the course of a procedure carried out in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in the course of a procedure carried out in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Relationship to the other participant

The second element that the prosecution must prove is that NOC is the [*insert relevant family relationship*] of the accused.

This matter is not in dispute and so you should have no difficulty finding that NOC is NOA's [*insert family relationship*].[605]

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[604] Because of how the offence is defined, the issue of intention is likely inseparable from the question of voluntariness. Where the issue is raised, the judge should direct the jury on the specific matters the jury must consider to find that the accused's conduct was voluntary and intentional (e.g. disproof of accident or proof that the accused was conscious).

[605] If the relationship between the accused and NOC has been disputed, this section of the charge will need to be modified accordingly.

Knowledge of relationship

The third element that the prosecution must prove is that the accused knew that NOC was [his/her] [*insert relevant family relationship*].

It has not been disputed that NOA knew that NOC was [his/her] [*insert relevant relationship*]. You should therefore have no difficulty finding this element proved.[606]

Age of the accused

The fourth element that the prosecution must prove is that the accused was aged 18 or older at the time of the sexual penetration.

In this case, it has not been disputed that NOA was at least 18 years of age at the time the alleged act of sexual penetration took place. The main issue in this case is [*insert relevant issue*].[607]

Defences

Non-consent of accused

[*If the accused relies on the non-consent defence in Crimes Act 1958 s 50H, add the following shaded section.*]

In this case, there is an additional matter the prosecution must prove before you can find NOA guilty of incest.

The prosecution must prove that the accused consented to the sexual penetration. That is, the prosecution must show that NOA freely agreed to [*identify relevant conduct*].

[*If the evidence raises the possibility that one of the circumstances listed in Crimes Act 1958 s 36(2) exists, add the following darker shaded section.*]

In order to show that NOA freely agreed to sexually penetrate NOC, the prosecution must also show that NOA:

[*Insert the following statements as appropriate*:

(a) Did not submit to the act because of force or fear of force, whether to NOA or to someone else;

(b) Did not submit to the act because of fear of harm of any type, whether to NOA or someone else or an animal;

(c) Did not submit to the act because NOA was unlawfully detained;

(d) Was not asleep or unconscious;

(e) Was not so affected by alcohol or another drug as to be incapable of consenting to the act;

---

[606] If the accused's knowledge of their relationship to the other party has been disputed, this section of the charge will need to be modified accordingly. If the defence raises evidence in rebuttal of the presumption in s 50B, it is for the prosecution to prove knowledge of the relationship beyond reasonable doubt. There is no onus of proof on the defence.

[607] If the accused's age has been disputed, this section of the charge will need to be modified accordingly.

(f) Was not so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

(g) Was capable of understanding the sexual nature of the act;

(h) Was not mistaken about the sexual nature of the act;

(i) Was not mistaken about the identity of any other person involved in the act;

(j) Did not mistakenly believe that the act was for medical or hygienic purposes;

(k) Said or did something to indicate consent; and

(l) Having given consent to the act, did not later withdraw consent to the act taking place or continuing.

Remember though that even if you accept that [*refer to relevant s 36(2) circumstance, e.g.* NOA was not asleep or unconscious], you must still decide whether the prosecution has proved, beyond reasonable doubt, that NOA consented to the sexual penetration alleged. Finding that [*refer to relevant s 36(2) circumstance as described above*] only removes one barrier to finding that NOA consented.

[*Refer to relevant prosecution and defence evidence and arguments.*]

No history of care, supervision or authority

[*If the accused relies on the defence under Crimes Act 1958 s 50J(1), add the following shaded section.*]

For this offence, the law recognises a defence. There are two parts to this defence.

First, NOC must be NOA's step-parent. This is not in dispute.

Second, NOA must not, at any time, have been under NOC's care, supervision or authority. The prosecution disputes this.

As I told you at the start of the trial, the prosecution must prove the accused's guilt. This means the prosecution must prove that the defence does not apply. In other words, the prosecution must prove that at some time NOA was under NOC's care, supervision or authority.

[*If care, supervision or authority is in issue and the prosecution relies on a prescribed relationship, add the following darker shaded section.*]

Parliament has defined a number of relationships where a child is deemed to be under the care, supervision and authority of another person. This includes [*name relevant relationships from s 37 list*].

In this case the prosecution alleged that NOC had been NOA's [*describe relationship*]. [*Insert prosecution evidence*]. The defence responded [*insert relevant evidence and/or arguments*].

If you find beyond reasonable doubt that NOC had been NOA's [*identify relationship*] [*identify relevant time*], the prosecution has proved this defence does not apply. If the prosecution has also proved the four elements of the offence then you may find NOA guilty of the charge of incest.

[*If care, supervision or authority is in issue and the prosecution does not rely on a prescribed relationship, add the following darker shaded section.*]

The words "care, supervision or authority" all describe different types of relationships where one person is in a position to exploit or take advantage of that relationship to influence a child to engage in an act of sexual penetration. You should take this into account when deciding whether the prosecution has proved that NOA was ever under NOC's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for

example, have to have been a formal agreement that NOC would take care of NOA. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add:* You do not need to find that the alleged act of penetration was actually connected with, or influenced by, the relationship of care, supervision or authority. It is sufficient if you are satisfied that at some time, NOA had been under NOC's care, supervision or authority.]

In this case the prosecution alleged that NOA had been under NOC's [care/supervision/authority]. [*Insert prosecution evidence*]. The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOA had been under NOC's care, supervision or authority at a time before the alleged offence. Unless the prosecution has proved that NOA had been under NOC's care, supervision or authority at an earlier time, you must find NOA not guilty of incest.

[*If the accused may be unaware of the facts giving rise to a relationship of care, supervision or authority, add the following darker shaded section*.[608]]

The law states that NOA must know and be aware of the facts that give rise to a relationship of care, supervision or authority. For example, if NOA did not recognise that NOC had been his/her [*describe relevant relationship*], then the prosecution could not prove the defence does not apply. In other words, the prosecution could not prove NOA's guilt.

[*Insert relevant prosecution and defence evidence and arguments*.]

History of sexual activity

[*If the accused relies on the defence under Crimes Act 1958 s 50J(2), add the following shaded section*.]

For this offence, the law recognises a defence which may be termed "history of sexual activity".

The law says that a person does not commit this offence if NOC engaged in sexual activity with NOA when NOA was under 18 years of age.

In this case, the defence say [*refer to relevant evidence and arguments*]. The prosecution argue that you should reject this. [*Refer to relevant evidence and arguments*.]

As I told you at the start of the trial, the prosecution must prove the accused's guilt. This means the prosecution must prove that the defence does not apply. In other words, the prosecution must prove that NOC did not engage in sexual activity with NOA when NOA was under 18 years of age.

Summary

To summarise, before you can find NOA guilty of incest, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA intentionally sexually penetrated NOC; and
- Two – that NOC is NOA's [*insert family relationship*]; and
- Three – that NOA knew that NOC was [his/her] [*insert family relationship*]; and

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[608] Warning! Judges should seek submissions from parties as to whether this direction is required, as it is adapted from caselaw developed in a different context.

- Four – that NOA was aged 18 or older at the time of the sexual penetration.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of Incest.

Last updated: 19 March 2018

7.3.9.6 Checklist: Incest with Parent, Lineal Ancestor or Step-Parent (From 1/7/17)

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Four elements the prosecution must prove beyond reasonable doubt:

1.The accused intentionally sexually penetrated the complainant;[609] and

2.The complainant is the [*insert relevant family relationship*] of the accused; and

3.The accused knew that the complainant was [his/her] [*insert relevant family relationship*]; and

4.The accused was aged 18 or older.

Accused's Acts

1. Did the accused intentionally sexually penetrate the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of Incest

Relationship between the Accused and the Complainant

2. Is the complainant the [*insert relevant family relationship*] of the accused?

If Yes, then go to 3

If No, then the accused is not guilty of Incest

Knowledge of the Accused

3. Did the accused know that the complainant was [his/her] [*insert relevant family relationship*]?

If Yes, then go to 4

If No, then the accused is not guilty of Incest

Age of accused

4. Was the accused aged 18 or older at the time of the sexual penetration?

If Yes, then the accused is guilty of Incest (as long as you have also answered yes to questions 1, 2 and 3)

[609] If the charge involves the accused causing or allowing the complaint to sexually penetrate the accused, the checklist must be modified accordingly.

If No, then the accused is not guilty of Incest

7.3.10 Incest (Pre-1/7/17)

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Operational period

1. The current s 44 offence came into force on 5 August 1991, replacing the former offence of incest under s 52.
2. The amendments to s 44 extended the offence to include the children, lineal descendants and step-children of an accused's de facto spouse.
3. The current offence applies to any acts committed on or after 5 August 1991 (*Crimes Act 1958* s 585A(2)).
4. If an offence is alleged to have been committed between two dates, one before and one on or after 5 August 1991, the offence is alleged to have been committed before 5 August 1991 (*Crimes Act 1958* s 585A(4)).
5. The offence as enacted in 1991 included a defence of coercion. Section 8 of the *Crimes (Sexual Offences) Act 2006* repealed with defence and replaced it with a new defence of compulsion. The new defence applies to offences alleged to have been committed on or after 1 December 2006 (*Crimes Act 1958* s 606A). These defences are discussed below.

Elements

6. There are four main elements to the offence of incest:
   i) The accused must have taken part in an act of sexual penetration with another person;
   ii) The sexual penetration must have been intentional;
   iii) The parties must have been in a prescribed family relationship;
   iv) The accused must have known about that relationship.
7. Where the question of voluntariness is in issue (e.g. where the accused alleges that he or she was asleep at the time the act was performed), the jury should also be instructed that the act of penetration must have been conscious, voluntary and deliberate (*R v MG* (2010) 29 VR 305). See 7.1.1 Voluntariness for further information.

Intentional sexual penetration

8. "Sexual penetration" is defined in s 35 of the *Crimes Act 1958. S*ee 7.3.2 Rape (From 1/1/92) for information about this definition.
9. Under s 35(2), the person who sexually penetrates and the person who is penetrated are both deemed to be "taking part" in an act of sexual penetration. This means that an accused may be found guilty of incest whether they were sexually *penetrating* or sexually *penetrated.*
10. It also means that both parties to an act of sexual penetration may be liable to prosecution for the offence of incest. It has been held that it is not appropriate to class a complainant as an accomplice in incest cases (*R v Ware* 10/3/1994 SC Vic).
11. The sexual penetration must be intentional (*R v AJS* 13/12/2005 CA Vic).

Prescribed family members

12. The four family relationships prescribed by s 44 are:

    i) The children, step-children or lineal descendants of the accused (s 44(1));

    ii) The children, step-children or lineal descendants of the accused's de–facto spouse who are under 18 years of age (s 44(2));

    iii) The parents or lineal ancestors of the accused, where the accused is over 18 years of age (s 44(3));

    iv) The siblings or half-siblings of the accused (s 44(4)).

13. Adopted children are deemed to be the children of both their natural parents and their adoptive parents for the purposes of s 44 (*Adoption Act 1984* (ss 53(1) and (2)).

14. Section 35 of the Act defines 'de–facto spouse' as "a person who is living with a person of the opposite sex as if they were married although they are not".

15. Applying this definition in the context of incest contrary to section 44(2) requires the jury to consider the nature of the relationship between the accused and the alleged de–facto spouse.

16. As part of this assessment, the jury may consider whether the accused exercises any parental responsibility for the children of the alleged de–facto spouse, including:

    (a) the role played, and responsibility assumed, by the accused with respect to the child(ren);
    (b) the authority exercised by the accused over the child(ren); and/or
    (c) the view which the child(ren) and the accused respectively had of the nature of the relationship between them (*Sutton v R* (2015) 47 VR 496, [36]).

17. A marriage–like relationship can exist even where its sole purpose is to provide support for the children (*Sutton v R* (2015) 47 VR 496, [36]).

18. Due to the statutory context of the offence of incest, the relationship between the accused and his or her partner's children is likely to be more significant in determining whether a de–facto relationship exists than in cases involving the distribution of property (*Sutton v R* (2015) 47 VR 496, [37]).

19. However, in general, it is undesirable for judges to expand on the statutory definition of "de–facto spouse" as the statutory definition calls for the jury to apply its common sense and experience to evaluate the relationship of the parties and compare it to their understanding of marriage relationships. This allows the jury to accommodate varied and even conflicting concepts of marriage–like relationships. Providing a list of factors relevant to assessing whether the relationship is marriage–like risks impermissibly interfering with the jury's assessment of what makes a relationship marriage–like (*Sutton v R* (2015) 47 VR 496, [53]).

Knowledge of the family relationship

20. Except for offences under s 44(2), the accused is presumed to know that they are related to the other person in the way alleged. This presumption can be rebutted by evidence to the contrary (s 44(7)(a)).

Marriage

21. Where it is necessary to prove that particular parties were married, there must be strict proof of the marriage. It is not sufficient to rely solely on admissions of the accused as to the marriage, or on evidence of co-habitation or common repute (*R v Umanski* [1961] VR 242).

Defences

22. Consent is not a defence to a charge of incest (s 44(5)).

Old scheme – Coercion defence

23. Where the offence is alleged to have been committed prior to 1 December 2006 it is a defence for the accused to prove on the balance of probabilities that he or she was coerced to take part in the act of sexual penetration (s 44(6)).

New scheme – Compulsion

24. The *Crimes (Sexual Offences) Act 2006* substituted a new s 44(6) & (6A) which replaced "coercion" with a defence of "compulsion".

25. For offences alleged to have been committed on or after 1 December 2006, a person will not be guilty of the offence of incest if he or she was compelled to take part in the act of sexual penetration (*Crimes Act 1958* s 44(6)).

26. The definition of compulsion was modified on 28 November 2007. Section 44(6A) now defines compulsion as follows:

> For the purposes of this section, a person compels another person (the victim) to take part in an act of sexual penetration if the person compels the victim (by force or otherwise) to engage in that act without the victim's consent.

27. These amendments apply to "any trial commenced on or after [28 November 2007] irrespective of when the offence to which the trial relates is alleged to have been committed" (*Crimes Act 1958* s 609(1)).

28. Despite the absolute terms of s 609(1) it is doubtful that it applies the new compulsion defence to offences committed before 1 December 2006. The 2008 amendments operated solely to delete qualifications to s 44(6A). They cannot operate to insert the positive aspects of ss 44(6) and 44(6A) into the Act at a time prior to the date of their substantive enactment. While in practice this provision is most likely to be considered in trials where the compelled party is the *uncharged victim* of the offence, it can be expected that s 44(6) will be raised as a defence by defendants.

29. It is likely that if raised on the evidence, this is a defence that the prosecution must disprove beyond a reasonable doubt (see *R v Mark & Elmazovski* [2006] VSCA 251; *R v Deblasis* (2007) 19 VR 128).

Other Relevant Matters

30. Depending on the circumstances of the case, the trial judge may need to consider the following issues in relation to incest cases:

    - Indemnities;
    - Accomplice warnings (but see *R v Ware* (10/3/1994 SC Vic), in which Coldrey J held, after a review of the authorities, that it was not appropriate to class a complainant as an accomplice in an incest case);
    - Possible exemptions from being compelled to give evidence in a case involving certain family members (*Evidence Act 2008* s 18);
    - The privilege against self-incrimination.

Last updated: 1 March 2016

7.3.10.1 Charge: Incest with Child, Step-Child or Sibling (Pre-1/7/17)

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This charge concerns acts of sexual penetration involving the accused's child, step-child or lineal descendant (s 44(1)), or brother, half-brother, sister or half-sister (s 44(4)).

The elements

I must now direct you about the crime of incest.[610] To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt.[611]

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused took part in this act intentionally.

Three – the complainant is the [*identify relationship, i.e. "*daughter", "son", "step-daughter", "step-son", "sister", "half-sister", "brother", "half-brother" or other "lineal descendant"] of the accused.

Four – the accused knew that the complainant was [his/her] [*insert relevant family relationship*].

I will now explain each of these elements in more detail.[612]

Taking part in sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If in issue, add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.[613]]

Act of sexual penetration

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

---

[610] Contrary to *Crimes Act 1958* ss 44(1) or (4)).

[611] If either of the defences of coercion or compulsion is in issue, a section will need to be added to this charge. Coercion applies to offences alleged to have been committed prior to 1 December 2006, "compulsion" to offences alleged to have been committed on or after 1 December 2006. See 7.3.10 Incest (Pre–1/7/17) for further information.

[612] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[613] Described in the instructions within this charge as the "voluntariness" requirement.

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "by putting his finger into NOC's anus"/"when he took NOC's penis in his mouth"].

[If relevant add:

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part other than the penis into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert relevant evidence or competing arguments about proof of the accused's participation in an act of sexual penetration*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed voluntariness in issue, add the following shaded section.*]

As I have directed you, the prosecution must prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.

In this case you are concerned with NOA's alleged act in [*describe relevant act of participation, e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth".]

This requirement is in issue because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[614]

[*If intention is not in issue, add the following shaded section*.]

This element is not in issue here. [*If appropriate, explain further, e.g.*

- The accused admits that s/he intentionally sexually penetrated the complainant.
- If you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally.]

Relationship to the complainant

The third element that the prosecution must prove is that the complainant is the [*insert relevant family relationship*] of the accused.

The law says that, in the absence of evidence to the contrary, it can be presumed that people who are generally considered to be related to each other in a particular way are in fact related in that way. In this case, as there has been no challenge to the alleged relationship between NOA and NOC, it can therefore be presumed that they are [*insert relevant relationship*], and that this third element has been satisfied.[615]

Knowledge of relationship

The fourth element that the prosecution must prove is that the accused knew that the complainant was [his/her] [*insert relevant family relationship*].

The law says that, in the absence of evidence to the contrary, it can be presumed that the accused knew that they were related to the complainant in the way alleged. In this case, as it has not been disputed that NOA knew that NOC was [his/her] [*insert relevant relationship*], it can therefore be presumed that [he/she] had such knowledge, and that this fourth element has been satisfied.[616]

---

[614] If the accused is alleged to have penetrated the complainant, "intention" will only rarely be in issue. This constitutes an offence of basic intent, that is, the intent to commit the physical act of penetrating the complainant. This means that proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Any mental state issues related to the act of penetration (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions. Offences involving penetration of the accused by the complainant may raise different issues.

[615] If the relationship between the accused and the complainant has been disputed, this section of the charge will need to be modified accordingly. If the defence raises evidence in rebuttal of the presumption in s 44(7), it is for the prosecution to prove the relationship beyond reasonable doubt. There is no onus of proof on the defence.

[616] If the accused's knowledge of their relationship to the complainant has been disputed, this section of the charge will need to be modified accordingly. If the defence raises evidence in rebuttal of the presumption in s 44(7), it is for the prosecution to prove knowledge of the relationship beyond reasonable doubt. There is no onus of proof on the defence.

Summary

To summarise, before you can find NOA guilty of incest, the prosecution must prove to you beyond reasonable doubt:

One – that NOA took part in an act of sexual penetration with NOC; and

Two – that NOA intended to take part in an act of sexual penetration with NOC; and

Three – that NOC is NOA's [*insert family relationship*]; and

Four – that NOA knew that NOC was [his/her] [*insert family relationship*].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of incest.

Last updated: 3 December 2012

7.3.10.2 Checklist: Incest with Child, Step-Child or Sibling (Pre-1/7/17)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with the complainant; and
2. The accused intended to take part in that act of sexual penetration with the complainant; and
3. The complainant is the [*insert relevant family relationship*] of the accused; and
4. The accused knew that the complainant was [his/her] [*insert relevant family relationship*].

Accused's Acts

1. Did the accused take part in an act of sexual penetration with the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of Incest

Accused's Intention

2. Did the accused intend to take part in that act of sexual penetration with the complainant?

If Yes, then go to 3

If No, then the accused is not guilty of Incest

Relationship between the Accused and the Complainant

3. Is the complainant the [*insert relevant family relationship*] of the accused?

If Yes, then go to 4

If No, then the accused is not guilty of Incest

Knowledge of the Accused

4. Did the accused know that the complainant was [his/her] [*insert relevant family relationship*]?

If Yes, then the accused is guilty of Incest (as long as you have also answered yes to questions 1,2 and 3)

If No, then the accused is not guilty of Incest

Last updated: 6 June 2006

7.3.10.3 Charge: Incest with Child of De Facto Spouse (Pre-1/7/17)

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This charge concerns acts of sexual penetration involving the child, step-child or lineal descendant of the accused's de facto spouse (ss 44(2)).

The elements

I must now direct you about the crime of incest. To prove this crime, the prosecution must prove the following five elements beyond reasonable doubt.[617]

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused took part in this act intentionally.

Three – the complainant is the [*identify family relationship, i.e. "*daughter", "son", "step-daughter", "step-son", or other "lineal descendant"] of the accused's de facto spouse.

Four – the accused knew that the complainant was the [*insert relevant family relationship*] of [his/her] de facto spouse.

Five – the complainant was under the age of 18 at the time of sexual penetration.

I will now explain each of these elements in more detail.[618]

Taking part in sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If in issue, add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.[619]]

Act of sexual penetration

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

---

[617] If either of the defences of coercion or compulsion is in issue, a section will need to be added to this charge. Coercion applies to offences alleged to have been committed prior to 1 December 2006, "compulsion" to offences alleged to have been committed on or after 1 December 2006. See 7.3.10 Incest (Pre–1/7/17) for further information.

[618] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[619] Described in the instructions within this charge as the "voluntariness" requirement.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "by putting his finger into NOC's anus"/"when he took NOC's penis in his mouth"].

[If relevant add:

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part other than the penis into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert relevant evidence or competing arguments about proof of the accused's participation in an act of sexual penetration*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed voluntariness in issue, add the following shaded section.*]

As I have directed you, the prosecution must prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.

In this case you are concerned with NOA's alleged act in [*describe relevant act of participation*, *e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth".]

This requirement is in issue because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[620]

[*If intention is not in issue, add the following shaded section.*]

This element is not in issue here. [*If appropriate, explain further,* e.g. The accused admits that s/he intentionally sexually penetrated the complainant. If you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally.]

Relationship to the complainant

The third element that the prosecution must prove is that the complainant is the [*insert relevant family relationship*] of the accused's de facto spouse.[621]

There are two parts to this element. First, the prosecution must prove that NOA and [*insert name of de facto spouse*] were de facto spouses. A "de facto spouse" is a person who is living with someone of the opposite sex as if they were married, although they are not. In this case it is alleged that NOA and [*insert name of de facto spouse*] were de facto spouses because [*insert relevant evidence*].

Secondly, the prosecution must prove that complainant was the [*insert relevant family relationship*] of the accused's de facto spouse. In this case,the prosecution submitted that NOC was the [*insert family relationship*] of NOA's alleged de facto spouse, [*insert name of de facto spouse*]. [*Insert details of any evidence supporting the existence of the relationship between the accused and the complainant*.] The defence responded [*insert evidence*].

So for this third element to be met, you must be satisfied, beyond reasonable doubt, that NOA and [*insert name of de facto spouse*] were de facto spouses, and that NOC is the [*insert family relationship*] of [*insert name of de facto spouse*].

Knowledge of relationship

The fourth element that the prosecution must prove is that the accused knew that the complainant was [his/her] de facto spouse's [*insert relevant family relationship*].[622]

In this case, the prosecution alleged that NOA knew that NOC was *[insert name of de facto spouse and relevant family relationship. Insert relevant evidence*]. The defence responded [*insert relevant evidence*].

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[620] If the accused is alleged to have penetrated the complainant, "intention" will only rarely be in issue. This constitutes an offence of basic intent, that is, the intent to commit the physical act of penetrating the complainant. This means that proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Any mental state issues related to the act of penetration (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions. Offences involving penetration of the accused by the complainant may raise different issues.

[621] Note that the presumption specified in s 44(7)(b) (that people who are reputed to be related to each other in a particular way are in fact related in that way) does not to apply to offences under s 44(2).

[622] Note that the presumption specified in s 44(7)(a) (that the accused knew that he or she was related to the other person in the way alleged) does not to apply to offences under s 44(2).

Age of the complainant

The fifth element that the prosecution must prove is that the complainant was under the age of 18 at the time of the sexual penetration.

In this case, it has not been disputed that NOC was under 18 at the time the alleged act of sexual penetration took place. The main issue in this case is [*insert relevant issue*].[623]

Summary

To summarise, before you can find NOA guilty of incest, the prosecution must prove to you beyond reasonable doubt:

One – that NOA took part in an act of sexual penetration with NOC; and

Two – that NOA intended to take part in an act of sexual penetration with NOC; and

Three – that NOC is the [*insert relevant family relationship*] of NOA's de facto spouse; and

Four – that NOA knew that NOC was the [*insert relevant family relationship*] of NOA's de facto spouse; and

Five – that NOC was under the age of 18 at the time of the sexual penetration.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of Incest.

Last updated: 3 December 2012

7.3.10.4 Checklist: Incest with Child of De Facto Spouse (Pre-1/7/17)

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with the complainant; and
2. The accused intended to take part in that act of sexual penetration with the complainant; and
3. The complainant is the [*insert relevant family relationship*] of the accused's de facto spouse; and
4. The accused knew that the complainant was the [*insert relevant family relationship*] of [his/her] de facto spouse; and
5. The complainant was under the age of 18 at the time the act of sexual penetration took place.

Accused's Acts

1. Did the accused take part in an act of sexual penetration with the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of Incest

[623] If the complainant's age has been disputed, this section of the charge will need to be modified accordingly.

Accused's Intention

2. Did the accused intend to take part in that act of sexual penetration with the complainant?

If Yes, then go to 3

If No, then the accused is not guilty of Incest

Relationship between the Accused and the Complainant

3. Is the complainant the [*insert relevant family relationship*] of the accused's de facto spouse?

Consider – A "de facto" spouse is someone who lives with a person of the opposite sex as if they are married although they are not.

If Yes, then go to 4

If No, then the accused is not guilty of Incest

Knowledge of the Accused

4. Did the accused know that the complainant was the [*insert relevant family relationship*] of [his/her] de facto spouse?

If Yes, then go to 5

If No, then the accused is not guilty of Incest

Age of the Complainant

5. Was the complainant under the age of 18 at the time of the sexual penetration?

If Yes, then the accused is guilty of Incest (as long as you have also answered yes to questions 1,2,3 and 4)

If No, then the accused is not guilty of Incest

Last updated: 6 June 2006

7.3.10.5 Charge: Incest with Parent (Pre-1/7/17)

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This charge concerns acts of sexual penetration involving the accused's father, mother, step-father, step-mother or lineal ancestor (s 44(3)).

The elements

I must now direct you about the crime of incest. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt.[624]

One – the accused took part in an act of sexual penetration with NOP.[625]

Two – the accused took part in this act intentionally.

Three – NOP is the accused's [*insert relevant family relationship*, *i.e.* "father", "mother", "step-father/mother", or "grandfather/grandmother"].

Four – the accused knew that NOP was [his/her] [*insert relevant family relationship*].

Five – the accused was aged 18 or older at the time of sexual penetration.

I will now explain each of these elements in more detail.[626]

Taking part in sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with NOP. [*If in issue, add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.[627]]

Act of sexual penetration

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOP, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOP [*describe relevant form of penetration, e.g.* "by putting his finger into NOP's anus"/"when he took NOP's penis in his mouth"].

[*If relevant add:*

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[624] If either of the defences of coercion or compulsion is in issue, a section will need to be added to this charge. Coercion applies to offences alleged to have been committed prior to 1 December 2006, "compulsion" to offences alleged to have been committed on or after 1 December 2006. See 7.3.10 Incest (Pre–1/7/17) for further information.

[625] Name of alleged parent, step-parent or other lineal ancestor.

[626] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[627] Described in the instructions within this charge as the "voluntariness" requirement.

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOP/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOP] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOP's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part other than the penis into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOP's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert relevant evidence or competing arguments about proof of the accused's participation in an act of sexual penetration*].

The act was conscious, voluntary and deliberate

[*If the evidence or arguments have placed voluntariness in issue, add the following shaded section.*]

As I have directed you, the prosecution must prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.

In this case you are concerned with NOA's alleged act in [*describe relevant act of participation, e.g.* "introducing his finger into NOP's anus"/"receiving NOP's penis into his mouth".]

This requirement is in issue because [*describe the evidence or arguments that place voluntariness in issue*].

You must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOP's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with NOP.[628]

[*If intention is not in issue, add the following shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.* The accused admits that s/he intentionally sexually penetrated NOP. If you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated NOP, you should have no trouble finding that s/he did so intentionally.]

Relationship to the other participant

The third element that the prosecution must prove is that NOP is the [*insert relevant family relationship*] of the accused.

The law says that, in the absence of evidence to the contrary, it can be presumed that people who are generally considered to be related to each other in a particular way are in fact related in that way. In this case, as there has been no challenge to the alleged relationship between NOA and NOP, it can therefore be presumed that they are [*insert relevant relationship*], and that this third element has been satisfied.[629]

Knowledge of relationship

The fourth element that the prosecution must prove is that the accused knew that NOP was [his/her] [*insert relevant family relationship*].

The law says that, in the absence of evidence to the contrary, it can be presumed that the accused knew that they were related to NOP in the way alleged. In this case, as it has not been disputed that NOA knew that NOP was [his/her] [*insert relevant relationship*], it can therefore be presumed that [he/she] had such knowledge, and that this fourth element has been satisfied.[630]

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[628] If the accused is alleged to have penetrated the other party, "intention" will only rarely be in issue. This constitutes an offence of basic intent, that is, the intent to commit the physical act of penetrating the complainant. This means that proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Any mental state issues related to the act of penetration (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions. Offences involving penetration of the accused by the other party may raise different issues.

[629] If the relationship between the accused and the other party has been disputed, this section of the charge will need to be modified accordingly. If the defence raises evidence in rebuttal of the presumption in s 44(7), it is for the prosecution to prove the relationship beyond reasonable doubt. There is no onus of proof on the defence.

[630] If the accused's knowledge of his or her relationship to the other party has been disputed, this section of the charge will need to be modified accordingly. If the defence raises evidence in rebuttal of the presumption in s 44(7), it is for the prosecution to prove knowledge of the relationship beyond reasonable doubt. There is no onus of proof on the defence.

Age of the accused

The fifth element that the prosecution must prove is that the accused was aged 18 or older at the time of the sexual penetration.

In this case, it has not been disputed that NOA was at least 18 years old at the time the alleged act of sexual penetration took place. The main issue in this case is [*insert relevant issue*].[631]

Summary

To summarise, before you can find NOA guilty of incest, the prosecution must prove to you beyond reasonable doubt:

One – that NOA took part in an act of sexual penetration with NOP; and

Two – that NOA intended to take part in an act of sexual penetration with NOP; and

Three – that NOP is NOA's [*insert family relationship*]; and

Four – that NOA knew that NOP was [his/her] [*insert family relationship*]; and

Five – that NOA was aged 18 or older at the time of the sexual penetration.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of Incest.

Last updated: 3 December 2012

7.3.10.6 Checklist: Incest with Parent (Pre-1/7/17)

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with [*insert name of other participant*]; and
2. The accused intended to take part in that act of sexual penetration with [*insert name of other participant*]; and
3. [*insert name of other participant*] is the [*insert relevant family relationship*] of the accused; and
4. The accused knew that [name of other participant] was [his/her] [*insert relevant family relationship*]; and
5. The accused was aged 18 or older at the time the act of sexual penetration took place.

Accused's Acts

1. Did the accused take part in an act of sexual penetration with [*insert name of other participant*]?

If Yes, then go to 2

If No, then the accused is not guilty of Incest

Accused's Intention

2. Did the accused intend to take part in that act of sexual penetration?

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[631] If the accused's has been disputed, this section of the charge will need to be modified accordingly.

If Yes, then go to 3

If No, then the accused is not guilty of Incest

Relationship between the Accused and the Other Participant

3. Is [*insert name of other participant*] the [*insert relevant family relationship*] of the accused?

If Yes, then go to 4

If No, then the accused is not guilty of Incest

Knowledge of the Accused

4. Did the accused know that [*insert name of other participant*] was [his/her] [*insert relevant family relationship*]?

If Yes, then go to 5

If No, then the accused is not guilty of Incest

Age of the Accused

5. Was the accused aged 18 or older at the time of the sexual penetration?

If Yes, then the accused is guilty of Incest (as long as you have also answered yes to questions 1,2,3 and 4)

If No, then the accused is not guilty of Incest

Last updated: 6 June 2006

7.3.11 Sexual Penetration of a Child under 12 (From 1/7/17)

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Commencement Information

1. The current s 49A offence came into force on 1 July 2017, replacing the former offences specified in s 45 of the *Crimes Act 1958*.
2. For offences committed before 1 July 2017, see 7.3.13 Sexual Penetration of a Child Under 16 (1/1/92–30/6/17).

Elements

3. The elements of the offence are set out in s 49A(1) of the *Crimes Act 1958*. The prosecution must prove that:

   (a) The accused (A) intentionally:

   i) sexually penetrated another person (B);

   ii) caused or allowed B to sexually penetrate A; or

iii) causes B to sexually penetrate themselves, another person (C) or be sexually penetrated by C; and

(b) B is a child under the age of 12 years.

Intentional sexual penetration

4. The first element involves three permutations on B being involved in an act of sexual penetration (*Crimes Act 1958* s 49A).

5. "Sexual penetration" is defined in s 35A of the *Crimes Act 1958.* For more information on the meaning of sexual penetration see 7.3.2 Rape (From 1/1/92).

6. The intention must have been to sexually penetrate or be penetrated. An intent to commit an indecent assault is not sufficient (*Anderson v R* [2010] VSCA 108).

7. There will often be no issue about whether the act was intentional. For example, if there is evidence that the penetration took place over an extended period of time, there will ordinarily be no doubt about the accused's mental state (*Anderson v R* [2010] VSCA 108).

8. However, in some cases intent will be in issue. Where this is so, it is of paramount importance that the jury be directed about the prosecution's obligation to establish basic intent or voluntariness, as the case may be, beyond reasonable doubt (*R v AJS* (2005) 12 VR 563; *MG v R* (2010) 29 VR 305; *Anderson v R* [2010] VSCA 108). See also 7.1.1 Voluntariness.

9. For example, a clear direction about intention will be necessary where it is possible that any penetration that occurred was accidental. Such a possibility must be excluded for this element to be proven (*Anderson v R* [2010] VSCA 108; *R v AJS* (2005) 12 VR 563).

Child Under 12

10. The second element requires the prosecution to prove that the complainant was under the age of 12 at the time the relevant act took place (*Crimes Act 1958* s 49A(1)).

Statutory exemption

Medical or hygienic purposes

11. A person does not commit the offence against s 49A(1) if the accused's conduct occurs in the course of a procedure carried out in good faith for medical or hygienic purposes (*Crimes Act 1958* s 49T).

Matters that do not provide a defence

Belief in age

12. The *Crimes Act 1958* specifically provides that a mistaken but honest and reasonable belief that the child was aged 12 or more is not a defence (*Crimes Act 1958* s 49ZC).

Consent

13. Consent forms no part of the definition of the offence and is irrelevant.

Marriage and domestic partnerships

14. Sections 49Y and 49Z specifically recognises that marriage, domestic partnership or a reasonable belief in marriage or a domestic partnership will be a defence for some sexual offences against children. However, section 49A is not such an offence (*Crimes Act 1958* ss 49Y, 49Z).

Section 49A and territorial jurisdiction

15. This offence can be committed where the accused causes one person to sexually penetrate a third person. This form of offending may be committed even if the accused causes the conduct while they are outside the Victoria, if the sexual penetration between the other two parties occurs in Victoria (*Case v The King* [2023] VSCA 12, [120], [134]–[137]).

Last updated: 22 March 2023

7.3.11.1 Charge: Sexual Penetration of a Child under 12 (From 1/7/17)

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I must now direct you about the crime of sexual penetration of a child under the age of 12. To prove this crime, the prosecution must prove the following 2 elements beyond reasonable doubt:

One – the accused intentionally sexually penetrated the complainant.[632]

Two – the complainant was under the age of 12 at that time.

I will now explain each of these elements in more detail.

Intentional sexual penetration

Warning! This charge is designed for cases where the prosecution relies on s 49A(1)(a)(i). This direction on the first element must be modified if the prosecution relies on other limbs of s 49A(1)(a).

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant, NOC.

The prosecution seeks to prove this element by showing that NOA [*describe relevant form of penetration, e.g.* "put his finger into NOC's anus"]. I direct you as a matter of law that if you find that NOA did this, then the prosecution has proved this first element.

[If relevant add:

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[632] This statement of the element must be modified if the prosecution relies on the other limbs of s 49A(1)(a). The words "sexually penetrated the complainant" may be replaced with "caused or allowed the complainant to sexually penetrate the accused" or "caused the complainant to sexually penetrate himself/herself" or "caused the complainant to sexually penetrate another person" or "caused the complainant to be sexually penetrated by another person".

[*If the evidence or arguments have placed the intentional or voluntary nature of the acts in issue, add the following shaded section.*[633]]

For this element to be met, the act of [*describe relevant act of penetration, e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been done intentionally.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves intention in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in the course of a procedure carried out in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object or body part*] by NOA into NOC's [anus/vagina], was not done in the course of a procedure carried out in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Child under the age of 12

The second element relates to the age of the complainant, NOC. The prosecution must prove that s/he was under the age of 12 when the alleged act of sexual penetration took place.

In this case, there is no dispute that NOC was under 12 at that time. The main issue in this case is [*insert relevant issue*].[634]

Statutory defences and exclusions

Direction on matters that are not a defence

To protect children under the age of 12, Parliament has specifically stated that consent is not relevant to this offence. You do not need to consider the issue of whether or not NOC agreed to be sexually penetrated by NOA.

Parliament has also stated that NOA belief about NOC's age is also not relevant. For the second element, you must only look at how old NOC was at the time of the conduct. Whether NOA knew that NOC under 12 at the time is not relevant.

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[633] Because of how the offence is defined, the issue of intention is likely inseparable from the question of voluntariness. Where the issue is raised, the judge should direct the jury on the specific matters the jury must consider to find that the accused's conduct was voluntary and intentional (e.g. disproof of accident or proof that the accused was conscious).

[634] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a child under the age of 12, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA intentionally sexually penetrated NOC; and
- Two – that NOC was under the age of 12 at the time of the sexual penetration.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child under the age of 12.

Last updated: 1 July 2017

7.3.11.2 Checklist: Sexual Penetration of a Child under 12 (From 1/7/17)

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Two elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally sexually penetrated the complainant; and

2. The complainant was under the age of 12.

Intentional sexual penetration

1. Did the accused intentionally [*identify relevant act of sexual penetration*] NOC?

    If Yes then go to 2

    If No, then the accused is not guilty of Sexual Penetration of a child under 12

Complainant under age of 12

2. At the time of the act, was NOC under the age of 12?

    If Yes then the accused is guilty of Sexual Penetration of a child under 12 (as long as you also answered Yes to Question 1)

    If No, then the accused is not guilty of Sexual Penetration of a child under 12

Last updated: 1 July 2017

7.3.12 Sexual Penetration of a Child under 16 (From 1/7/17)

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Commencement Information

1. The current s 49B offence came into force on 1 July 2017, replacing the former offences specified in s 46 of the *Crimes Act 1958*.
2. For offences committed before 1 July 2017, see 7.3.13 Sexual Penetration of a Child Under 16 (1/1/992–30/6/17).

Elements

3. The elements of the offence are set out in s 49B(1) of the *Crimes Act 1958*. The prosecution must prove that:

   i) The accused (A) intentionally:

      - sexually penetrated another person (B);
      - caused or allowed B to sexually penetrate A; or
      - causes B to sexually penetrate themselves, another person (C) or be sexually penetrated by C; and

   ii) B is a child under the age of 16 years.

Intentional sexual penetration

4. The first element involves three permutations on B being involved in an act of sexual penetration (*Crimes Act 1958* s 49B).

5. "Sexual penetration" is defined in s 35A of the *Crimes Act 1958.* For more information on the meaning of sexual penetration see, 7.3.2 Rape (From 1/1/92).

6. For more information about this element, including proof of intention, see 7.3.11 Sexual penetration of a child under 12 (From 1/7/17).

Child Under 16

7. The second element requires the prosecution to prove that the complainant was under the age of 16 at the time the relevant act took place (*Crimes Act 1958* s 49B(1)).

Statutory defences and exemption

Medical or hygienic purposes

8. A person does not commit the offence against s 49B(1) if the accused's conduct occurs in the course of a procedure carried out in good faith for medical or hygienic purposes (*Crimes Act 1958* s 49T).

Similarity in age

9. Section 49V of the *Crimes Act 1958* provides that it is a defence to an offence against section 49B(1) if, at the time of the conduct:

   i) A was not more than 2 years older than B; and

   ii) B was 12 years of age or more; and

   iii) B consented to the sexual penetration.

10. In relation to this defence, the accused's actual age must not exceed the child's by more than 24 months. The availability of the defence is not determined by a measure limited to whole–years (*Stannard v DPP* (2010) 28 VR 84).

11. To disprove this defence, the prosecution must rebut one or more limbs of section 49V. For information on the circumstances in which a person does not consent, see 7.3.1.2 Consent and reasonable belief in consent.

12. This defence does not involve a consideration of whether the accused had a reasonable belief in consent. Compare 7.3.13 Sexual Penetration of a Child Under 16 (1/1/92 – 30/6/17).

Reasonable belief as to age

13. Section 49W of the *Crimes Act 1958* provides that it is a defence to an offence against section 49B(1) if, at the time of the conduct:

    i) B was 12 years of age or more; and

    ii) A reasonably believed that B was 16 years of age or more.

14. The accused bears the burden of proving, on the balance of probabilities, that he or she reasonably believed that B was 16 years of age or more (*Crimes Act 1958* s 49W(4)).

15. The Note to section 49W states that:

> Whether or not A reasonably believed that B … was 16 years of age or more depends on the circumstances. The circumstances include any steps that A took to find out [B's] age.

16. The Note also specifies that the accused has an evidential burden to establish that B was 12 years of age or more.

17. Unlike the former s 45, a reasonable belief in age is not used as a threshold requirement before consent is relevant. This means that the jury does not need to consider consent, or a reasonable belief in consent, as part of this belief in age defence.

Last updated: 1 July 2017

7.3.12.1 Charge: Sexual Penetration of a Child under 16 (From 1/7/17)

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I must now direct you about the crime of sexual penetration of a child under the age of 16. To prove this crime, the prosecution must prove the following 2 elements beyond reasonable doubt:

One – the accused intentionally sexually penetrated the complainant.[635]

Two – the complainant was under the age of 16 at that time.

I will now explain each of these elements in more detail.

Intentional sexual penetration

Warning! This charge is designed for cases where the prosecution relies on s 49B(1)(a)(i). This direction on the first element must be modified if the prosecution relies on other limbs of s 49B(1)(a).

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant, NOC.

The prosecution seeks to prove this element by showing that NOA [*describe relevant form of penetration, e.g.* "put his finger into NOC's anus"]. I direct you as a matter of law that if you find that NOA did this, then the prosecution has proved this first element.

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[635] This statement of the element must be modified if the prosecution relies on the other limbs of s 49B(1)(a). The words "sexually penetrated the complainant" may be replaced with "caused or allowed the complainant to sexually penetrate the accused" or "caused the complainant to sexually penetrate himself/herself" or "caused the complainant to sexually penetrate another person" or "caused the complainant to be sexually penetrated by another person".

[If relevant add:

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the *[describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the intentional or voluntary nature of the acts in issue, add the following shaded section*.[636]]

For this element to be met, the act of [*describe relevant act of participation, e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been done intentionally.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves intention in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in the course of a procedure carried out in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*name of object or body part*] by NOA into NOC's [anus/vagina], was not done in the course of a procedure carried out in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Child under the age of 16

The second element relates to the age of the complainant, NOC. The prosecution must prove that s/he was under the age of 16 when the alleged act of sexual penetration took place.

In this case, there is no dispute that NOC was under 16 at that time. The main issue in this case is [*insert relevant issue*].[637]

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[636] Because of how the offence is defined, the issue of intention is likely inseparable from the question of voluntariness. Where the issue is raised, the judge should direct the jury on the specific matters the jury must consider to find that the accused's conduct was voluntary and intentional (e.g. disproof of accident or proof that the accused was conscious).

[637] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

Statutory defences and exclusions

Similarity in age

[*If the accused relies on the similarity in age defence in Crimes Act 1958 s 49V, add the following shaded section*.]

For this offence, the law recognises a defence which may be termed "similarity in age". There are three parts to this defence.

First, the accused must be no more than 2 years older than the complainant. In this case, that requirement is met.

Second, the complainant must have been 12 years old or more at the time of the alleged conduct. Again, this requirement is met in this case.[638]

Third, the complainant must have consented to the sexual penetration. It is this part of the defence which is in dispute.

As I told you at the start of the trial, the prosecution must prove the accused's guilt. This means the prosecution must prove that the defence does not apply. In other words, the prosecution must prove that NOC did not consent to the sexual penetration.

Consent is a state of mind. The law says that consent means free agreement. So the prosecution must prove that NOC did not freely agree to being sexually penetrated by NOA at the time.

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs.*]

The law says that a person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

The law says that where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following shaded section.*]

The law specifies some circumstances in which a person does not freely agree, or consent, to sexual penetration. These circumstances include where [*insert relevant section(s) from the following and apply to the evidence*:

a) the person submits to the act because of force or the fear of force, whether to that person or someone else;

b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;

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[638] This part of the direction must be modified if the age of the complainant is in issue. If this part of the defence is in issue, the judge must explain that the prosecution can rebut the defence by disproving any of the three components of the defence.

c) the person submits to the act because the person is unlawfully detained;

d) the person is asleep or unconscious;

e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;

f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

g) the person is incapable of understanding the sexual nature of the act;

h) the person is mistaken about the sexual nature of the act;

i) the person is mistaken about the identity of any other person involved in the act;

j) the person mistakenly believes that the act is for medical or hygienic purposes;

k) if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes;

l) the person does not say or do anything to indicate consent to the act;

m) having initially given consent to the act, the person later withdraws consent to the act taking place or continuing]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC at the time [*describe relevant act*], you must find that s/he was not consenting.

However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*Where a party requests a direction about the lack of physical injury, add the following shaded section.*]

When you are assessing the evidence, it is important to know that experience shows that there are many different circumstances in which a person does not consent to sexual penetration. Experience also shows that just because a person is not physically injured, subjected to violence or threatened with physical injury or violence does not mean that they consented.

[*When a party requests a direction about the lack of protest or physical resistance, add the following shaded section.*]

When you are assessing the evidence, it is important to know that experience shows that people react in different ways to a non-consensual sexual act. There is no typical, proper or normal response. Experience shows that just because a person did not protest or resist does not mean that they consented. For example, a person might freeze and not say or do anything, even though they are not consenting.

[*When a party requests a direction on the relevance of past consensual sex, add the following shaded section*.]

When you are assessing the evidence, it is important to know that experience shows just because a person has consented to sexual activity with a person on one occasion does not mean that they

consented to sexual activity with that person on another occasion.[639]

In this case, [*insert evidence and competing arguments relevant to proof that the complainant was not consenting*].

It is important that you remember that it is not for the accused to prove to you that the complainant consented. Unless the prosecution proves, beyond reasonable doubt, that the complainant did not consent, you must find the accused not guilty of this offence.

Belief in age

[*If the accused relies on the belief in age defence in Crimes Act 1958 s 49W, add the following shaded section.*]

The law states that a person does not commit this offence if, at the time s/he sexually penetrated NOC, s/he reasonably believed that the accused was aged 16 years or more. There are two parts to this defence.

First, at the time of the conduct, NOC must have been aged 12 or more. There is no issue in this case that NOC was aged 12 or more at the time of the conduct.[640]

Second, NOA must have reasonably believed that NOC was aged 16 or more. It is a matter for you to decide whether NOA held this belief, and whether it was reasonable. As part of deciding this issue, you should consider what steps NOA took to find out NOC's age.

Unlike the elements of the offence, this is a matter which the accused must prove. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that NOC was aged 16 or more on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he believed that NOC was aged 16 or more and that this belief was reasonable. Unlike the prosecution, s/he does not need to prove these matters beyond reasonable doubt.

[*Identify relevant evidence and arguments.*]

Consent not a defence

To protect children under the age of 16, Parliament has specifically stated that consent is not relevant to this offence. You do not need to consider the issue of whether or not NOC agreed to be sexually penetrated by NOA.[641]

Summary

To summarise, before you can find NOA guilty of sexual penetration of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA intentionally sexually penetrated NOC; and

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[639] This direction may be modified to include reference to different forms of sexual activity, or sexual activity with different people, if appropriate in the circumstances of the case. See *Jury Directions Act 2015* s 46(3)(e).

[640] If the age of the child is in dispute, then this direction must be modified. The prosecution bears the onus of rebutting this threshold requirement, once the accused has satisfied the evidential burden.

[641] This part of the direction must be omitted if the similarity in age defence is relevant.

- Two – that NOC was under the age of 16 at the time of the sexual penetration.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child under the age of 16.

Last updated: 1 July 2017

7.3.12.2 Checklist: Sexual Penetration of a Child under 16 (From 1/7/17)

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Two elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally sexually penetrated the complainant; and

2. The complainant was under the age of 16.

Intentional sexual penetration

1. Did the accused intentionally [*identify relevant act of sexual penetration*] NOC?

If Yes then go to 2

If No, then the accused is not guilty of Sexual Penetration of a child under 16

Complainant under age of 16

2. At the time of the act, was NOC under the age of 16?

If Yes then the accused is guilty of Sexual Penetration of a child under 16 (as long as you also answered Yes to Question 1)

If No, then the accused is not guilty of Intentional Sexual Penetration of a child under 16

Last updated: 1 July 2017

7.3.13 Sexual Penetration of a Child under 16 (1/1/92–30/6/17)

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Commencement Information

1. For offences alleged to have been committed before 1 July 2017, s 45 contained the offence of sexual penetration of a child under 16.
2. This offence came into force on 22 November 2000, replacing the former offences specified in ss 45 and 46 of the *Crimes Act 1958*.
3. The offence applies to any acts committed on or after 5 August 1991 and before 1 July 2017 (*Crimes Act 1958* s 593(5)).
4. If an offence is alleged to have been committed between dates, one date before and one date on or after 5 August 1991, the offence is alleged to have been committed before 5 August 1991 (*Crimes Act 1958* s 593(6)).
5. The current s 45(4) and s 45(4A) apply only to offences committed on or after 1 December 2006. Their impact is considered below in the discussion of Statutory defences and exemptions.
6. The offence was further amended on 17 March 2010 by s 3 of the *Crimes Legislation Amendment Act 2010* to raise the age limits for various purposes from 10 to 12. This change only applies to offences committed on or after 17 March 2010.

Elements

7. The elements of the offence are set out in s 45(1) of the *Crimes Act 1958*. The prosecution must prove that:

   i) The accused took part in an act of sexual penetration with the complainant;

   ii) The accused intended to take part in that act of sexual penetration; and

   iii) The complainant was under the age of 16 at the time the sexual penetration took place.

Taking Part in an Act of Sexual Penetration

8. The first element requires the accused to have "taken part" in an act of "sexual penetration" with the complainant (*Crimes Act 1958* s 45(1)).

9. "Sexual penetration" is defined in s 35(1)(a) of the *Crimes Act 1958.* For more information on the meaning of sexual penetration see 7.3.2 Rape (From 1/1/92).

10. Section 35(2) of the *Crimes Act 1958* provides that both the person who sexually penetrates another person and that other person shall be deemed to be "taking part" in an act of sexual penetration. This means that an accused may be found guilty of the offence whether he or she was sexually *penetrating* the complainant or was being sexually *penetrated* by the complainant.

Intention to Take Part in an Act of Sexual Penetration

11. The second element requires the accused to have intended to take part in an act of sexual penetration with the complainant (*Crimes Act 1958* s 45(1)).

12. The intention must have been to sexually penetrate or be penetrated. An intent to commit an indecent assault is not sufficient (*Anderson v R* [2010] VSCA 108).

13. There will often be no issue about whether the act was intentional. For example, if there is evidence that the penetration took place over an extended period of time, there will ordinarily be no doubt about the accused's mental state (*Anderson v R* [2010] VSCA 108).

14. However, in some cases intent will be in issue. Where this is so, it is of paramount importance that the jury be directed about the prosecution's obligation to establish intent beyond reasonable doubt (*R v AJS* (2005) 12 VR 563; *MG v R* (2010) 29 VR 305; *Anderson v R* [2010] VSCA 108).

15. For example, a clear direction about intention will be necessary where it is possible that any penetration that occurred was accidental. Such a possibility must be excluded for this element to be proven (*Anderson v R* [2010] VSCA 108; *R v AJS* (2005) 12 VR 563).

Child Under 16

16. The third element requires the prosecution to prove that the complainant was under the age of 16 at the time the relevant act took place (*Crimes Act 1958* s 45(1)).

17. The jury should determine the complainant's age having regard to the evidence in the case, or if no other sufficient evidence is presented, to the complainant's appearance (*Crimes Act 1958* s 411).

Aggravating Circumstances

18. Section 45(2) specifies two aggravating circumstances which will make someone who is guilty liable to a greater maximum penalty. These circumstances are:

    - Where the child was under the age of 12 at the time of the offence; or

- Where the child was aged between 12 and 16, and is under the care, supervision or authority of the accused.

19. Section 45(5) provides that these circumstances of aggravation are not elements of the offence, but that they must be stated in the indictment if they are alleged by the prosecution.
20. Under s 45(6), where an accused disputes the circumstances set out in s 45(2) and wants to have this matter determined at the trial, they may do so by pleading not guilty to the offence, even if they do not dispute the other facts alleged by the prosecution in proof of the offence.
21. Section 45(7) provides that the circumstances of aggravation must be determined by a jury where the accused pleads not guilty, and by the trial judge where the accused pleads guilty.
22. It is therefore possible that where an accused pleads not guilty to sexual penetration of a child under 16, the trial may require the prosecution to prove:

    i) The elements of the offence only (if no circumstances of aggravation are alleged in the indictment);

    ii) The aggravating circumstances only (if the accused disputes the aggravating circumstances but not the other facts alleged by the prosecution); or

    iii) The elements of the offence and the aggravating circumstances.

23. If an accused pleads not guilty to an alleged offence contrary to s 45 in which aggravating circumstances have been included in the indictment, the judge should inquire as to whether they will be contesting the elements of the offence, the aggravating circumstances, or both.

Care, supervision or authority

24. The words "care, supervision or authority" are to be given their ordinary grammatical meaning (*R v Howes* (2000) 2 VR 141).
25. The words "care, supervision or authority" should be read disjunctively (*R v Howes* (2000) 2 VR 141).
26. These words are intended to encompass those who, by virtue of an established and ongoing relationship involving care, supervision or authority, are in a position to exploit or take advantage of the influence which grows out of the relationship (*R v Howes* (2000) 2 VR 141).
27. The relationship of care, supervision or authority does not need to be based on a legal right or power. While legal authority may create or help to create such a relationship, it is not essential (*R v Howes* (2000) 2 VR 141; *R v Macfie* [2000] VSCA 173).
28. The words therefore cover a person who has assumed de facto control, supervision or authority over a child, even if responsibility for that child has not been delegated to them by the person with legal responsibility for that child (*R v Macfie* [2000] VSCA 173).
29. Care, supervision or authority may be vested in more than one person or authority at the same time (*R v Macfie* [2000] VSCA 173).
30. Care, supervision or authority may change from time to time, depending on the circumstances (*R v Macfie* [2000] VSCA 173).
31. It is not necessary that the occasion on which the penetration took place was connected with, or arose out of, the relationship of care, supervision or authority, or that the parties were acting in the capacities which gave rise to the relationship. It is sufficient if the jury is satisfied that there was a standing relationship of care, supervision or authority between the parties, and that that relationship existed on the day on which the penetration took place (*R v Howes* (2000) 2 VR 141).

Statutory defences and exemptions

Marriage

32. The offence specified in s 45(1) does not apply if the child is between the ages of 12 and 16 *and* the people taking part in sexual penetration were married to each other (s 45(3)).

33. For offences committed before 17 March 2010, this defence is also available if the child was aged 10 or 11 (see *Crimes Legislation Amendment Act 2010* s 3).

Consent

34. Section 45(4) states that consent is not a defence to a charge of sexual penetration of a child under 16, unless the child was 12 years or older and:

    (a) The accused believed on reasonable grounds that the child was 16 or older; or

    (b) The accused was not more than 2 years older than the child; or

    (c) The accused believed on reasonable grounds that he or she was married to the child.

35. For offences committed before 17 March 2010, this defence is also available if the child was aged 10 or 11 (see *Crimes Legislation Amendment Act 2010* s 3).

36. In relation to s 45(4)(b), consent will not be a defence where the accused's actual age exceeds the child's by anything more than 24 months. The availability of the defence is not determined by a measure limited to whole–years (*Stannard v DPP* (2010) 28 VR 84).

Burden of proof

37. Sections 45(4) and 45(4A) were introduced by s 9 of the *Crimes (Sexual Offences) Act 2006*. These amendments apply to offences committed after 1 December 2006 (*Crimes Act 1958* s 606A).

38. The sections were further amended by s 3 of the *Crimes Legislation Amendment Act 2010* to raise the age at which a child may consent from 10 to 12. Those amendments only apply to offences committed on or after 17 March 2010.

39. The effect of these provisions is to place the legal burden on the accused to prove, on the balance of probabilities, that he or she believed on reasonable grounds that the child was 16 or older (s 45(4)(a)), or that he or she was married to the child (s 45(4)(c)).

40. However, for offences alleged to have been committed prior to 1 December 2006, where there is an evidentiary basis for a s 45(4) defence, the burden of proof is on the prosecution to disprove the defence beyond reasonable doubt (*R v Mark & Elmazovski* [2006] VSCA 251; *R v Deblasis* (2007) 19 VR 128; *R v Fagone* [2008] VSCA 175. Cf *R v Douglas* [1985] VR 721).

41. Judges should carefully explain the burden of proof to the jury in a way they can understand (*R v Fagone* [2008] VSCA 175).[642]

42. Generally, if the age gap between the complainant and the accused is in issue under s 45(4)(b), the prosecution will be required to prove, beyond a reasonable doubt, that the accused is more than 2 years older than the complainant.

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[642] For example, instead of charging the jury that "the prosecutor carried an onus to negative, to the criminal standard of beyond reasonable doubt, a belief on reasonable grounds that the complainant was 16 or older", the jury should be directed that "the prosecution must prove, beyond reasonable doubt, that the accused did not believe, on reasonable grounds, that the complainant was 16 or older" (*R v Fagone* [2008] VSCA 175).

43. It is only if the jury is satisfied that one of the matters specified in s 45(4) have been proved to the requisite standard that consent will be relevant. In such cases, the prosecution will then need to prove, beyond reasonable doubt, that the complainant did not consent.

44. For there to be reasonable grounds for a state of mind (such as belief), there must exist facts which are sufficient to induce that state of mind in a reasonable person (*George v Rockett and Another* (1990) 170 CLR 104).

Intoxication

45. At common law, the fact that the accused had used drugs or alcohol could be relevant to his or her belief that the child was 16 or older (see, e.g. *R v Fagone* [2008] VSCA 175).

46. However, this issue only needed to be addressed if there was a factual foundation for finding that the accused's drug or alcohol use affected his or her belief that the child was 16 or older. The mere fact that s/he had used drugs or alcohol at the relevant time was not sufficient (*R v Fagone* [2008] VSCA 175).

47. For offences committed on or after 1 November 2014, section 322T restricts the use of evidence of self-induced intoxication in assessing whether a person had a reasonable belief for the purpose of a defence. Judges will need to consider whether section 322T applies to the defence of consent for this offence. As a matter of prudence, for the purpose of this Charge Book, we have assumed that s 322T does not apply to this defence. See 8.5 Statutory Intoxication (From 1/11/14) for more information.

48. For offences committed before 1 November 2014, the relevance of drug or alcohol use generally is discussed in 8.7 Common Law Intoxication.

Reasonable grounds for belief

49. As it is the grounds for the accused's belief that must be reasonable, not the belief itself, the accused does not need to prove that he or she had the same state of mind as a reasonable person (*LAL v R* [2011] VSCA 111).

50. However, it is not sufficient for the accused to prove that he or she thought that there were reasonable grounds for his or her belief. There must be facts which would be sufficient to induce a reasonable person to believe the child was 16 or older (*Curtis v R* [2011] VSCA 102; *LAL v R* [2011] VSCA 111; *George v Rockett* (1990) 170 CLR 104).

51. Where the complainant did not tell the accused his or her age, it will usually be necessary for the accused to say what it was about the complainant's appearance, demeanour or behaviour which induced the belief that he or she was aged 16 or over (*Curtis v R* [2011] VSCA 102).

Accused's awareness of the absence of consent

52. *Crimes Act 1958* ss 38, 38A, & 39 expressly describe a fault element (or *mens rea*) associated with the complainant's lack of consent. This is, the accused must have acted while aware that the complainant was not or might not have been consenting, or while not giving any thought to whether the complainant was consenting. No other *Crimes Act 1958* sexual offences include "awareness of non consent" as a statutory fault element.

53. Whether this additional awareness element should be implied for other sexual offences has not been authoritatively determined. However, despite the contrast in drafting between ss 38, 38A, & 39 and the other sexual offences, it is likely that wherever consent is an issue, *mens rea* in respect of consent will also be relevant. This would be consistent with the principles set down in *He Kaw Teh v R* (1985) 157 CLR 523 and now applied in relation to common assault by *Parish v DPP* (2007) 17 VR 412.

54. If a *mens rea* requirement in respect of consent is to be implied, it will be necessary to determine the form of *mens rea* that will be sufficient. For rape and indecent assault at common law the *mens rea* associated with consent was the same as that reflected in *Crimes Act 1958* ss 38 and 39 before 1 January 2008 (*R v Saragozza* [1984] VR 187, *DPP v Morgan* [1976] AC 182, *R v Kimber* [1983] 1 WLR 1118). That is, it was sufficient if the sexual act was done with the awareness that the complainant was not consenting or might not be consenting. It has been assumed that this form of *mens rea* attaches to the consent element of all relevant sexual offences, and the charges for these offences are drafted accordingly.

55. For rape, compelled sexual penetration and indecent assault the *Crimes Amendment (Rape) Act 2007* introduced a new statutory fault element. For these offences it is no defence for accused persons to assert that they were not aware that the complainant might not have been consenting to the sexual act because they had not given any thought to whether or not the complainant was consenting (*Crimes Act 1958* ss 38(2)(a)(ii), 38(4)(b)(ii), 38A(3)(b)(ii), 39(2)(b)).

56. It is unclear whether this additional fault element was acknowledged under the common law, and if so whether it should now be applied to offences such as Sexual penetration of a child under 16 where it is not a statutory element. See further the discussion in 7.3.2 Rape (From 1/1/92). The charge book charges only include this fault element where it is a statutory fault element. If it is to be applied to other offences, the charge will need to be amended.

Directions about consent and awareness of non-consent

57. The definition and mandatory directions in respect of consent in s 36 and s 37, and s 37AAA of the *Crimes Act* 1958 apply to this offence. If *mens rea* in respect of consent is an implied requirement for this offence, then the directions in s 37AA may also need to be given. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information in relation to these matters.

Procedural matters

58. As the circumstances of aggravation in s 45(2) are not elements of the offence, they should not be considered as part of the jury's determination of the accused's guilt. The jury should be directed that their first task is to decide whether the prosecution has proven the elements of the offence beyond reasonable doubt.

59. The jury should be directed that they should only consider the circumstances of aggravation if they decide that the accused is guilty of the offence specified in s 45(1).

60. In taking the jury's verdict, the judge should first ask whether the jury has reached a verdict in relation to the offence. If that verdict is guilty, the judge should then ask whether the jury has reached agreement about the circumstances of aggravation.

61. It has not been judicially determined whether the jury must be unanimous as to the circumstances of aggravation, or whether a majority verdict will suffice. Under s 46 of the *Juries Act 2000*, a majority verdict may only be taken if the jury is unable to agree on its "verdict". While it has not been decided that the jury's decision about the circumstances of aggravation is a "verdict" for the purposes of the *Juries Act*, it seems likely that it will be treated in this way.

62. Due to the construction of s 45(2), it seems likely that if the jury return a unanimous verdict as to guilt, but cannot reach a unanimous verdict as to the aggravating circumstances, the verdict will stand and the accused will be liable to the lower penalty specified in s 45(2)(c). However, this issue has not been judicially determined.

Last updated: 30 November 2017

7.3.13.1 Charge: Sexual Penetration of a Child under 16 (From 17/3/10) Consent Not in Issue

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This charge can be used for trials involving offences alleged to have been committed on or after 17/3/2010 where neither consent nor any precondition for relying on consent as a defence is in issue.

I must now direct you about the crime of sexual penetration of a child under the age of 16. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused did this intentionally.

Three – the complainant was under the age of 16 at the time that the act of sexual penetration took place.

I will now explain each of these elements in more detail.[643]

Taking part in an act of sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If the conscious, voluntary or deliberate nature of the act is in issue,*[644] *add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.]

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "by putting his finger into NOC's anus"/"when he took NOC's penis in his mouth"].

[*If relevant add:*

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface,* e.g. "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the conscious, voluntary or deliberate nature of the acts in issue, add the following shaded section.*]

For this element to be met, the act of [*describe relevant act of participation, e.g.* "introducing his finger into

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[643] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[644] Described hereafter as the "voluntariness" requirement.

NOC's anus"/"receiving NOC's penis into his mouth"] must have been done consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section*.]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section*.]

However, according to the law, the introduction of an object or body part other than the penis into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[645]

[*If intention is not in issue, add the shaded section*.]

This element is not in issue here. [*If appropriate, explain further, e.g.* If you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally.]

Child under the age of 16

The third element relates to the complainant. The prosecution must prove that s/he was under the age of 16 when the alleged act of sexual penetration took place.

In this case, there is no dispute that NOC was under 16 at that time. The main issue in this case is [*insert relevant issue*].[646]

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[645] Because sexual penetration of a child under 16 is an offence of basic intent (the intent to take part in the act of penetration), the issue of intention is only likely to arise in cases involving penetration of the accused by the complainant. In cases where the accused is alleged to have penetrated the complainant, proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Mental state issues related to the intention to penetrate (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions.

[646] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

Statutory defences and exclusions

Accused married to the complainant

[*For offences allegedly committed before 22 October 2014, if the accused alleged that s/he was married to the complainant, who was aged between 12 and 16 at the time of the alleged penetration, add the following shaded section.*]

Even if these three elements are met, the law states that a person is not guilty of this offence if the accused and the complainant were married to each other at the time of the alleged penetration, and the complainant was at least 12 years' old at that time.

In this case [*insert relevant evidence and competing arguments*].

It is for the prosecution to prove, beyond reasonable doubt, that NOA was not married to NOC at the time of the alleged act of sexual penetration, or that NOC was aged under 12 at the relevant time. If the prosecution cannot prove at least one of these matters, then you must find NOA not guilty of this offence.

Consent is not a defence

[*This charge is designed for use in cases where consent is not in issue. Use one of the charges listed at the beginning of this document if consent or a precondition for consideration of consent (belief in age, age gap of less than 2 years, or marriage to complainant) is contested.*]

To protect children under the age of 16, Parliament has created a number of offences where consent is not relevant. This is one of those offences, so you do not need to consider the issue of whether or not NOC agreed to take part in the alleged act of sexual penetration.

Circumstances of Aggravation

[*If any circumstances of aggravation have been alleged in the indictment, add the following shaded section*.]

The law has specified certain "circumstances of aggravation" which you must consider if you find that each of the elements of this offence has been proved. These are not elements of the offence, but circumstances which make the crime more serious. Like the elements of the offence, these are matters which the prosecution must prove beyond reasonable doubt and you can only find a circumstance of aggravation if you all agree that circumstance exists.[647]

[*Where it is alleged that the complainant was under the age of 12, add the following shaded section.*]

One of the "circumstances of aggravation" specified by the law is that the complainant was under the age of 12 at the time that the alleged act of sexual penetration took place.

In this case [*insert relevant evidence and competing arguments about the complainant's age*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the offence. I will tell you later how your verdicts are to be taken by my associate.

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[647] If more than one circumstance of aggravation is in issue, the judge should consider spelling out that the jury must agree on a particular circumstance of aggravation.

[*Where it is alleged that the complainant was between 12 and 16 and under the care, supervision or authority of the accused, add the following shaded section.*]

One of the "circumstances of aggravation" specified by the law is that the complainant was aged between 12 and 16 at the time that the alleged act of sexual penetration took place, and was under the care, supervision or authority of the accused.

This is a two-part test. You must first be satisfied that NOC was aged between 12 and 16. You must also be satisfied that NOC was under NOA's care, supervision or authority at the time the alleged act of sexual penetration took place. These are ordinary everyday English words.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, support or authority is sufficient.

[*If relevant, add*: You do not need to find that the occasion on which the alleged act of penetration took place was connected with, or arose out of, the relationship of care, supervision or authority. It is sufficient if you are satisfied that there was an ongoing relationship of care, supervision or authority between NOA and NOC, and that that relationship existed on the day on which the penetration took place.]

In this case the prosecution alleged that NOC was [*insert age*] at the relevant time, and was under NOA's [care/supervision/authority]. [*Insert relevant evidence and competing arguments.*]

It is for you to determine, on the basis of all the evidence, whether the prosecution has proved this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the crime. I will tell you later how your verdicts are to be taken by my associate.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt: ·

One – that NOA took part in an act of sexual penetration with NOC; and

Two – that NOA intended to take part in that act of sexual penetration; and

Three – that NOC was under the age of 16 at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child under the age of 16.

[*If any circumstances of aggravation are in issue, add the following shaded section.*]

If you find that all of these elements have been proved, you must then consider whether circumstances of aggravation have been established.

[*Where it is alleged that the complainant was under the age of 12, add*: You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was under 12 at the time of the alleged penetration.]

[*Where it is alleged that the complainant was between 12 and 16 and under the care, supervision or authority of the accused, add*: You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was aged between 12 and 16 at the time of the alleged penetration, and was under the care, supervision or authority of the accused.]

Taking the verdict

When you have reached your verdict and returned to this court room, my associate will ask you whether you have agreed on a verdict, and what your verdict is. You, [Mr/Madam] foreman, will answer "guilty" or "not guilty", according to the decision the jury has reached.

If you answer guilty, you will then be asked whether you have reached agreement about the circumstances of aggravation, to which you, [Madam/Mr] foreman will answer according to what the jury have decided.

Last updated: 22 January 2016

7.3.13.2 Checklist: Sexual Penetration of a Child under the Age of 16 (From 17/3/10) Consent Not in Issue

Click here for a downloadable version of this document for adaptation

This checklist includes two aggravating circumstances which are mutually exclusive. If both circumstances are alleged in a single case because of uncertainty about the date of offending, the numbering and instructions of the aggravating circumstances should be changed.

The Elements

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with the complainant; and

2. The accused intended to take part in that act of sexual penetration; and

3. The complainant was under the age of 16 at the time that the act of sexual penetration took place.

Accused's Acts

1. Did the accused take part in an act of sexual penetration with the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of sexual penetration of a child under 16

Accused's Intention

2. Did the accused intend to take part in that act of sexual penetration with the complainant?

If Yes, then go to 3

If No, then the accused is not guilty of sexual penetration of a child under 16

The Complainant's Age

3. Was the complainant under the age of 16 at the time that the act of sexual penetration took place?

If Yes, then the accused is guilty of sexual penetration of a child under 16 (as long as you have also answered yes to questions 1 and 2). Go to aggravating circumstances.

If No, then the accused is not guilty of sexual penetration of a child under 16

Aggravating Circumstances

[*If it is alleged in the presentment that the complainant was under the age of 12 at the time of the offence, add the following section*.]

4. Was the complainant under the age of 12 at the time that the act of sexual penetration took place?

If Yes, then you are satisfied the child was under 12

If No, then you are not satisfied the child was under 12

[*If it is alleged in the presentment that the complainant was between the ages of 12 and 16 at the time of the offence, and was under care, supervision or authority of the accused, add the following section*.]

4. Was the complainant between the ages of 12 and 16 at the time that the act of sexual penetration took place?

If Yes, then go to 5

If No, then you are not satisfied the child was between 12 and 16 and under the accused's care, supervision and authority

5. Was the complainant under the care, supervision or authority of the accused at the time that the act of sexual penetration took place?

If Yes, then you are satisfied the child was between 12 and 16 and under the accused's care, supervision and authority

If No, then you are not satisfied the child was between 12 and 16 and under the accused's care, supervision and authority

Last updated: 19 September 2019

7.3.13.3 Charge: Sexual Penetration of a Child under 16 (Pre-17/3/10) Consent Not in Issue

Click here to obtain a Word version of this document for adaptation

This charge can be used for trials involving offences alleged to have been committed before 17/3/2010 where neither consent nor any precondition for relying on consent as a defence is in issue.

I must now direct you about the crime of sexual penetration of a child under the age of 16. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused did this intentionally.

Three – the complainant was under the age of 16 at the time that the act of sexual penetration took place.

I will now explain each of these elements in more detail.[648]

[648] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA *[describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

Taking part in an act of sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If the conscious, voluntary or deliberate nature of the act is in issue,*[649] *add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.]

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "by putting his finger into NOC's anus"/"when he took NOC's penis in his mouth"].

[*If relevant add:*

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface*, *e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the conscious, voluntary or deliberate nature of the acts are in issue, add the following shaded section*.]

For this element to be met, the act of [*describe relevant act of participation, e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been done consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part other than the penis into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to*

[649] Described hereafter as the "voluntariness" requirement.

relevant evidence]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[650]

[*If intention is not in issue, add the shaded section.*]

This element is not in issue here. [*If appropriate, explain further*, *e.g.* "If you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally".]

Child under the age of 16

The third element relates to the complainant. The prosecution must prove that s/he was under the age of 16 when the alleged act of sexual penetration took place.

In this case, there is no dispute that NOC was under 16 at that time. The main issue in this case is [*insert relevant issue*].[651]

Statutory defences and exclusions

Accused married to the complainant

[*If the accused alleged that s/he was married to the complainant, who was aged between 10 and 16 at the time of the alleged penetration, add the following shaded section.*]

Even if these three elements are met, the law states that a person is not guilty of this offence if the accused and the complainant were married to each other at the time of the alleged penetration, and the complainant was at least 10 years' old at that time.

In this case [*insert relevant evidence and competing arguments*].

It is for the prosecution to prove, beyond reasonable doubt, that NOA was not married to NOC at the time of the alleged act of sexual penetration, or that NOC was aged under 10 at the relevant time. If the prosecution cannot prove at least one of these matters, then you must find NOA not guilty of this offence.

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[650] Because sexual penetration of a child under 16 is an offence of basic intent (the intent to take part in the act of penetration), the issue of intention is only likely to arise in cases involving *penetration of the accused by the complainant*. In cases where the accused is alleged to have *penetrated the complainant*, proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Mental state issues related to the intention to penetrate (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions.

[651] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

Consent is not a defence

[*This charge is designed for use in cases where consent is not in issue. Use one of the charges listed at the beginning of this document if consent or a precondition for consideration of consent (belief in age, age gap of less than 2 years, or marriage to complainant) is contested.*]

To protect children under the age of 16, Parliament has created a number of offences where consent is not relevant. This is one of those offences, so you do not need to consider the issue of whether or not NOC agreed to take part in the alleged act of sexual penetration.

Circumstances of Aggravation

[*If any circumstances of aggravation have been alleged in the indictment, add the following shaded section*.]

The law has specified certain "circumstances of aggravation" which you must consider if you find that each of the elements of this offence has been proved. These are not elements of the offence, but circumstances which make the crime more serious. Like the elements of the offence, these are matters which the prosecution must prove beyond reasonable doubt and you can only find a circumstance of aggravation if you all agree that circumstance exists.[652]

[*Where it is alleged that the complainant was under the age of 10, add the following shaded section*.]

One of the "circumstances of aggravation" specified by the law is that the complainant was under the age of 10 at the time that the alleged act of sexual penetration took place.

In this case [*insert relevant evidence and competing arguments about the complainant's age*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proved this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the offence. I will tell you later how your verdicts are to be taken by my associate.

[*Where it is alleged that the complainant was between 10 and 16 and under the care, supervision or authority of the accused, add the following shaded section*.]

One of the "circumstances of aggravation" specified by the law is that the complainant was aged between 10 and 16 at the time that the alleged act of sexual penetration took place, and was under the care, supervision or authority of the accused.

This is a two-part test. You must first be satisfied that NOC was aged between 10 and 16. You must also be satisfied that NOC was under NOA's care, supervision or authority at the time the alleged act of sexual penetration took place. These are ordinary everyday English words.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, support or authority is sufficient.

[*If relevant, add*: You do not need to find that the occasion on which the alleged act of penetration took place was connected with, or arose out of, the relationship of care, supervision or authority. It is sufficient if you are satisfied that there was an ongoing relationship of care, supervision or authority between NOA and NOC, and that that relationship existed on the day on which the penetration took

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[652] If more than one circumstance of aggravation is in issue, the judge should consider spelling out that the jury must agree on a particular circumstance of aggravation.

place.]

In this case the prosecution alleged that NOC was [*insert age*] at the relevant time, and was under NOA's [care/supervision/authority]. [*Insert relevant evidence and competing arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proved this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the crime. I will tell you later how your verdicts are to be taken by my associate.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

One – that NOA took part in an act of sexual penetration with NOC; and

Two – that NOA intended to take part in that act of sexual penetration; and

Three – that NOC was under the age of 16 at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child under the age of 16.

[*If any circumstances of aggravation are in issue, add the following shaded section*.]

If you find that all of these elements have been proved, you must then consider whether circumstances of aggravation have been established.

[*Where it is alleged that the complainant was under the age of 10, add*: You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was under 10 at the time of the alleged penetration.]

[*Where it is alleged that the complainant was between 10 and 16 and under the care, supervision or authority of the accused, add*: You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was aged between 10 and 16 at the time of the alleged penetration, and was under the care, supervision or authority of the accused.]

Taking the verdict

When you have reached your verdict and returned to this court room, my associate will ask you whether you have agreed on a verdict, and what your verdict is. You, [Mr/Madam] foreman, will answer "guilty" or "not guilty", according to the decision the jury has reached.

If you answer guilty, you will then be asked whether you have reached agreement about the circumstances of aggravation, to which you, [Madam/Mr] foreman will answer according to what the jury have decided.

Last updated: 19 March 2015

7.3.13.4 Checklist: Sexual Penetration of a Child under the Age of 16 Consent Not in Issue (Pre-17/3/10)

Click here to obtain a Word version of this document for adaptation

This checklist includes two aggravating circumstances which are mutually exclusive. If both circumstances are alleged in a single case because of uncertainty about the date of offending, the numbering and instructions of the aggravating circumstances should be changed.

The Elements

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with the complainant; and
2. The accused intended to take part in that act of sexual penetration; and
3. The complainant was under the age of 16 at the time that the act of sexual penetration took place.

Accused's Acts

1. Did the accused take part in an act of sexual penetration with the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of sexual penetration of a child under 16

Accused's Intention

2. Did the accused intend to take part in that act of sexual penetration with the complainant?

If Yes, then go to 3

If No, then the accused is not guilty of sexual penetration of a child under 16

The Complainant's Age

3. Was the complainant under the age of 16 at the time that the act of sexual penetration took place?

If Yes, then the accused is guilty of sexual penetration of a child under 16 (as long as you have also answered yes to questions 1 and 2). Go to aggravating circumstances.

If No, then the accused is not guilty of sexual penetration of a child under 16

Aggravating Circumstances

[*If it is alleged in the presentment that the complainant was under the age of 10 at the time of the offence, add the following section.*]

4. Was the complainant under the age of 10 at the time that the act of sexual penetration took place?

If Yes, then you are satisfied the child was under 10

If No, then you are not satisfied the child was under 10

[*If it is alleged in the presentment that the complainant was between the ages of 10 and 16 at the time of the offence, and was under care, supervision or authority of the accused, add the following section.*]

4. Was the complainant between the ages of 10 and 16 at the time that the act of sexual penetration took place?

If Yes, then go to 5

If No, then you are not satisfied the child was between 10 and 16 and under the accused's care, supervision and authority

5. Was the complainant under the care, supervision or authority of the accused at the time that the act

of sexual penetration took place?

If Yes, then you are satisfied the child was between 10 and 16 and under the accused's care, supervision and authority

If No, then you are not satisfied the child was between 10 and 16 and under the accused's care, supervision and authority

Last updated: 19 September 2019

7.3.13.5 Charge: Sexual Penetration of a Child under 16 (From 1/7/15) Consent in Issue

Click here to obtain a Word version of this document for adaptation

This charge can be used for trials involving offences alleged to have been committed on or after 1/7/2015 where consent is in issue (because the complainant was aged 12 or over and the accused relies on a circumstance described in s 45(4)).

I must now direct you about the crime of sexual penetration of a child under the age of 16. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused did this intentionally.

Three – the complainant was under the age of 16 at the time that the act of sexual penetration took place.

I will now explain each of these elements in more detail.[653]

Taking part in an act of sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If the conscious, voluntary or deliberate nature of the act is in issue,*[654] *add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.]

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

[653] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proved."

[654] Described hereafter as the "voluntariness" requirement.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add:* This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "by putting his finger into NOC's anus"/"when he took NOC's penis in his mouth"].

[*If relevant add:*

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the conscious, voluntary or deliberate nature of the acts in issue, add the following shaded section.*]

For this element to be met, the act of [*describe relevant act of participation, e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been done consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part other than the penis into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[655]

[*If intention is not in issue, add the shaded section*.]

This element is not in issue here. [*If appropriate, explain further, e.g.* "if you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally".]

Child under the age of 16

The third element relates to the complainant. The prosecution must prove that s/he was under the age of 16 when the alleged act of sexual penetration took place.

In this case, there is no dispute that NOC was under 16 at that time. The main issue in this case is [*insert relevant issue*].[656]

Statutory defences and exclusions

Consent

Consent can only be in issue if the complainant was aged 12 or older at the time of the offence. If age is in issue in this respect this charge will need to be modified.

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 16 or older (s 45(4)(a)). If the issue is s 45(4)(b) (accused not more than 2 years older than the complainant) or s 45(4)(c) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See Sexual penetration of a child under 16 (1/1/92 – 30/6/17) for guidance.

Warning! It is not clear whether *Crimes Act 1958* s 322T affects the relevance of intoxication to this defence. Judges should seek submissions from the parties on this issue where relevant.

Belief that complainant was aged 16 or more

Even if you find that the prosecution has proved all three elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

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[655] Because sexual penetration of a child under 16 is an offence of basic intent (the intent to take part in the act of penetration), the issue of intention is only likely to arise in cases involving *penetration of the accused by the complainant*. In cases where the accused is alleged to have *penetrated* the *complainant*, proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Mental state issues related to the intention to penetrate (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions.

[656] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 16 years old at the time of the alleged penetration.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this belief is a matter which the accused must prove on the balance of probabilities. That is, the accused must prove that it is more likely than not that s/he believed on reasonable grounds that NOC was aged 16 or over for consent to be available as a defence.

So, by contrast to proof of the elements of the offence(s), where the prosecution must satisfy you beyond reasonable doubt of them, for the defence of reasonable belief to be established to your satisfaction, it is for the accused, not the prosecution to prove the existence of a reasonable belief in age.

And the standard to which the defence must do this is a lesser standard than proof beyond reasonable doubt, it is proof on the balance of probabilities. That is, the accused must satisfy you that it is more likely than not that he believed, on reasonable grounds, that the complainant was 16 or over.

In this case [*insert relevant evidence and competing arguments*].

[*If the prosecution has conceded either consent or belief in consent, add the shaded section.*]

As it is not in issue in this case that the sexual act was consensual, if the accused satisfied you, on the balance of probabilities that s/he believed, on reasonable grounds, that at the time s/he took part in the act of sexual penetration, that the complainant was 16 or over, then your verdict in respect of that charge will be not guilty. If however, the accused does not satisfy you on the balance of probabilities that at the time he believed the complainant was 16 or over, and that his belief was based on reasonable grounds, then despite the fact that the act was consensual, this defence will fail.

[*If either consent or belief in consent is in issue, add the shaded section.*]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

If, however, you find that the NOA has proven that s/he believed on reasonable grounds that NOC was at least 16 years old at the time of the alleged indecent act, then you will need to determine whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged act of sexual penetration and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the sexual penetration if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the sexual penetration. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the sexual penetration, then you must find NOA not guilty of this offence.

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs.*]

The law says that a person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

The law says that where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following darker shaded section.*]

In some circumstances the law says that the complainant did not freely agree, or consent, to an act. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep or unconscious;

(e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;

(f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;[657]

(g) the person is incapable of understanding the sexual nature of the act;

(h) the person is mistaken about the sexual nature of the act;

(i) the person is mistaken about the identity of any other person involved in the act;

(j) the person mistakenly believes that the act is for medical or hygienic purposes;

(k) if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes;

(l) the person does not say or do anything to indicate consent to the act;

(m) having initially given consent to the act, the person later withdraws consent to the act taking place or continuing].

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting.

However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following darker shaded section.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the alleged act of sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where a party requests a direction about the absence of physical resistance or protest, lack of physical injury or past consensual sexual conduct, add the following shaded section as relevant to the facts in issue.*]

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[657] Only for offences committed from 1 July 2017.

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury;
- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proven beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to the alleged sexual penetration, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of that act, or not said and done at the time of the alleged act, as well as the evidence s/he gave in court about [his/her] state of mind at that time.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing arguments.*]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged act of sexual penetration the accused was aware either:

- that the complainant was not consenting; or
- that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

[Warning! If this element is in issue, the judge should invite submissions on how to direct the jury about this issue. With the repeal of Crimes Act 1958 s 37AA, it may not be prudent to use 7.3.1.3.1 Charge: Belief in consent (Pre 1/07/2015).]

Onus and standard of proof

Remember, you may not need to consider the issue of consent. The process that you must follow is this. First, you must decide if the prosecution has proven the three elements of the offence beyond reasonable doubt. That is, the prosecution must prove that NOA took part in an act of sexual penetration with NOC, that s/he intended to take part in the act of sexual penetration, and that NOC was under the age of 16 at the relevant time. If the prosecution cannot prove all three of these elements, then you must find NOA not guilty of this offence.

Next, if you find that the prosecution has proven each of these elements beyond reasonable doubt, and the accused has raised the issue as to belief in age, you must then decide if NOA has proven, on the balance of probabilities, that s/he believed that NOC was at least 16 years old, and that that belief was based on reasonable grounds. If the accused cannot prove both of these matters, then NOA will

be guilty of this offence, as long as the prosecution have proven each of the first three elements of the offence beyond reasonable doubt.

If, however, you find that the accused has proven these matters as to belief in age on the balance of probabilities, you must then decide whether the prosecution has proven, beyond reasonable doubt, the two additional elements that NOC did not consent, and that NOA was aware that s/he was not or might not be consenting. If the prosecution cannot prove both of these things, then you must find NOA not guilty of this offence. It is only if you are satisfied that they have been proven beyond reasonable doubt, together with each of the first three elements of the offence, that you can convict NOA of indecent act with a child under 16.

Circumstances of Aggravation

[*If any circumstances of aggravation have been alleged in the indictment, add the following shaded section.*]

The law has specified certain "circumstances of aggravation" which you must consider if you find that each of the elements of this offence has been proved. These are not elements of the offence, but circumstances which make the crime more serious. Like the elements of the offence, these are matters which the prosecution must prove beyond reasonable doubt and you can only find a circumstance of aggravation if you all agree that circumstance exists.[658]

[*Where it is alleged that the complainant was under the age of 12, add the following shaded section*.]

One of the "circumstances of aggravation" specified by the law is that the complainant was under the age of 12 at the time that the alleged act of sexual penetration took place.

In this case [*insert relevant evidence and competing arguments about the complainant's age*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proved this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the offence. I will tell you later how your verdicts are to be taken by my associate.

[*Where it is alleged that the complainant was between 12 and 16 and under the care, supervision or authority of the accused, add the following shaded section.*]

One of the "circumstances of aggravation" specified by the law is that the complainant was aged between 12 and 16 at the time that the alleged act of sexual penetration took place, and was under the care, supervision or authority of the accused.

This is a two-part test. You must first be satisfied that NOC was aged between 12 and 16. You must also be satisfied that NOC was under NOA's care, supervision or authority at the time the alleged act of sexual penetration took place. These are ordinary everyday English words.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, support or authority is sufficient.

[*If relevant, add*: You do not need to find that the occasion on which the alleged act of penetration took place was connected with, or arose out of, the relationship of care, supervision or authority. It is

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[658] If more than one circumstance of aggravation is in issue, the judge should consider spelling out that the jury must agree on a particular circumstance of aggravation.

sufficient if you are satisfied that there was an ongoing relationship of care, supervision or authority between NOA and NOC, and that that relationship existed on the day on which the penetration took place.]

In this case the prosecution alleged that NOC was [*insert age*] at the relevant time, and was under NOA's [care/supervision/authority]. [*Insert prosecution evidence*]. The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proved this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the crime. I will tell you later how your verdicts are to be taken by my associate.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA took part in an act of sexual penetration with NOC; and
- Two – that NOA intended to take part in that act of sexual penetration; and
- Three – that NOC was under the age of 16 at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child under the age of 16.

If you decide that each of these elements have been proved beyond reasonable doubt, you must decide if the accused has proved, on the balance of probabilities:

- That NOA believed that NOC was aged 16 or older at the relevant time; and
- That NOA had reasonable grounds for that belief.

If the accused has not proved both of these matters on the balance of probabilities, and you find that all of the elements have been proved by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if you find that both of these matters have been proved by the accused on the balance of probabilities, you must then decide if the prosecution has proved, beyond reasonable doubt, that NOC did not consent to the act of sexual penetration and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the shaded section*.]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the shaded section*.]

If the prosecution cannot prove these matters, then you must find NOA not guilty of sexual penetration of a child under the age of 16.

[*If any circumstances of aggravation are in issue, add the following shaded section.*]

If you find that all of these elements have been proved, you must then consider whether circumstances of aggravation have been established.

[*Where it is alleged that the complainant was under the age of 12, add:* You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was under 12 at the time of the alleged penetration.]

[*Where it is alleged that the complainant was between 12 and 16 and under the care, supervision or authority of the accused, add:* You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was aged between 12 and 16 at the time of the alleged penetration, and was under the care, supervision or authority of the accused.]

Taking the verdict

When you have reached your verdict and returned to this court room, my associate will ask you whether you have agreed on a verdict, and what your verdict is. You, [Mr/Madam] foreman, will answer "guilty" or "not guilty", according to the decision the jury has reached.

If you answer guilty, you will then be asked whether you have reached agreement about the circumstances of aggravation. My associate will ask you "Do you find that [*describe relevant aggravating circumstances*]?", to which you, [Madam/Mr] foreman will answer "yes" or "no", according to what the jury have decided.

Last updated: 30 November 2017

7.3.13.6 Charge: Sexual Penetration of a Child under 16 (17/3/10–30/6/15) Consent in Issue

Click here to obtain a Word version of this document for adaptation

This charge can be used for trials involving offences alleged to have been committed between 17/3/2010 and 30/6/2015 where consent is in issue (because the complainant was aged 12 or over and the accused relies on a circumstance described in s 45(4)).

I must now direct you about the crime of sexual penetration of a child under the age of 16. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused did this intentionally.

Three – the complainant was under the age of 16 at the time that the act of sexual penetration took place.

I will now explain each of these elements in more detail.[659]

Taking part in an act of sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If the conscious, voluntary or deliberate nature of the act is in issue,*[660] *add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.]

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

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[659] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[660] Described hereafter as the "voluntariness" requirement.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "by putting his finger into NOC's anus"/"when he took NOC's penis in his mouth"].

[*If relevant add:*

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the conscious, voluntary or deliberate nature of the acts in issue, add the following shaded section.*]

For this element to be met, the act of [*describe relevant act of participation, e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been done consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" *or* "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part other than the penis into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[661]

[*If intention is not in issue, add the shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.* "if you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally".]

Child under the age of 16

The third element relates to the complainant. The prosecution must prove that s/he was under the age of 16 when the alleged act of sexual penetration took place.

In this case, there is no dispute that NOC was under 16 at that time. The main issue in this case is [*insert relevant issue*].[662]

Statutory defences and exclusions

Accused married to the complainant

[*For offences allegedly committed before 22 October 2014, if the accused alleged that s/he was married to the complainant, who was aged between 12 and 16 at the time of the alleged penetration, add the following shaded section.*]

Even if these three elements are met, the law states that a person is not guilty of this offence if the accused and the complainant were married to each other at the time of the alleged penetration, and the complainant was at least 12 years' old at that time.

In this case [*insert relevant evidence and competing arguments*].

It is for the prosecution to prove, beyond reasonable doubt, that NOA was not married to NOC at the time of the alleged act of sexual penetration, or that NOC was aged under 12 at the relevant time. If the prosecution cannot prove at least one of these matters, then you must find NOA not guilty of this offence.

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[661] Because sexual penetration of a child under 16 is an offence of basic intent (the intent to take part in the act of penetration), the issue of intention is only likely to arise in cases involving *penetration of the accused by the complainant*. In cases where the accused is alleged to have *penetrated the complainant*, proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Mental state issues related to the intention to penetrate (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions.

[662] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

Consent

Consent can only be in issue if the complainant was aged 12 or older at the time of the offence. If age is in issue in this respect this charge will need to be modified.

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 16 or older (s 45(4)(a)). If the issue is s 45(4)(b) (accused not more than 2 years older than the complainant) or s 45(4)(c) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See Sexual penetration of a child under 16 (1/1/92–30/6/17) for guidance.

Warning! For offences alleged to have been committed on or after 1 November 2014, it is not clear whether *Crimes Act 1958* s 322T affects the relevance of intoxication to this defence. Judges should seek submissions from the parties on this issue where relevant.

Belief that complainant was aged 16 or more

Even if you find that the prosecution has proved all three elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 16 years old at the time of the alleged penetration.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this belief is a matter which the accused must prove on the balance of probabilities. That is, the accused must prove that it is more likely than not that s/he believed on reasonable grounds that NOC was aged 16 or over for consent to be available as a defence.

So, by contrast to proof of the elements of the offence(s), where the prosecution must satisfy you beyond reasonable doubt of them, for the defence of reasonable belief to be established to your satisfaction, it is for the accused, not the prosecution to prove the existence of a reasonable belief in age.

And the standard to which the defence must do this is a lesser standard than proof beyond reasonable doubt, it is proof on the balance of probabilities. That is, the accused must satisfy you that it is more likely than not that he believed, on reasonable grounds, that the complainant was 16 or over.

In this case [*insert relevant evidence and competing arguments*].

[*If the prosecution has conceded either consent or belief in consent, add the shaded section.*]

As it is not in issue in this case that the sexual act was consensual, if the accused satisfied you, on the balance of probabilities that s/he believed, on reasonable grounds, that at the time s/he took part in the act of sexual penetration, that the complainant was 16 or over, then your verdict in respect of that charge will be not guilty. If however, the accused does not satisfy you on the balance of probabilities that at the time he believed the complainant was 16 or over, and that his belief was based on reasonable grounds, then despite the fact that the act was consensual, this defence will fail.

[*If either consent or belief in consent is in issue, add the shaded section.*]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

If, however, you find that the NOA has proved that s/he believed on reasonable grounds that NOC was at least 16 years old at the time of the alleged penetration, then you will need to determine whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged act of sexual penetration and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the sexual penetration if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the sexual penetration. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the penetration, then you must find NOA not guilty of this offence.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proved.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following darker shaded section.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where evidence is given about the absence of physical resistance, lack of physical injury or past consensual sex, add the following darker shaded section if relevant to the facts in issue*.]

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury;
- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proved beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to take part in the act of sexual penetration, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged penetration.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing arguments.*]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged sexual penetration the accused was aware either:

- that the complainant was not consenting; or
- that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

Belief in consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Onus and standard of proof

Remember, you may not need to consider the issue of consent. The process that you must follow is this. First, you must decide if the prosecution has proved the three elements of the offence beyond reasonable doubt. That is, the prosecution must prove that NOA took part in an act of sexual penetration with NOC, that s/he intended to take part in the act of sexual penetration, and that NOC was under the age of 16 at the relevant time. If the prosecution cannot prove all three of these elements, then you must find NOA not guilty of this offence.

Next, if you find that the prosecution has proved each of these elements beyond reasonable doubt, and the accused has raised the issue as to belief in age, you must then decide if NOA has proved, on the balance of probabilities, that s/he believed that NOC was at least 16 years old, and that that belief was based on reasonable grounds. If the accused cannot prove both of these matters, then NOA will be guilty of this offence, as long as the prosecution have proved each of the first three elements of the offence beyond reasonable doubt.

If, however, you find that the accused has proved these matters as to belief in age on the balance of probabilities, you must then decide whether the prosecution has proved, beyond reasonable doubt, the two additional elements that NOC did not consent, and that NOA was aware that s/he was not or might not be consenting. If the prosecution cannot prove both of these things, then you must find NOA not guilty of this offence. It is only if you are satisfied that they have been proved beyond reasonable doubt, together with each of the first three elements of the offence, that you can convict NOA of sexual penetration of a child under 16.

Circumstances of Aggravation

[*If any circumstances of aggravation have been alleged in the indictment, add the following shaded section.*]

The law has specified certain "circumstances of aggravation" which you must consider if you find that each of the elements of this offence has been proved. These are not elements of the offence, but circumstances which make the crime more serious. Like the elements of the offence, these are matters which the prosecution must prove beyond reasonable doubt and you can only find a circumstance of aggravation if you all agree that circumstance exists.[663]

[*Where it is alleged that the complainant was under the age of 12, add the following shaded section.*]

One of the "circumstances of aggravation" specified by the law is that the complainant was under the age of 12 at the time that the alleged act of sexual penetration took place.

In this case [*insert relevant evidence and competing arguments about the complainant's age*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proved this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the offence. I will tell you later how your verdicts are to be taken by my associate.

[*Where it is alleged that the complainant was between 12 and 16 and under the care, supervision or authority of the accused, add the following shaded section.*]

One of the "circumstances of aggravation" specified by the law is that the complainant was aged between 12 and 16 at the time that the alleged act of sexual penetration took place, and was under the care, supervision or authority of the accused.

This is a two-part test. You must first be satisfied that NOC was aged between 12 and 16. You must also be satisfied that NOC was under NOA's care, supervision or authority at the time the alleged act of sexual penetration took place. These are ordinary everyday English words.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, support or authority is sufficient.

[*If relevant, add*: You do not need to find that the occasion on which the alleged act of penetration took place was connected with, or arose out of, the relationship of care, supervision or authority. It is sufficient if you are satisfied that there was an ongoing relationship of care, supervision or authority between NOA and NOC, and that that relationship existed on the day on which the penetration took place.]

In this case the prosecution alleged that NOC was [*insert age*] at the relevant time, and was under NOA's [care/supervision/authority]. [*Insert prosecution evidence.*] The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proved this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must

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[663] If more than one circumstance of aggravation is in issue, the judge should consider spelling out that the jury must agree on a particular circumstance of aggravation.

first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the crime. I will tell you later how your verdicts are to be taken by my associate.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

One – that NOA took part in an act of sexual penetration with NOC; and

Two – that NOA intended to take part in that act of sexual penetration; and

Three – that NOC was under the age of 16 at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child under the age of 16.

If you decide that each of these elements have been proved beyond reasonable doubt, you must decide if the accused has proved, on the balance of probabilities:

- That NOA believed that NOC was aged 16 or older at the relevant time; and
- That NOA had reasonable grounds for that belief.

If the accused has not proved both of these matters on the balance of probabilities, and you find that all of the elements have been proved by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if you find that both of these matters have been proved by the accused on the balance of probabilities, you must then decide if the prosecution has proved, beyond reasonable doubt, that NOC did not consent to the act of sexual penetration and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the shaded section.*]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the shaded section.*]

If the prosecution cannot prove these matters, then you must find NOA not guilty of sexual penetration of a child under the age of 16.

[*If any circumstances of aggravation are in issue, add the following shaded section.*]

If you find that all of these elements have been proved, you must then consider whether circumstances of aggravation have been established.

[*Where it is alleged that the complainant was under the age of 12, add: You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was under 12 at the time of the alleged penetration.*]

[*Where it is alleged that the complainant was* between 12 and 16 *and under* the care, supervision or authority *of the accused, add*: You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was aged between 12 and 16 at the time of the alleged penetration, and was under the care, supervision or authority of the accused.]

Taking the verdict

When you have reached your verdict and returned to this court room, my associate will ask you whether you have agreed on a verdict, and what your verdict is. You, [Mr/Madam] foreman, will answer "guilty" or "not guilty", according to the decision the jury has reached.

If you answer guilty, you will then be asked whether you have reached agreement about the circumstances of aggravation. My associate will ask you "Do you find that [*describe relevant aggravating circumstances*]?", to which you, [Madam/Mr] foreman will answer "yes" or "no", according to what the jury have decided.

Last updated: 30 November 2017

7.3.13.7 Checklist: Sexual Penetration of a Child under 16 (From 17/3/10) Consent in Issue

Click here for a Word version of this document for adaptation

This checklist is designed for offences committed on or after 17 March 2010.

The Elements

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with the complainant; and
2. The accused intended to take part in that act of sexual penetration; and
3. The complainant was under the age of 16 at the time that the act of sexual penetration took place.

Accused's Acts

1. Did the accused take part in an act of sexual penetration with the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of sexual penetration of a child under 16

Accused's Intention

2. Did the accused intend to take part in that act of sexual penetration with the complainant?

If Yes, then go to 3

If No, then the accused is not guilty of sexual penetration of a child under 16

The Complainant's Age

3. Was the complainant under the age of 16 at the time that the act of sexual penetration took place?

If Yes, then go to 4

If No, then the accused is not guilty of sexual penetration of a child under 16

Relevance of Consent

[*Consent can only be relevant where the complainant was aged 12 or over at the time of the offence. If the complainant's age is in issue in this respect this checklist will need to be modified. This section of the checklist can be used if the accused alleged that s/he believed on reasonable grounds that the complainant was 16 or older and consented to the act of sexual penetration. If consent is in issue because the accused alleged that s/he is not more than 2 years older than the complainant, or that s/he believed on reasonable grounds that s/he was married to the complainant, it will need to be modified as necessary.*]

Consent is only relevant if you are satisfied the defence has proven, on the balance of probabilities, both that:

4. The accused believed that the complainant was aged 16 or older at the time the act of sexual penetration took place; and

5. The accused's belief that the complainant was aged 16 or older was based on reasonable grounds.

Lack of Consent

If consent is relevant, the prosecution must prove, beyond reasonable doubt, that:

6. The complainant did not consent to taking part in the act of sexual penetration; and

7. The accused was aware that the complainant was not or might not be consenting.

Consent

6. Did the sexual penetration occur without the complainant's consent?

If Yes, then go to 7

If No, then the accused is not guilty of sexual penetration of a child under 16 (as long as you answered yes to questions 4 and 5)

Awareness of Lack of Consent

7. At the time of sexual penetration, was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes, then the accused is guilty of sexual penetration of a child under 16 (as long as you also answered yes to questions 1, 2, 3 and 6). Go to aggravating circumstances.

If No, then the accused is not guilty of sexual penetration of a child under 16 (as long as you answered yes to questions 4 and 5)

Aggravating Circumstances

[*If it is alleged in the presentment that the complainant was under the age of 12 at the time of the offence, add the following section.*]

8. Was the complainant under the age of 12 at the time that the act of sexual penetration took place?

If Yes, then you are satisfied the child was under 12

If No, then you are not satisfied the child was under 12

[*If it is alleged in the presentment that the complainant was between the ages of 12 and 16 at the time of the offence, and was under the care, supervision or authority of the accused, add the following section.*]

8. Was the complainant between the ages of 12 and 16 at the time that the act of sexual penetration took place?

If Yes, then go to 9

If No, then you are not satisfied the child was between 12 and 16 and under the accused's care, supervision and authority

9. Was the complainant under the care, supervision or authority of the accused at the time that the act

of sexual penetration took place?

If Yes, then you are satisfied the child was between 12 and 16 and under the accused's care, supervision and authority

If No, then you are not satisfied the child was between 12 and 16 and under the accused's care, supervision and authority

Last updated: 22 June 2016

7.3.13.8 Charge: Sexual Penetration of a Child under 16 (1/12/06–16/3/10) Consent in Issue

Click here to obtain a Word version of this document for adaptation

This charge can be used for trials involving offences alleged to have been committed between 1/12/2006 and 16/3/2010 where consent is in issue (because the complainant was aged 10 or over and the accused relies on a circumstance described in s 45(4)).

I must now direct you about the crime of sexual penetration of a child under the age of 16. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused did this intentionally.

Three – the complainant was under the age of 16 at the time that the act of sexual penetration took place.

I will now explain each of these elements in more detail.[664]

Taking part in an act of sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If the conscious, voluntary or deliberate nature of the act is in issue,*[665] *add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.]

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

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[664] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[665] Described hereafter as the "voluntariness" requirement.

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "by putting his finger into NOC's anus"/"when he took NOC's penis in his mouth"].

[*If relevant add:*

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the conscious, voluntary or deliberate nature of the acts in issue, add the following shaded section.*]

For this element to be met, the act of [*describe relevant act of participation, e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been done consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part other than the penis into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[666]

[*If intention is not in issue, add the shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.* if you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally.]

Child under the age of 16

The third element relates to the complainant. The prosecution must prove that s/he was under the age of 16 when the alleged act of sexual penetration took place.

In this case, there is no dispute that NOC was under 16 at that time. The main issue in this case is [*insert relevant issue*].[667]

Statutory defences and exclusions

Accused married to the complainant

[*If the accused alleged that s/he was married to the complainant, who was aged between 10 and 16 at the time of the alleged penetration, add the following shaded section.*]

Even if these three elements are met, the law states that a person is not guilty of this offence if the accused and the complainant were married to each other at the time of the alleged penetration, and the complainant was at least 10 years' old at that time.

In this case [*insert relevant evidence and competing arguments*].

It is for the prosecution to prove, beyond reasonable doubt, that NOA was not married to NOC at the time of the alleged act of sexual penetration, or that NOC was aged under 10 at the relevant time. If the prosecution cannot prove at least one of these matters, then you must find NOA not guilty of this offence.

Consent

Consent can only be in issue if the complainant was aged 10 or older at the time of the offence. If age is in issue in this respect this charge will need to be modified.

[666] Because sexual penetration of a child under 16 is an offence of basic intent (the intent to take part in the act of penetration), the issue of intention is only likely to arise in cases involving *penetration of the accused by the complainant*. In cases where the accused is alleged to have *penetrated the complainant*, proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Mental state issues related to the intention to penetrate (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions.

[667] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 16 or older (s 45(4)(a)). If the issue is s 45(4)(b) (accused not more than 2 years older than the complainant) or s 45(4)(c) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See Sexual penetration of a child under 16 (1/1/92 – 30/6/17) for guidance.

Belief that complainant was aged 16 or more

Even if you find that the prosecution has proved all three elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 16 years old at the time of the alleged penetration.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this belief is a matter which the accused must prove on the balance of probabilities. That is, the accused must prove that it is more likely than not that s/he believed on reasonable grounds that NOC was aged 16 or over for consent to be available as a defence.

So, by contrast to proof of the elements of the offence(s), where the prosecution must satisfy you beyond reasonable doubt of them, for the defence of reasonable belief to be established to your satisfaction, it is for the accused, not the prosecution to prove the existence of a reasonable belief in age.

And the standard to which the defence must do this is a lesser standard than proof beyond reasonable doubt, it is proof on the balance of probabilities. That is, the accused must satisfy you that it is more likely than not that he believed, on reasonable grounds, that the complainant was 16 or over.

In this case [*insert relevant evidence and competing arguments*].

[*If the prosecution has conceded either consent or belief in consent, add the shaded section.*]

As it is not in issue in this case that the sexual act was consensual, if the accused satisfied you, on the balance of probabilities that s/he believed, on reasonable grounds, that at the time s/he took part in the act of sexual penetration, that the complainant was 16 or over, then your verdict in respect of that charge will be not guilty. If however, the accused does not satisfy you on the balance of probabilities that at the time he believed the complainant was 16 or over, and that his belief was based on reasonable grounds, then despite the fact that the act was consensual, this defence will fail.

[*If either consent or belief in consent is in issue, add the shaded section.*]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

If, however, you find that the NOA has proved that s/he believed on reasonable grounds that NOC was at least 16 years old at the time of the alleged penetration, then you will need to determine whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged act of sexual penetration and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the sexual penetration if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the sexual penetration. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the penetration, then you must find

NOA not guilty of this offence.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proved.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following darker shaded section.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where evidence is given about the absence of physical resistance, lack of physical injury or past consensual sex, add the following darker shaded section if relevant to the facts in issue.*]

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury;
- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proved beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to take part in the act of sexual penetration, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged penetration.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing arguments.*]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged sexual penetration the accused was aware either:

- that the complainant was not consenting; or
- that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

Belief in Consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Onus and standard of proof

Remember, you may not need to consider the issue of consent. The process that you must follow is this. First, you must decide if the prosecution has proved the three elements of the offence beyond reasonable doubt. That is, the prosecution must prove that NOA took part in an act of sexual penetration with NOC, that s/he intended to take part in the act of sexual penetration, and that NOC was under the age of 16 at the relevant time. If the prosecution cannot prove all three of these elements, then you must find NOA not guilty of this offence.

Next, if you find that the prosecution has proved each of these elements beyond reasonable doubt, and the accused has raised the issue as to belief in age, you must then decide if NOA has proved, on the balance of probabilities, that s/he believed that NOC was at least 16 years old, and that that belief was based on reasonable grounds. If the accused cannot prove both of these matters, then NOA will be guilty of this offence, as long as the prosecution have proved each of the first three elements of the offence beyond reasonable doubt.

If, however, you find that the accused has proved these matters as to belief in age on the balance of probabilities, you must then decide whether the prosecution has proved, beyond reasonable doubt, the two additional elements that NOC did not consent, and that NOA was aware that s/he was not or might not be consenting. If the prosecution cannot prove both of these things, then you must find NOA not guilty of this offence. It is only if you are satisfied that they have been proved beyond reasonable doubt, together with each of the first three elements of the offence, that you can convict NOA of sexual penetration of a child under 16.

Circumstances of Aggravation

[*If any circumstances of aggravation have been alleged in the indictment, add the following shaded section.*]

The law has specified certain "circumstances of aggravation" which you must consider if you find that each of the elements of this offence has been proved. These are not elements of the offence, but circumstances which make the crime more serious. Like the elements of the offence, these are matters which the prosecution must prove beyond reasonable doubt and you can only find a circumstance of

aggravation if you all agree that circumstance exists.[668]

[*Where it is alleged that the complainant was under the age of 10, add the following shaded section.*]

One of the "circumstances of aggravation" specified by the law is that the complainant was under the age of 10 at the time that the alleged act of sexual penetration took place.

In this case [*insert relevant evidence and competing arguments about the complainant's age*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proved this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the offence. I will tell you later how your verdicts are to be taken by my associate.

[*Where it is alleged that the complainant was between 10 and 16 and under the care, supervision or authority of the accused, add the following shaded section.*]

One of the "circumstances of aggravation" specified by the law is that the complainant was aged between 10 and 16 at the time that the alleged act of sexual penetration took place, and was under the care, supervision or authority of the accused.

This is a two-part test. You must first be satisfied that NOC was aged between 10 and 16. You must also be satisfied that NOC was under NOA's care, supervision or authority at the time the alleged act of sexual penetration took place. These are ordinary everyday English words.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, support or authority is sufficient.

[*If relevant, add*: You do not need to find that the occasion on which the alleged act of penetration took place was connected with, or arose out of, the relationship of care, supervision or authority. It is sufficient if you are satisfied that there was an ongoing relationship of care, supervision or authority between NOA and NOC, and that that relationship existed on the day on which the penetration took place.]

In this case the prosecution alleged that NOC was [*insert age*] at the relevant time, and was under NOA's [care/supervision/authority]. [*Insert prosecution evidence*]. The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proved this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the crime. I will tell you later how your verdicts are to be taken by my associate.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

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[668] If more than one circumstance of aggravation is in issue, the judge should consider spelling out that the jury must agree on a particular circumstance of aggravation.

One – that NOA took part in an act of sexual penetration with NOC; and

Two – that NOA intended to take part in that act of sexual penetration; and

Three – that NOC was under the age of 16 at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child under the age of 16.

If you decide that each of these elements have been proved beyond reasonable doubt, you must decide if the accused has proved, on the balance of probabilities:

- That NOA believed that NOC was aged 16 or older at the relevant time; and
- That NOA had reasonable grounds for that belief.

If the accused has not proved both of these matters on the balance of probabilities, and you find that all of the elements have been proved by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if you find that both of these matters have been proved by the accused on the balance of probabilities, you must then decide if the prosecution has proved, beyond reasonable doubt, that NOC did not consent to the act of sexual penetration and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the shaded section.*]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the shaded section.*]

If the prosecution cannot prove these matters, then you must find NOA not guilty of sexual penetration of a child under the age of 16.

[*If any circumstances of aggravation are in issue, add the following shaded section.*]

If you find that all of these elements have been proved, you must then consider whether circumstances of aggravation have been established.

[*Where it is alleged that the complainant was under the age of 10, add*: You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was under 10 at the time of the alleged penetration.]

[*Where it is alleged that the complainant was between 10 and 16 and under the care, supervision or authority of the accused, add*: You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was aged between 10 and 16 at the time of the alleged penetration, and was under the care, supervision or authority of the accused.]

Taking the verdict

When you have reached your verdict and returned to this court room, my associate will ask you whether you have agreed on a verdict, and what your verdict is. You, [Mr/Madam] foreman, will answer "guilty" or "not guilty", according to the decision the jury has reached.

If you answer guilty, you will then be asked whether you have reached agreement about the circumstances of aggravation. My associate will ask you "Do you find that [*describe relevant aggravating circumstances*]?", to which you, [Madam/Mr] foreman will answer "yes" or "no", according to what the jury have decided.

Last updated: 22 January 2016

7.3.13.9 Charge: Sexual Penetration of a Child under 16 (Pre-1/12/06) Consent in Issue

Click here to obtain a Word version of this document for adaptation

This charge can be used for trials involving offences alleged to have been committed before 1/12/2006 where consent is in issue (because the complainant was aged 10 or over and the accused relies on a circumstance described in s 45(4)).

I must now direct you about the crime of sexual penetration of a child under the age of 16. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused did this intentionally.

Three – the complainant was under the age of 16 at the time that the act of sexual penetration took place.

I will now explain each of these elements in more detail.[669]

Taking part in an act of sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If the conscious, voluntary or deliberate nature of the act is in issue,*[670] *add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.]

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "by putting his finger into NOC's anus"/"when he took NOC's penis in his mouth"].

[*If relevant add:*

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.

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669 If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

670 Described hereafter as the "voluntariness" requirement.

- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the conscious, voluntary or deliberate nature of the acts in issue, add the following shaded section.*]

For this element to be met, the act of [*describe relevant act of participation, e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been done consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section.*]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part other than the penis into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[671]

[*If intention is not in issue, add the shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.* "if you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally".]

Child under the age of 16

The third element relates to the complainant. The prosecution must prove that s/he was under the age of 16 when the alleged act of sexual penetration took place.

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[671] Because sexual penetration of a child under 16 is an offence of basic intent (the intent to take part in the act of penetration), the issue of intention is only likely to arise in cases involving *penetration of the accused by the complainant*. In cases where the accused is alleged to have *penetrated the complainant*, proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Mental state issues related to the intention to penetrate (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions.

In this case, there is no dispute that NOC was under 16 at that time. The main issue in this case is [*insert relevant issue*].[672]

Statutory defences and exclusions

Accused married to the complainant

[*If the accused alleged that s/he was married to the complainant, who was aged between 10 and 16 at the time of the alleged penetration, add the following shaded section.*]

Even if these three elements are met, the law states that a person is not guilty of this offence if the accused and the complainant were married to each other at the time of the alleged penetration, and the complainant was at least 10 years' old at that time.

In this case [*insert relevant evidence and competing arguments*].

It is for the prosecution to prove, beyond reasonable doubt, that NOA was not married to NOC at the time of the alleged act of sexual penetration, or that NOC was aged under 10 at the relevant time. If the prosecution cannot prove at least one of these matters, then you must find NOA not guilty of this offence.

Consent

Consent can only be in issue if the complainant was aged 10 or older at the time of the offence. If age is in issue in this respect this charge will need to be modified.

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 16 or older (s 45(4)(a)). If the issue is s 45(4)(b) (accused not more than 2 years older than the complainant) or s 45(4)(c) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See Sexual penetration of a child under 16 (1/1/92 – 30/6/17) for guidance.

Belief that complainant was aged 16 or more

Even if you find that the prosecution has proved all three elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 16 years old at the time of the alleged penetration.

As a result, the prosecution must prove beyond reasonable doubt either:

1. That NOA did not believe that NOC was aged 16 or older at the time of the alleged penetration; or

2. That NOA did not have reasonable grounds to believe that NOC was aged 16 or older at the time of the alleged penetration

For there to be reasonable grounds for a belief, the belief must be based on facts which could have caused a reasonable person to believe the same thing. So to prove this second alternative the prosecution must prove that even if NOA may have believed NOC was 16 or older, a reasonable person in his/her situation could not have reached that conclusion based on the facts known to NOA.

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[672] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

In this case the prosecution alleged [*insert relevant evidence and/or arguments*]. In response, the defence submitted [*insert relevant evidence and/or arguments*].

If the prosecution has proved beyond reasonable doubt, that NOA did not believe on reasonable grounds that NOC was at least 16 years old at the time of the alleged penetration, then consent will not be a defence, and will not be relevant to your determination of the accused's guilt.

[*If the prosecution has conceded either consent or belief in consent, add the shaded section.*]

If, however, you find that this has not been proved, then you will find the accused not guilty. This is because the prosecution does not dispute that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "NOA believed that NOC was consenting"].

[*If either consent or belief in consent is in issue, add the shaded section.*]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

If, however, you find that this has not been proved, then you will need to determine whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged act of sexual penetration and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the sexual penetration if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the sexual penetration. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the penetration, then you must find NOA not guilty of this offence.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proved.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following darker shaded section.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where evidence is given about the absence of physical resistance, lack of physical injury or past consensual sex, add the following darker shaded section if relevant to the facts in issue.*]

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury;
- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proved beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to take part in the act of sexual penetration, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged penetration.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing arguments.*]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged sexual penetration the accused was aware either:

- that the complainant was not consenting; or
- that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

Belief in Consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Onus and standard of proof

Remember, you may not need to consider the issue of consent. The process that you must follow is this. First, you must decide if the prosecution has proved the three elements of the offence beyond reasonable doubt. That is, the prosecution must prove that NOA took part in an act of sexual penetration with NOC, that s/he intended to take part in the act of sexual penetration, and that NOC was under the age of 16 at the relevant time. If the prosecution cannot prove all three of these elements, then you must find NOA not guilty of this offence.

Next, if you find that the prosecution has proved each of these elements beyond reasonable doubt, and the accused has raised the issue as to belief in age, you must then decide if NOA has proved, on the balance of probabilities, that s/he believed that NOC was at least 16 years old, and that that belief was based on reasonable grounds. If the accused cannot prove both of these matters, then NOA will be guilty of this offence, as long as the prosecution have proved each of the first three elements of the offence beyond reasonable doubt.

If, however, you find that the accused has proved these matters as to belief in age on the balance of probabilities, you must then decide whether the prosecution has proved, beyond reasonable doubt, the two additional elements that NOC did not consent, and that NOA was aware that s/he was not or might not be consenting. If the prosecution cannot prove both of these things, then you must find NOA not guilty of this offence. It is only if you are satisfied that they have been proved beyond reasonable doubt, together with each of the first three elements of the offence, that you can convict NOA of sexual penetration of a child under 16.

Circumstances of Aggravation

[*If any circumstances of aggravation have been alleged in the indictment, add the following shaded section.*]

The law has specified certain "circumstances of aggravation" which you must consider if you find that each of the elements of this offence has been proved. These are not elements of the offence, but circumstances which make the crime more serious. Like the elements of the offence, these are matters which the prosecution must prove beyond reasonable doubt and you can only find a circumstance of aggravation if you all agree that circumstance exists.[673]

[*Where it is alleged that the complainant was under the age of 10, add the following shaded section.*]

One of the "circumstances of aggravation" specified by the law is that the complainant was under the age of 10 at the time that the alleged act of sexual penetration took place.

In this case [*insert relevant evidence and competing arguments about the complainant's age*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proved this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the offence. I will tell you later how your verdicts are to be taken by my associate.

[*Where it is alleged that the complainant was between 10 and 16 and under the care, supervision or authority of the accused, add the following shaded section.*]

One of the "circumstances of aggravation" specified by the law is that the complainant was aged

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[673] If more than one circumstance of aggravation is in issue, the judge should consider spelling out that the jury must agree on a particular circumstance of aggravation.

between 10 and 16 at the time that the alleged act of sexual penetration took place, and was under the care, supervision or authority of the accused.

This is a two-part test. You must first be satisfied that NOC was aged between 10 and 16. You must also be satisfied that NOC was under NOA's care, supervision or authority at the time the alleged act of sexual penetration took place. These are ordinary everyday English words.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, support or authority is sufficient.

[*If relevant, add*: You do not need to find that the occasion on which the alleged act of penetration took place was connected with, or arose out of, the relationship of care, supervision or authority. It is sufficient if you are satisfied that there was an ongoing relationship of care, supervision or authority between NOA and NOC, and that that relationship existed on the day on which the penetration took place.]

In this case the prosecution alleged that NOC was [*insert age*] at the relevant time, and was under NOA's [care/supervision/authority]. [*Insert prosecution evidence.*] The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proved this circumstance of aggravation beyond reasonable doubt. I want to remind you, however, that you must first determine whether the elements of the offence have been proved beyond reasonable doubt. When your verdict is taken, you will only be asked about this circumstance if you have found the accused guilty of the crime. I will tell you later how your verdicts are to be taken by my associate.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

One – that NOA took part in an act of sexual penetration with NOC; and

Two – that NOA intended to take part in that act of sexual penetration; and

Three – that NOC was under the age of 16 at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child under the age of 16.

If you decide that each of these elements have been proved beyond reasonable doubt, you must decide if the prosecution has also proved, to the same standard:

- That NOA did not believe that NOC was aged 16 or older at the relevant time; or
- That NOA had no reasonable grounds to believe that NOC was aged 16 or older at the relevant time.

If the prosecution has proved one of these matters, and you find that all of the elements have been proved by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if the prosecution has not proved either of these matters, you must then decide if the prosecution has proved, beyond reasonable doubt, that NOC did not consent to the act of sexual penetration and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the shaded section.*]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent*, e.g. "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the shaded section.*]

If the prosecution cannot prove these matters, then you must find NOA not guilty of sexual penetration of a child under the age of 16.

[*If any circumstances of aggravation are in issue, add the following shaded section.*]

If you find that all of these elements have been proved, you must then consider whether circumstances of aggravation have been established.

[*Where it is alleged that the complainant was* under the age of 10*, add*: You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was under 10 at the time of the alleged penetration.]

[*Where it is alleged that the complainant was* between 10 and 16 *and under the care, supervision or authority of the accused, add*: You must decide if the prosecution has proved, beyond reasonable doubt, that NOC was aged between 10 and 16 at the time of the alleged penetration, and was under the care, supervision or authority of the accused.]

Taking the verdict

When you have reached your verdict and returned to this court room, my associate will ask you whether you have agreed on a verdict, and what your verdict is. You, [Mr/Madam] foreman, will answer "guilty" or "not guilty", according to the decision the jury has reached.

If you answer guilty, you will then be asked whether you have reached agreement about the circumstances of aggravation. My associate will ask you "Do you find that [*describe relevant aggravating circumstances*]?", to which you, [Madam/Mr] foreman will answer "yes" or "no", according to what the jury have decided.

Last updated: 22 January 2016

7.3.13.10 Checklist: Sexual Penetration of a Child under the Age of 16 (Pre-17/3/10) Consent in Issue

Click here to obtain a Word version of this document for adaptation

This checklist is designed for offences committed before 17 March 2010

The Elements

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with the complainant; and
2. The accused intended to take part in that act of sexual penetration; and
3. The complainant was under the age of 16 at the time that the act of sexual penetration took place.

Accused's Acts

1. Did the accused take part in an act of sexual penetration with the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of sexual penetration of a child under 16

Accused's Intention

2. Did the accused intend to take part in that act of sexual penetration with the complainant?

If Yes, then go to 3

If No, then the accused is not guilty of sexual penetration of a child under 16

The Complainant's Age

3. Was the complainant under the age of 16 at the time that the act of sexual penetration took place?

If Yes, then go to 4

If No, then the accused is not guilty of sexual penetration of a child under 16

Relevance of Consent

[*Consent can only be relevant where the complainant was aged 10 or over at the time of the offence. If the complainant's age is in issue in this respect this checklist will need to be modified. This section of the checklist can be used if the accused alleged that s/he believed on reasonable grounds that the complainant was 16 or older and consented to the act of sexual penetration. If consent is in issue because the accused alleged that s/he is not more than 2 years older than the complainant, or that s/he believed on reasonable grounds that s/he was married to the complainant, it will need to be modified as necessary.*]

[Use this section if the offence was allegedly committed on or after 1 December 2006.]

Consent is only relevant if you are satisfied the defence has proven, on the balance of probabilities, both that:

4. The accused believed that the complainant was aged 16 or older at the time the act of sexual penetration took place; and

5. The accused's belief that the complainant was aged 16 or older was based on reasonable grounds.

[Use this section if the offence was allegedly committed before 1 December 2006.]

Consent is relevant unless you are satisfied the prosecution has proven beyond reasonable doubt that either:

4. The accused did not believe that the complainant was aged 16 or older at the time the act of sexual penetration took place; or

5. The accused did not have reasonable grounds to believe that the complainant was aged 16 or older.

Lack of Consent

If consent is relevant, the prosecution must prove, beyond reasonable doubt, that:

6. The complainant did not consent to taking part in the act of sexual penetration; and

7. The accused was aware that the complainant was not or might not be consenting.

Consent

6. Did the sexual penetration occur without the complainant's consent?

If Yes, then go to 7

If No, then the accused is not guilty of sexual penetration of a child under 16 (as long as you

answered yes to questions 4 and 5)

Awareness of Lack of Consent

7. At the time of sexual penetration, was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes, then the accused is guilty of sexual penetration of a child under 16 (as long as you also answered yes to questions 1, 2, 3 and 6). Go to aggravating circumstances.

If No, then the accused is not guilty of sexual penetration of a child under 16 (as long as you answered yes to questions 4 and 5)

Aggravating Circumstances

[*If it is alleged in the presentment that the complainant was under the age of 10 at the time of the offence, add the following section*.]

8. Was the complainant under the age of 10 at the time that the act of sexual penetration took place?

If Yes, then you are satisfied the child was under 10

If No, then you are not satisfied the child was under 10

[*If it is alleged in the presentment that the complainant was between the ages of 10 and 16 at the time of the offence, and was under the care, supervision or authority of the accused, add the following section*.]

8. Was the complainant between the ages of 12 and 16 at the time that the act of sexual penetration took place?

If Yes, then go to 9

If No, then you are not satisfied the child was between 12 and 16 and under the accused's care, supervision and authority

9. Was the complainant under the care, supervision or authority of the accused at the time that the act of sexual penetration took place?

If Yes, then you are satisfied the child was between 12 and 16 and under the accused's care, supervision and authority

If No, then you are not satisfied the child was between 12 and 16 and under the accused's care, supervision and authority

Last updated: 21 August 2008

7.3.14 Sexual Penetration of a 16- or 17-Year-Old Child (From 1/7/17)

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Operational Period

1. Section 49C commenced on 1 July 2017, replacing the former offences specified in s 48 of the *Crimes Act 1958*.
2. For offences committed before 1 July 2017, see 7.3.15 Sexual Penetration of a 16 or 17 Year Old Child (1/1/92 – 30/6/17).

The Elements

3. The elements of the offence are set out in s 49C(1) of the *Crimes Act 1958*. The prosecution must prove that:

   i) The accused (A) intentionally:

      - sexually penetrated another person (B);
      - caused or allowed B to sexually penetrate A; or
      - causes B to sexually penetrate themselves, another person (C) or be sexually penetrated by C; and

   ii) B is a child aged 16 or 17 years; and

   iii) B is under A's care, supervision or authority

Intentional sexual penetration

4. The first element involves three permutations on B being involved in an act of sexual penetration (*Crimes Act 1958* s 49C).
5. "Sexual penetration" is defined in s 35A of the *Crimes Act 1958.* For more information on the meaning of sexual penetration see, 7.3.2 Rape (From 1/1/92).
6. For more information about this element, including proof of intention, see 7.3.11 Sexual penetration of a child under 12 (From 1/7/17).

Complainant's age

7. The second element requires the prosecution to prove that the complainant was aged 16 or 17 at the time the relevant act took place (*Crimes Act 1958* s 49C(1)).

Care, supervision or authority

8. The third element is that the complainant was under the accused's care, supervision or authority.
9. Section 37 of the *Crimes Act 1958* provides a non-exhaustive list of relationships where a child is deemed to be under the care, supervision or authority of a person.
10. The relationships listed are:

(a) the child's parent or step-parent;

(b) the child's teacher;

(c) the child's employer;

(d) the child's youth worker;

(e) the child's sports coach;

(f) the child's counsellor;

(g) the child's health professional;

(h) a person with parental responsibility within the meaning of the *Children, Youth and Families Act 2005* for the child;

(i) a religious or spiritual guide, or a leader or official (including a lay member) of a church or religious body, however any such guide, leader, official, church or body is described, who provides care, advice or instruction to the child or has authority over the child;

(j) an out of home carer within the meaning given by section 74 of the *Children, Youth and Families Act 2005* of the child;

(k) a police officer acting in the course of his or her duty in respect of the child;

(k) a person employed in, or providing services in, a remand centre, youth residential centre, youth training centre or prison and acting in the course of his or her duty in respect of the child

11. Section 37(2) provides that a parent includes a parent by adoption or a parent by operation of the *Status of Children Act 1974*, and that a step parent includes the spouse or domestic partner of the person's parent.

12. Judgments sometimes draw a distinction between a "standing relationship" and an "ad hoc" relationship for the purpose of care, supervision or authority. A "standing" relationship is one that has existed for some time, whereas an "ad hoc" relationship is one that comes into being on the day of the alleged offending.

13. However, the language of standing relationships and ad hoc relationships must not be allowed to distract attention from the requirements of the Act, which does not use the word "relationship" (*Lydgate v R* (2014) 46 VR 78, [98]).

14. Instead, the question is whether the complainant is under the care, supervision or authority of the accused or, alternatively, is in one of the relationships listed in s 37.

15. Section 37 of the *Crimes Act 1958* is a deeming provision. Where the jury finds that the accused falls within one of the listed categories, the jury should not be instructed to look beyond the listed relationships to determine whether there was a relationship of "care, supervision or authority" (*Lydgate v R* (2014) 46 VR 78, [97]).

16. The words "care, supervision or authority" are to be given their ordinary grammatical meaning (*R v Howes* (2000) 2 VR 141).

17. The meaning of the words is a question for the jury. While a jury may be provided with the dictionary definitions of the words "care", "supervision" and "authority", the judge must make clear that these are not definitions prescribed by the Act (*R v Howes* (2000) 2 VR 141, [57]; *R v Little* (2015) 45 VR 816, [83]).

18. For the purpose of providing dictionary definitions, the following definitions are likely to be most relevant:

- Authority – "power to influence the conduct and actions of others; personal or practical influence"
- Supervision – "the act or function of supervising"
- Supervising – "to oversee, have the oversight of, superintend the execution of performance of (a thing), the movements or work of (a person)" (*R v Howes* (2000) 2 VR 141, [57]).

19. The words "care, supervision or authority" must be read disjunctively (*R v Howes* (2000) 2 VR 141; *R v Little* (2015) 45 VR 816, [81]).
20. These words extend to cover those who, by virtue of an established and ongoing relationship involving care, supervision or authority, are in a position to exploit or take advantage of the influence which grows out of the relationship (*R v Howes* (2000) 2 VR 141, [58]; *R v Little* (2015) 45 VR 816, [84]).
21. The relationship of care, supervision or authority does not need to be based on a legal right or power. While legal authority may create or help to create such a relationship, it is not essential (*R v Howes* (2000) 2 VR 141; *R v Macfie* [2000] VSCA 173. See also *R v Little* (2015) 45 VR 816, [86]–[90]).
22. The words therefore cover a person who has assumed de facto control, supervision or authority over a child, even if responsibility for that child has not been delegated to them by the person with legal responsibility for that child (*R v Macfie* [2000] VSCA 173).
23. Care, supervision or authority may be vested in more than one person or authority at the same time (*R v Macfie* [2000] VSCA 173).
24. Care, supervision or authority may change from time to time, depending on the circumstances (*R v Macfie* [2000] VSCA 173).
25. It is not necessary that the occasion on which the penetration took place was connected with, or arose out of, the relationship of care, supervision or authority, or that the parties were acting in the capacities which gave rise to the relationship. Similarly, it is not necessary to show that the complainant's consent to sexual penetration was influenced by the relationship of care, supervision or authority. It is sufficient if the jury is satisfied that there was a relationship of care, supervision or authority between the parties, and that that relationship existed on the day on which the penetration took place (*R v Howes* (2000) 2 VR 141, [60]).
26. In identifying what a jury should be told, Brooking JA in *R v Howes* (2000) 2 VR 141, [58] said that:

> It is appropriate to tell them to consider the three words in the context in which they appear, that of creating a sexual offence. They may be told that what is often called the age of consent for acts of sexual penetration is fixed by the law at 16 as a general rule but that Parliament has chosen to give special protection by raising the age of consent by two years for the protection of 16 and 17 year old children against what Parliament has called, in a general statement of its purposes, "exploitation by persons in positions of care, supervision and authority".... Juries may be told that the obvious purpose underlying the section is to protect 16 and 17 year olds from being taken advantage of by persons who are in a position to influence them. They may be told that the section is concerned to protect young people, and often, protect them from themselves. ... I would prefer, with the Victorian Act, to say that the section is obviously concerned to protect 16 and 17 year olds against persons who occupy a position of responsibility towards them and that in considering the words "care, supervision and authority" juries should bear in mind the obvious underlying purpose of the section.

27. Brooking JA also explained that instructing jurors about the purpose of the section may help a jury dealing with cases where there may be a technical relationship of supervision, but no reason to think that Parliament intended that a complainant in such a relationship needed to be protected from people who occupy that position of responsibility (see *R v Howes* (2000) 2 VR 141, [59] for examples).

28. In deciding whether a relationship of care, supervision or authority exists, it may be relevant to consider that the parties were previously in a relationship prescribed by s 37. While the prosecution cannot rely solely on the existence of a former prescribed relationship, the former relationship, along with other evidence, may provide a basis for a jury to find that there was an relationship of care, supervision or authority at the time of the alleged offence (*Lydgate v R* (2014) 46 VR 78, [103]).

29. In determining whether the former prescribed relationship is relevant to the existence of a current care, supervision or authority relationship, it may be important to consider the length of time between the former prescribed relationship ending and the alleged commission of the offence. This is because the period of time may rationally affect the probability that the complainant was under the accused's care, supervision or authority at the time of the alleged offence (*Lydgate v R* (2014) 46 VR 78, [104]; *Lydgate v R (No 2)* [2016] VSCA 33).

Statutory defences and exemption

Medical or hygienic purposes

30. A person does not commit the offence against s 49C(1) if the accused's conduct occurs in the course of a procedure carried out in good faith for medical or hygienic purposes (*Crimes Act 1958* s 49T).

Reasonable belief as to age

31. Section 49X of the *Crimes Act 1958* provides that it is a defence to an offence against section 49C(1) if, at the time of the conduct, the accused reasonably believed that the child was 18 years of age or more (*Crimes Act 1958* s 49X(1)).

32. The accused bears the burden of proving, on the balance of probabilities, that he or she reasonably believed that B was 18 years of age or more (*Crimes Act 1958* s 49X(4)).

33. The Note to section 49X states that:

> Whether or not A reasonably believed that B … was 18 years of age or more depends on the circumstances. The circumstances include any steps that A took to find out [B's] age.

Marriage or domestic partnership

34. Section 49Y of the *Crimes Act 1958* provides an exception to the offence in s 49C(1). This exception applies if, at the time of the alleged offence –

    (i) A and B are married to each other and the marriage is recognised as valid under the *Marriage Act 1961* of the Commonwealth; or

    (ii) A–

        (a) is not more than 5 years older than B; and

        (b) is B's domestic partner and the domestic partnership commenced before B came under A's care, supervision or authority.

35. For more information on the meaning of the term "domestic partnership", see 7.3.9 Incest (From 1/7/17).

Reasonable belief as to marriage or domestic partnership

36. Section 49Z of the *Crimes Act 1958* provides a defence to the offence in s 49C(1) which applies if, at the time of the alleged offence –

(i) A reasonably believed that A and B are married to each other and that the marriage is recognised as valid under the *Marriage Act 1961* of the Commonwealth; or

(ii) A–

(a) was not more than 5 years older than B; and

(b) reasonably believed that A was B's domestic partner and that the domestic partnership commenced before B came under A's care, supervision or authority.

37. The accused bears the burden of proving, on the balance of probabilities, the reasonable belief referred to in the section (*Crimes Act 1958* s 49Z(3)).

38. The Note to the section specifies that the accused has an evidential burden in relation to the relative ages of the accused and the complainant.

Reasonable belief as to care, supervision or authority

39. Section 49ZA provides a defence to a charge under s 49C(1) that applies if, at the time of the conduct constituting the offence, the accused reasonably believed that the complainant was not under his or her care, supervision or authority.

40. The accused bears the burden of proving, on the balance of probabilities, that he or she held this reasonable belief (Crimes Act 1958 s 49ZA(3)).

41. This is a new defence, as the law did not previously require the prosecution to prove that A knew or believed that B was under his or her care, supervision or authority. Instead, the law required the prosecution to show only that A was aware of the primary facts which gave rise to the relevant relationship (compare *Lydgate v R* (2014) 46 VR 78, [113] (Beach JA)).

Last updated: 1 July 2017

7.3.14.1 Charge: Sexual Penetration of a 16- or 17-Year-Old Child (From 1/7/17)

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I must now direct you about the crime of sexual penetration of a 16 or 17 year old child.

The law says that the age of consent for sexual acts is normally 16. However, for persons aged 16 or 17, the law has created this specific offence to protect such young people from exploitation by persons in positions of care, supervision or authority.

To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused intentionally sexually penetrated the complainant.[674]

Two – the complainant was either 16 or 17 years of age at the time that the sexual penetration took place.

Three – at the time that the act of sexual penetration took place, the complainant was under the care, supervision or authority of the accused.

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[674] This statement of the element must be modified if the prosecution relies on the other limbs of s 49C(1)(a). The words "sexually penetrated the complainant" may be replaced with "caused or allowed the complainant to sexually penetrate the accused" or "caused the complainant to sexually penetrate himself/herself" or "caused the complainant to sexually penetrate another person" or "caused the complainant to be sexually penetrated by another person".

I will now explain each of these elements in more detail.

Intentional sexual penetration

Warning! This charge is designed for cases where the prosecution relies on s 49C(1)(a)(i). This direction on the first element must be modified if the prosecution relies on other limbs of s 49C(1)(a).

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant, NOC.

The prosecution seeks to prove this element by showing that NOA [*describe relevant form of penetration,* e.g. "put his finger into NOC's anus"]. I direct you as a matter of law that if you find that NOA did this, then the prosecution has proved this first element.

[*If relevant add:*

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface,* e.g. "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the intentional or voluntary nature of the acts in issue, add the following shaded section*.[675]]

For this element to be met, the act of [*describe relevant act of participation, e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been done intentionally.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves intention in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section*.]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section*.]

However, according to the law, the introduction of an object or body part into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in the course of a procedure carried out in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not

[675] Because of how the offence is defined, the issue of intention is likely inseparable from the question of voluntariness. Where the issue is raised, the judge should direct the jury on the specific matters the jury must consider to find that the accused's conduct was voluntary and intentional (e.g. disproof of accident or proof that the accused was conscious).

done in the course of a procedure carried out in good faith for [medical/hygienic] purposes.

In this case [*insert evidence and arguments relevant to proof of this element*].

Complainant aged 16 or 17

The second element relates to the age of the complainant, NOC. The prosecution must prove that s/he was either 16 or 17 years of age at the time that the alleged sexual penetration took place.

In this case, there is no dispute that NOC was [16/17] at the time the alleged sexual penetration took place. The main issue in this case is [*insert relevant issue*].[676]

Care, supervision or authority

The third element that the prosecution must prove is that, at the time that the sexual penetration took place, the complainant was under the care, supervision or authority of the accused.

[*If care, supervision or authority is not in issue, add the following shaded section*.]

In this case it was conceded by the defence that NOA was NOC's [*describe relationship*] and that the complainant was therefore under the care, supervision or authority of the accused [*at the relevant time*]. While it is for you to determine whether this was the case, you should have no difficulty finding that this element has been proven.

[*If care, supervision or authority is in issue and the prosecution relies on a prescribed relationship, add the following shaded section*.]

Parliament has defined a number of relationships where a child is deemed to be under the care, supervision and authority of another person. This includes [*name relevant relationships from s 37 list*].

In this case the prosecution alleged that NOA was NOC's [*describe relationship*]. [*Insert prosecution evidence.*] The defence responded [*insert relevant evidence and/or arguments*].

If you find beyond reasonable doubt that NOA was NOC's [*identify relationship*] at the time of the alleged offence(s), then you will find this element has been proven.

[*If care, supervision or authority is in issue and the prosecution does not rely on a prescribed relationship, add the following shaded section*.]

The words "care, supervision or authority" all describe different types of relationships where the accused is in a position to exploit or take advantage of that relationship to influence the child to engage in an act of sexual penetration. You should take this into account when deciding whether the prosecution has proved that the complainant was under the accused's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add:* You do not need to find that the alleged act of penetration was actually connected with, or influenced by, the relationship of care, supervision or authority or that NOA was actually exploiting his/her position of advantage. It is sufficient if you are satisfied that an established relationship of care, supervision or authority existed between NOA and NOC that *could have* been

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[676] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

connected with, or influenced the child to engage in, the act of sexual penetration, and that the relationship existed on the day on which the penetration took place.]

In this case the prosecution alleged that NOC was under NOA's [care/supervision/authority]. [*Insert prosecution evidence.*] The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOC was under NOA's care, supervision or authority at the time that the act of sexual penetration took place.

[*If the accused may be unaware of the facts giving rise to a relationship of care, supervision or authority, add the following shaded section.*]

The law states that NOA must know and be aware of the facts that give rise to a relationship of care, supervision or authority. For example, if a teacher with a large number of students did not recognise the complainant was a member of one of his/her classes, then you could not find this element proved.

[*Insert relevant prosecution and defence evidence and arguments.*]

[*If the accused raises the defence in Crimes Act 1958 s 49ZA of a reasonable belief as to no care, supervision or authority, add the following shaded section.*]

This element requires you to look at the facts and decide whether NOC was under NOA's care, supervision or authority. The prosecution does not need to prove that NOA thought NOC was under his/her care, supervision or authority.

However, the law provides that NOA has a defence to this charge if s/he can show that s/he reasonably believed that NOC was not under his/her care, supervision or authority.

Unlike the elements of the offence, this is a matter which the accused must prove. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that NOC was not under his/her care, supervision or authority on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he believed that NOC was not under his/her care, supervision or authority and that this belief was reasonable. Unlike the prosecution, s/he does not need to prove this matter beyond reasonable doubt.

[*Refer to relevant evidence and arguments.*]

Defences

Marriage or domestic partnership

[*If the accused relies on the domestic partnership defence in Crimes Act 1958 s 49Y, add the following shaded section.*]

For this offence, the law recognises a defence which may be termed "domestic partnership".

There are three parts to the defence.

First, NOA must be no more than 5 years older than NOC. This applies here.

Second, NOA must be NOC's domestic partner. The law recognises that two people are in a

domestic partnership if they are not married but are living as a couple on a genuine domestic basis.[677]

To decide whether two people are domestic partners, you must consider all the circumstances of the relationship, including [*add the following factors from Relationships Act 2008* s 35(2), *as relevant*:

(a) the degree of mutual commitment to a shared life;

(b) the duration of the relationship;

(c) the nature and extent of common residence;

(d) whether or not a sexual relationship exists;

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(f) the ownership, use and acquisition of property;

(g) the care and support of children;

(h) the reputation and public aspects of the relationship.

[*Refer to relevant evidence and arguments.*]

Third, the domestic partnership must have started before NOC came under NOA's care, supervision or authority.

[*Refer to relevant evidence and arguments.*]

Remember, while I called this a defence, it is the prosecution's role to prove guilt. This means that the prosecution must show that this defence of domestic partnership does not apply. In other words, you cannot find NOA guilty unless the prosecution can prove beyond reasonable doubt either that NOA was not NOC's domestic partner, or that the domestic partnership started after NOC came under NOA's care, supervision or authority.

Reasonable belief as to age

[*If the accused relies on the belief in age defence in Crimes Act 1958 s 49X, add the following shaded section.*]

For this offence, the law recognises a defence which may be termed "reasonable belief in age".

This defence is available if the accused had a reasonable belief that at the time of the act, the complainant was 18 years of age or more.

Unlike the elements of the offence, this is a matter which the accused must prove. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that NOC was aged 18 or more on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he reasonably believed that NOC was aged 18 or more at the time of the sexual penetration and that this belief was reasonable. Unlike the

[677] If there is evidence of a registered domestic relationship, this part of the direction must be modified accordingly.

prosecution, s/he does not need to prove this matter beyond reasonable doubt.

Reasonable belief as to marriage or domestic partnership

[*If the accused relies on the reasonable belief in domestic partnership defence in Crimes Act 1958 s 49Z, add the following shaded section.*]

For this offence, the law recognises a defence which may be termed "reasonable belief in domestic partnership".[678]

There are three parts to this defence.

First, NOA must be no more than 5 years older than NOC. This applies here.

Second, NOA must have reasonably believed that s/he was in a domestic partnership with NOC.

The law recognises that two people are in a domestic partnership if they are not married but are living as a couple on a genuine domestic basis.[679]

To decide whether two people are domestic partners, you must consider all the circumstances of the relationship, including [*add the following factors from Relationships Act 2008* s 35(2), *as relevant*:

(a) the degree of mutual commitment to a shared life;

(b) the duration of the relationship;

(c) the nature and extent of common residence;

(d) whether or not a sexual relationship exists;

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(f) the ownership, use and acquisition of property;

(g) the care and support of children;

(h) the reputation and public aspects of the relationship.

Third, NOA must have reasonably believed that this domestic partnership started before NOC came under his/her care, supervision or authority.

[*Refer to relevant evidence and arguments.*]

Unlike the elements of the offence, the accused must prove these matters. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that s/he was in a domestic partnership with NOC which started before

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[678] Section 49Z also creates a reasonable belief in marriage defence. If the accused relies on this defence the directions must be modified accordingly.

[679] Section 35 defines a domestic partner also as a person who is in a registered domestic relationship with the person. If the accused relies on this limb of the definition the directions must be modified accordingly.

NOC came under his/her care, supervision or authority on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he believed that s/he was in a domestic partnership with NOC which started before NOC came under his/her care, supervision or authority, and that this belief was reasonable. Unlike the prosecution, s/he does not need to prove this matter beyond reasonable doubt.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a 16 or 17 year old child, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA intentionally sexually penetrated the complainant; and
- Two – that NOC was either 16 or 17 years of age at the time that the act of sexual penetration took place; and
- Three – that NOC was under NOA's care, supervision or authority at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child aged 16 or 17.

Last updated: 1 July 2017

7.3.14.2 Checklist: Sexual Penetration of a 16- or 17-Year-Old Child (From 1/7/17)

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally sexually penetrated the complainant; and

2. The complainant was aged 16 or 17; and

3. The complainant was under the accused's care, supervision or authority at the time of the sexual penetration.

Intentional sexual penetration

1. Did the accused intentionally [*identify relevant act of sexual penetration*] NOC?

If Yes then go to 2

If No, then the accused is not guilty of Sexual Penetration of a child aged 16 or 17

Complainant aged 16 or 17

2. At the time of the act, was NOC aged 16 or 17?

If Yes then go to 3

If No, then the accused is not guilty of Sexual Penetration of a child aged 16 or 17

Care, supervision or authority

3. At the time of the act, was NOC under NOA's care, supervision or authority?

If Yes then the accused is guilty of Sexual Penetration of a child aged 16 or 17 (as long as you also answered Yes to Questions 1 and 2)

If No, then the accused is not guilty of Sexual Penetration of a child aged 16 or 17

Last updated: 1 July 2017

7.3.15 Sexual Penetration of a 16- or 17-Year-Old Child (1/1/92–30/6/17)

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Operational Period

1. For offences alleged to have been committed before 1 July 2017, s 48 contained the offence of sexual penetration of a child aged 16 or 17.
2. This offence came into force on 5 August 1991.
3. The offence applies to any acts committed on or after 5 August 1991 and before 1 July 2017 (*Crimes Act 1958* s 585A(2)).
4. If an offence is alleged to have been committed between dates, one date before and one date on or after 5 August 1991, the offence is alleged to have been committed before 5 August 1991 (*Crimes Act 1958* s 585A(4)).
5. Section 48 was substantially amended in 2006. These changes apply only to offences committed on or after 1 December 2006. Their impact is considered below.

The Elements

6. The elements of the offence are set out in s 48(1) of the *Crimes Act 1958*. The section makes it an offence to take part in an act of sexual penetration with a 16 or 17 year old to whom the accused is not married and who is under their care, supervision or authority.

Taking part in an act of sexual penetration

7. "Sexual penetration" is defined in s 35(1)(a) of the *Crimes Act 1958.* For more information on the meaning of sexual penetration see 7.3.2 Rape (From 1/1/92).
8. Section 35(2) of the *Crimes Act 1958* provides that both the person who sexually penetrates another person and that other person shall be deemed to be "taking part" in an act of sexual penetration. This means that an accused may be found guilty of the offence whether they were sexually *penetrating* the complainant or were being sexually *penetrated* by the complainant.

Complainant's age

9. The jury should determine the complainant's age having regard to the evidence in the case, or if no other sufficient evidence is presented, to the complainant's appearance (*Crimes Act 1958* s 411).

Care, supervision or authority

10. Section 48(4) of the *Crimes Act 1958* now non-exhaustively lists relationships where a child is deemed to be under the care, supervision or authority of a person. This list applies only in respect of offences alleged to have been committed on or after 1 December 2006.
11. The relationships listed are:
    (a) the child's teacher;
    (b) the child's foster parent;
    (c) the child's legal guardian;
    (d) a minister of religion with pastoral responsibility for the child;

(e) the child's employer;

(f) the child's youth worker;

(g) the child's sports coach;

(h) the child's counsellor;

(i) the child's health professional;

(j) a member of the police force acting in the course of his or her duty in respect of the child;

(k) employed in, or providing services in, a remand centre, youth residential centre, youth training centre or prison and is acting in the course of his or her duty in respect of the child

12. Section 48(4) of the *Crimes Act 1958* is a deeming provision. Where it applies, and where the jury finds that the accused falls within one of the listed categories, the jury should not be instructed to look beyond s 48(4) to determine whether there was a relationship of "care, supervision or authority".

13. Where s 48(4) of the *Crimes Act 1958* does not apply (i.e. if the offence was committed before 1 December 2006), or where an accused does not fall within one of the listed relationships, courts must apply the common law definition of the terms "care, supervision or authority".

14. The words "care, supervision or authority" are to be given their ordinary grammatical meaning (*R v Howes* (2000) 2 VR 141).

15. The words "care, supervision or authority" should be read disjunctively (*R v Howes* (2000) 2 VR 141).

16. These words are intended to encompass those who, by virtue of an established and ongoing relationship involving care, supervision or authority, are in a position to exploit or take advantage of the influence which grows out of the relationship (*R v Howes* (2000) 2 VR 141).

17. The relationship of care, supervision or authority does not need to be based on a legal right or power. While legal authority may create or help to create such a relationship, it is not essential (*R v Howes* (2000) 2 VR 141; *R v Macfie* [2000] VSCA 173).

18. The words therefore cover a person who has assumed de facto control, supervision or authority over a child, even if responsibility for that child has not been delegated to them by the person with legal responsibility for that child (*R v Macfie* [2000] VSCA 173).

19. Care, supervision or authority may be vested in more than one person or authority at the same time (*R v Macfie* [2000] VSCA 173).

20. Care, supervision or authority may change from time to time, depending on the circumstances (*R v Macfie* [2000] VSCA 173).

21. It is not necessary that the occasion on which the penetration took place was connected with, or arose out of, the relationship of care, supervision or authority, or that the parties were acting in the capacities which gave rise to the relationship. It is sufficient if the jury is satisfied that there was a standing relationship of care, supervision or authority between the parties, and that that relationship existed on the day on which the penetration took place (*R v Howes* (2000) 2 VR 141).

Consent

22. Section 48(2) states that consent is not a defence unless, at the time of the offence, the accused believed on reasonable grounds, that:

- The complainant was aged 18 or older; or
- He or she was married to the complainant.

23. For information on this defence, see 7.3.13 Sexual Penetration of a child under 16 (1/1/92 – 30/6/17), where the equivalent defence under s 45(4) is discussed.

Last updated: 30 November 2017

7.3.15.1 Charge: Sexual Penetration of a 16- or 17-Year-Old Child Consent Not in Issue

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This charge can be used for trials commenced on or after 1/1/08 involving offences alleged to have been committed on or after 5/8/1991 where consent is not in issue.

I must now direct you about the crime of sexual penetration of a 16 or 17 year old child.

The law says that the age of consent for sexual acts is normally 16. However, for persons aged 16 or 17, the law has created this specific offence to protect such young people from exploitation by persons in positions of care, supervision or authority.

To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt.

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused intended to take part in that act of sexual penetration.

Three – the complainant was either 16 or 17 years of age at the time that the act of sexual penetration took place.

Four – the accused was not married to the complainant.

Five – at the time that the act of sexual penetration took place, the complainant was under the care, supervision or authority of the accused.

I will now explain each of these elements in more detail.[680]

Taking part in sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If in issue, add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.[681]]

Act of sexual penetration

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "by putting his finger into NOC's anus"/"when he took NOC's penis in his mouth"].

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[680] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[681] Described in the instructions within this charge as the "voluntariness" requirement.

[*If relevant add*:

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface*, *e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation.]

[*If the evidence or arguments have placed voluntariness in issue, add the shaded section*.]

For this element to be met, the act of [*describe relevant act of participation*, *e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstances of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section*.]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section*.]

However, according to the law, the introduction of an object or body part other than the penis into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert relevant evidence or competing arguments about proof of the accused's participation in an act of sexual penetration*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[682]

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[682] If the accused is alleged to have penetrated the complainant, "intention" will only rarely be in issue. This constitutes an offence of basic intent, that is, the intent to commit the physical act of penetrating the complainant. This means that proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Any mental state issues related to the act of penetration (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions. Offences involving penetration of the accused by the complainant may raise different issues.

[*If intention is not in issue, add the shaded section*.]

This element is not in issue here. [*If appropriate, explain further*, *e.g.*

- The accused admits that s/he *intentionally* sexually penetrated the complainant.
- If you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so *intentionally*.]

Complainant aged 16 or 17

The third element relates to the complainant. The prosecution must prove that the [he/she] was either 16 or 17 years of age at the time that the alleged act of sexual penetration took place.

In this case, there is no dispute that NOC was [16/17] at the time the alleged act of sexual penetration took place. The main issue in this case is [*insert relevant issue*].[683]

Accused not married to the complainant

The fourth element that the prosecution must prove is that the accused was not married to the complainant at the time the alleged act of sexual penetration took place.

In this case, the defence has not disputed the prosecution's submission that [he/she] was not married to NOC at the time that the alleged act of sexual penetration took place. The main issue in this case is [*insert relevant issue*].[684]

Care, supervision or authority

The fifth element that the prosecution must prove is that, at the time that the act of sexual penetration took place, the complainant was under the care, supervision or authority of the accused.

[*If care, supervision or authority is not in issue, add the following shaded section*.]

In this case it was conceded by the defence that NOA was NOC's [*describe relationship*] and that the complainant was thus under the care, supervision or authority of the accused [at the relevant time]. While it is for you to determine whether this was the case, you should have no difficulty finding that this element has been proven.

[*If care, supervision or authority is in issue and s 48(4) applies, add the following shaded section.*]

[Note: Section 48(4) of the *Crimes Act 1958* will apply if the relationship between the accused and the complainant *is listed in s 48(4)*, and the offence was alleged to have been committed *on or after 1 December 2006*. If the prosecution relies on s 48(4) and the phrase 'care, supervision or authority' as alternatives, this charge will need to be modified.]

Parliament has defined a number of relationships where a child is deemed to be under the care, supervision and authority of another person. This includes [*name relevant relationships from s 48(4) list*].

In this case the prosecution alleged that NOA was NOC's [*describe relationship*]. [*Insert prosecution evidence.*] The defence responded [*insert relevant evidence and/or arguments*].

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[683] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

[684] If it is alleged that the accused and complainant were married, this section will need to be modified accordingly.

If you find beyond reasonable doubt that NOA was NOC's [*identify relationship*] at the time of the alleged offence(s), then you will find this element has been proven.

[*If care, supervision or authority is in issue and s 48(4) does not apply, add the following shaded section*.]

[Note: Section 48(4) of the *Crimes Act 1958* will not apply if the relationship between the accused and the complainant is not listed in s 48(4), or if the offence was alleged to have been committed before 1 December 2006.]

The words "care, supervision or authority" all describe different types of relationships where the accused is in a position to exploit or take advantage of that relationship to influence the child to engage in an act of sexual penetration. You should take this into account when deciding whether the prosecution has proved that the complainant was under the accused's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add*: You do not need to find that the alleged act of penetration was actually connected with, or influenced by, the relationship of care, supervision or authority or that NOA was actually exploiting his/her position of advantage. It is sufficient if you are satisfied that an established relationship of care, supervision or authority existed between NOA and NOC that could have been connected with, or influenced the child to engage in, the act of sexual penetration, and that the relationship existed on the day on which the penetration took place.]

In this case the prosecution alleged that NOC was under NOA's [care/supervision/authority]. [*Insert prosecution evidence*.] The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOC was under NOA's care, supervision or authority at the time that the act of sexual penetration took place.

[*If the accused may be unaware of the facts giving rise to a relationship of care, supervision or authority, add the following shaded section*.]

The law states that NOA must know and be aware of the facts that give rise to a relationship of care, supervision or authority. For example, if a teacher with a large number of students did not recognise the complainant was a member of one of his/her classes, then you could not find this element proved.

[*Insert relevant prosecution and defence evidence and arguments*.]

Consent is not a defence

[*This charge is designed for use in cases where consent is not in issue. Use one of the charges listed at the beginning of this document if consent or a precondition for consideration of consent (belief in age or marriage to complainant) is contested.*]

To protect children, Parliament has created a number of offences where consent is not relevant. This is one of those offences, so you do not need to consider the issue of whether or not NOC agreed to take part in the alleged act of sexual penetration.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a 16 or 17 year old child, the prosecution must prove to you beyond reasonable doubt:

One – that NOA took part in an act of sexual penetration with the complainant; and

Two – that NOA intended to take part in that act of sexual penetration; and

Three – that NOC was either 16 or 17 years of age at the time that the act of sexual penetration took place; and

Four – that NOA and NOC were not married at the relevant time; and

Five – that NOC was under NOA's care, supervision or authority at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child aged 16 or 17.

Last updated: 14 May 2015

7.3.15.2 Checklist: Sexual Penetration of a 16- or 17-Year-Old Child Consent Not in Issue

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The Elements

Five elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with the complainant; and
2. The accused intended to take part in that act of sexual penetration; and
3. The complainant was either 16 or 17 years of age at the time that the act of sexual penetration took place; and
4. The accused was not married to the complainant at that time; and
5. The complainant was under the care, supervision or authority of the accused at that time.

Accused's Acts

1. Did the accused take part in an act of sexual penetration with the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child

Accused's Intention

2. Did the accused intend to take part in that act of sexual penetration with the complainant?

If Yes, then go to 3

If No, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child

The Complainant's Age

3. Was the complainant either 16 or 17 years of age at the time that the act of sexual penetration took place?

If Yes, then go to 4

If No, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child

No Marital Relationship

4. Were the accused and the complainant married to each other at the time that the act of sexual penetration took place?

If Yes, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child

If No, then go to 5

Relationship of Care, Supervision or Authority

5. Was the complainant in a relationship of care, supervision or authority with the accused at the time that the act of sexual penetration took place?

If Yes, then the accused is guilty of sexual penetration of a 16 or 17 year-old child

(as long as you also answered yes to questions 1, 2 and 3, and no to question 4)

If No, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child

Last updated: 1 August 2006

7.3.15.3 Charge: Sexual Penetration of a 16- or 17-Year-Old Child (1/12/06–30/6/17) Consent in Issue

Click here to obtain a Word version of this document for adaptation

This charge can be used for trials commenced on or after 1/1/08 involving offences alleged to have been committed on or after 1/12/2006 where consent is in issue.

I must now direct you about the crime of sexual penetration of a 16 or 17 year old child.

The law says that the age of consent for sexual acts is normally 16. However, for persons aged 16 or 17, the law has created this specific offence to protect such young people from exploitation by persons in positions of care, supervision or authority.

To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt.

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused intended to take part in that act of sexual penetration.

Three – the complainant was either 16 or 17 years of age at the time that the act of sexual penetration took place.

Four – the accused was not married to the complainant.

Five – at the time that the act of sexual penetration took place, the complainant was under the care, supervision or authority of the accused.

I will now explain each of these elements in more detail.[685]

[685] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

Taking part in sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If in issue, add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.[686]]

Act of sexual penetration

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "by putting his finger into NOC's anus"/"when he took NOC's penis in his mouth"].

[*If relevant add*:

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation.]

[*If the evidence or arguments have placed voluntariness in issue, add the shaded section.*]

For this element to be met, the act of [*describe relevant act of participation*, *e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstances of the case*, *e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section*.]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object or body part other than the penis into a

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[686] Described in the instructions within this charge as the "voluntariness" requirement.

person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert relevant evidence or competing arguments about proof of the accused's participation in an act of sexual penetration*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[687]

[*If intention is not in issue, add the following shaded section*.]

This element is not in issue here. [*If appropriate, explain further, e.g.*

- The accused admits that s/he *intentionally* sexually penetrated the complainant.
- If you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so *intentionally.*]

Complainant aged 16 or 17

The third element relates to the complainant. The prosecution must prove that the [he/she] was either 16 or 17 years of age at the time that the alleged act of sexual penetration took place.

In this case, there is no dispute that NOC was [16/17] at the time the alleged act of sexual penetration took place. The main issue in this case is [*insert relevant issue*].[688]

Accused not married to the complainant

The fourth element that the prosecution must prove is that the accused was not married to the complainant at the time the alleged act of sexual penetration took place.

In this case, the defence has not disputed the prosecution's submission that [he/she] was not married to NOC at the time that the alleged act of sexual penetration took place. The main issue in this case is [*insert relevant issue*].[689]

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[687] If the accused is alleged to have penetrated the complainant, "intention" will only rarely be in issue. This constitutes an offence of basic intent, that is, the intent to commit the physical act of penetrating the complainant. This means that proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Any mental state issues related to the act of penetration (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions. Offences involving penetration of the accused by the complainant may raise different issues.

[688] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

[689] If it is alleged that the accused and complainant were married, this section will need to be modified accordingly.

Care, supervision or authority

The fifth element that the prosecution must prove is that, at the time that the act of sexual penetration took place, the complainant was under the care, supervision or authority of the accused.

[*If care, supervision or authority is not in issue, add the following shaded section*.]

In this case it was conceded by the defence that NOA was NOC's [*describe relationship*] and that the complainant was thus under the care, supervision or authority of the accused [at the relevant time]. While it is for you to determine whether this was the case, you should have no difficulty finding that this element has been proven.

[*If care, supervision or authority is in issue and s 48(4) applies, add the following shaded section*.]

[Note: Section 48(4) of the *Crimes Act 1958* will apply if the relationship between the accused and the complainant *is listed in s 48(4)*, and the offence was alleged to have been committed *on or after 1 December 2006*. If the prosecution relies on s 48(4) and the phrase 'care, supervision or authority' as alternatives, this charge will need to be modified.]

Parliament has defined a number of relationships where a child is deemed to be under the care, supervision and authority of another person. This includes [*name relevant relationships from s 48(4) list*].

In this case the prosecution alleged that NOA was NOC's [*describe relationship*]. [*Insert prosecution evidence.*] The defence responded [*insert relevant evidence and/or arguments*].

If you find beyond reasonable doubt that NOA was NOC's [*identify relationship*] at the time of the alleged offence(s), then you will find this element has been proven.

[*If care, supervision or authority is in issue and s 48(4) does not apply, add the following shaded section*.]

[Note: Section 48(4) of the *Crimes Act 1958* will not apply if the relationship between the accused and the complainant is not listed in s 48(4), or if the offence was alleged to have been committed before 1 December 2006.]

The words "care, supervision or authority" all describe different types of relationships where the accused is in a position to exploit or take advantage of that relationship to influence the child to engage in an act of sexual penetration. You should take this into account when deciding whether the prosecution has proved that the complainant was under the accused's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add*: You do not need to find that the alleged act of penetration was actually connected with, or influenced by, the relationship of care, supervision or authority or that NOA was actually exploiting his/her position of advantage. It is sufficient if you are satisfied that an established relationship of care, supervision or authority existed between NOA and NOC that could have been connected with, or influenced the child to engage in, the act of sexual penetration, and that the relationship existed on the day on which the penetration took place.]

In this case the prosecution alleged that NOC was under NOA's [care/supervision/authority]. [*Insert prosecution evidence*.] The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOC was under NOA's care, supervision or authority at the time that the act of sexual penetration took place.

[*If the accused may be unaware of the facts giving rise to a relationship of care, supervision or authority, add the following shaded section*.]

The law states that NOA must know and be aware of the facts that give rise to a relationship of care, supervision or authority. For example, if a teacher with a large number of students did not recognise the complainant was a member of one of his/her classes, then you could not find this element proved.

[*Insert relevant prosecution and defence evidence and arguments.*]

Consent

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 18 or older (s 48(2)(a)). If the issue is s 48(2)(b) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See 7.3.15 Sexual penetration of a 16 or 17 year old child (1/1/92 – 30/6/17) for guidance.

Warning! For offences alleged to have been committed on or after 1 November 2014, it is not clear whether *Crimes Act 1958* s 322T affects the relevance of intoxication to this defence. Judges should seek submissions from the parties on this issue where relevant.

Belief that complainant was aged 18 or more

Even if you find that the prosecution has proven all five elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 18 years old at the time of the alleged sexual penetration.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this belief is a matter which the accused must prove on the balance of probabilities. That is, the accused must prove that it is more likely than not that s/he believed on reasonable grounds that NOC was aged 18 or over for consent to be available as a defence.

So, by contrast to proof of the elements of the offence(s), where the prosecution must satisfy you beyond reasonable doubt of them, for the defence of reasonable belief to be established to your satisfaction, it is for the accused, not the prosecution to prove the existence of a reasonable belief in age.

And the standard to which the defence must do this is a lesser standard than proof beyond reasonable doubt, it is proof on the balance of probabilities. That is, the accused must satisfy you that it is more likely than not that he believed, on reasonable grounds, that the complainant was 18 or over.

In this case [*insert relevant evidence and competing arguments*].

[*If the prosecution has conceded either consent or belief in consent, add the shaded section.*]

As it is not in issue in this case that the alleged sexual act was consensual, if the accused satisfied you, on the balance of probabilities that s/he believed, on reasonable grounds, that at the time s/he took part in the alleged sexual act, that the complainant was 18 or over, then your verdict in respect of that charge will be not guilty. If however, the accused does not satisfy you on the balance of probabilities that at the time he believed the complainant was 18 or over, and that his belief was based on reasonable grounds, then despite the fact that the act was consensual, this defence will fail.

[*If either consent or belief in consent is in issue, add the shaded section.*]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

If, however, you find that the NOA has proven that s/he believed on reasonable grounds that NOC was at least 18 years old at the time of the alleged penetration, then you will need to determine

whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged act of sexual penetration and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the sexual penetration if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the sexual penetration. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the penetration, then you must find NOA not guilty of this offence.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following darker shaded section.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where evidence is given about the lack of resistance or injury or about past consensual sex, add the following darker shaded section.*]

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury;

- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proven beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to take part in the act of sexual penetration, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged penetration.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing arguments.*]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged sexual penetration the accused was aware either:

- that the complainant was not consenting; or
- that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

Belief in consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Onus and standard of proof

Remember, you may not need to consider the issue of consent. The process that you must follow is this. First, you must decide if the prosecution has proven the five elements of the offence beyond reasonable doubt. That is, the prosecution must prove that NOA took part in an act of sexual penetration with NOC, that s/he intended to take part in the act of sexual penetration, that NOC was aged 16 or 17 at the relevant time, that NOA was not married to NOC and that at the relevant time, NOC was under the care, supervision or authority of the accused. If the prosecution cannot prove all five of these elements, then you must find NOA not guilty of this offence.

Next, if you find that the prosecution has proven each of these elements beyond reasonable doubt, and the accused has raised the issue as to belief in age, you must then decide if NOA has proven, on the balance of probabilities, that s/he believed that NOC was at least 18 years old, and that that belief was based on reasonable grounds. If the accused cannot prove both of these matters, then NOA will be guilty of this offence, as long as the prosecution have proven each of the first three elements of the offence beyond reasonable doubt.

If, however, you find that the accused has proven these matters as to belief in age on the balance of

probabilities, you must then decide whether the prosecution has proven, beyond reasonable doubt, the two additional elements that NOC did not consent, and that NOA was aware that s/he was not or might not be consenting. If the prosecution cannot prove both of these things, then you must find NOA not guilty of this offence. It is only if you are satisfied that they have been proven beyond reasonable doubt, together with each of the first five elements of the offence, that you can convict NOA of sexual penetration of a child aged 16 or 17.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a 16 or 17 year old child, the prosecution must prove to you beyond reasonable doubt:

One – that NOA took part in an act of sexual penetration with the complainant; and

Two – that NOA intended to take part in that act of sexual penetration; and

Three – that NOC was either 16 or 17 years of age at the time that the act of sexual penetration took place; and

Four – that NOA and NOC were not married at the relevant time; and

Five – that NOC was under NOA's care, supervision or authority at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child aged 16 or 17.

If you decide that each of these elements have been proven beyond reasonable doubt, you must decide if the accused has proved, on the balance of probabilities:

- That NOA believed that NOC was aged 18 or older at the relevant time; and
- That NOA had reasonable grounds for that belief.

If the accused has not proved both of these matters on the balance of probabilities, and you find that all of the elements have been proved by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if you find that both of these matters have been proved by the accused on the balance of probabilities, you must then decide if the prosecution has proved, beyond reasonable doubt, that NOC did not consent to the act of sexual penetration and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the shaded section*.]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the shaded section*.]

If the prosecution cannot prove these matters, then you must find NOA not guilty of sexual penetration of a child aged of 16 or 17.

Last updated: 30 November 2017

7.3.15.4 Charge: Sexual Penetration of a 16- or 17-Year-Old Child (1/1/92–1/12/06) Consent in Issue

Click here to obtain a Word version of this document for adaptation

This charge can be used for trials commenced on or after 1/1/08 involving offences alleged to have been committed between 5/8/1991 and 30/11/2006 where consent is in issue.

I must now direct you about the crime of sexual penetration of a 16 or 17 year old child.

The law says that the age of consent for sexual acts is normally 16. However, for persons aged 16 or 17, the law has created this specific offence to protect such young people from exploitation by persons in positions of care, supervision or authority.

To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt.

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused intended to take part in that act of sexual penetration.

Three – the complainant was either 16 or 17 years of age at the time that the act of sexual penetration took place.

Four – the accused was not married to the complainant.

Five – at the time that the act of sexual penetration took place, the complainant was under the care, supervision or authority of the accused.

I will now explain each of these elements in more detail.[690]

Taking part in sexual penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If in issue, add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.[691]]

Act of sexual penetration

The law defines sexual penetration as the introduction of a person's penis, body part or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "by putting his finger into NOC's anus"/"when he took NOC's penis in his mouth"].

[*If relevant add:*

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.

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[690] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[691] Described in the instructions within this charge as the "voluntariness" requirement.

- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed voluntariness in issue, add the following shaded section*.]

For this element to be met, the act of [*describe relevant act of participation*, *e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstances of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In vaginal penetration cases, add the following shaded section*.]

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that [NOA/NOC] introduced [*identify body part or object*] to any extent between the outer lips of [NOA/NOC's] vagina.

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section*.]

However, according to the law, the introduction of an object or body part other than the penis into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done in good faith for medical or hygienic purposes. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done in good faith for [medical/hygienic] purposes.

In this case [*insert relevant evidence or competing arguments about proof of the accused's participation in an act of sexual penetration*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[692]

[*If intention is not in issue, add the following shaded section*.]

This element is not in issue here. [*If appropriate, explain further, e.g.*

- The accused admits that s/he intentionally sexually penetrated the complainant.
- If you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally.]

[692] If the accused is alleged to have penetrated the complainant, "intention" will only rarely be in issue. This constitutes an offence of basic intent, that is, the intent to commit the physical act of penetrating the complainant. This means that proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Any mental state issues related to the act of penetration (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions. Offences involving penetration of the accused by the complainant may raise different issues.

Complainant aged 16 or 17

The third element relates to the complainant. The prosecution must prove that [he/she] was either 16 or 17 years of age at the time that the alleged act of sexual penetration took place.

In this case, there is no dispute that NOC was [16/17] at the time the alleged act of sexual penetration took place. The main issue in this case is [*insert relevant issue*].[693]

Accused not married to the complainant

The fourth element that the prosecution must prove is that the accused was not married to the complainant at the time the alleged act of sexual penetration took place.

In this case, the defence has not disputed the prosecution's submission that [he/she] was not married to NOC at the time that the alleged act of sexual penetration took place. The main issue in this case is [*insert relevant issue*].[694]

Care, supervision or authority

The fifth element that the prosecution must prove is that, at the time that the act of sexual penetration took place, the complainant was under the care, supervision or authority of the accused.

[*If care, supervision or authority is not in issue, add the following shaded section*.]

In this case it was conceded by the defence that NOA was NOC's [*describe relationship*] and that the complainant was thus under the care, supervision or authority of the accused [at the relevant time]. While it is for you to determine whether this was the case, you should have no difficulty finding that this element has been proven.

[*If care, supervision or authority is in issue, add the following shaded section.*]

The words "care, supervision or authority" all describe different types of relationships where the accused is in a position to exploit or take advantage of that relationship to influence the child to engage in an act of sexual penetration. You should take this into account when deciding whether the prosecution has proved that the complainant was under the accused's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add*: You do not need to find that the alleged act of penetration was actually connected with, or influenced by, the relationship of care, supervision or authority or that NOA was actually exploiting his/her position of advantage. It is sufficient if you are satisfied that an established relationship of care, supervision or authority existed between NOA and NOC that could have been connected with, or influenced the child to engage in, the act of sexual penetration, and that the relationship existed on the day on which the penetration took place.]

In this case the prosecution alleged that NOC was under NOA's [care/supervision/authority]. [*Insert*

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[693] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

[694] If it is alleged that the accused and complainant were married, this section will need to be modified accordingly.

prosecution evidence]. The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOC was under NOA's care, supervision or authority at the time that the act of sexual penetration took place..

[*If the accused may be unaware of the facts giving rise to a relationship of care, supervision or authority, add the following shaded section*.]

The law states that NOA must know and be aware of the facts that give rise to a relationship of care, supervision or authority. For example, if a teacher with a large number of students did not recognise the complainant was a member of one of his/her classes, then you could not find this element proved.

[*Insert relevant prosecution and defence evidence and arguments.*]

Consent

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 16 or older (s 48(2)(a)). If the issue is 48(2)(b) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See 7.3.15 Sexual penetration of a 16 or 17 year old child (1/1/92 – 30/6/17) for guidance.

Belief that complainant was aged 18 or more

Even if you find that the prosecution has proven all five elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 18 years old at the time of the alleged sexual penetration.

As a result, the prosecution must prove beyond reasonable doubt either:

1. That NOA did not believe that NOC was aged 18 or older at the time of the alleged sexual penetration; or

2. That NOA did not have reasonable grounds to believe that NOC was aged 18 or older at the time of the alleged sexual penetration

For there to be reasonable grounds for a belief, the belief must be based on facts which could have caused a reasonable person to believe the same thing. So to prove this second alternative the prosecution must prove that even if NOA may have believed NOC was 18 or older, a reasonable person in his/her situation could not have reached that conclusion based on the facts known to NOA.

In this case the prosecution alleged [*insert relevant evidence and/or arguments*]. In response, the defence submitted [*insert relevant evidence and/or arguments*].

If the prosecution has proven beyond reasonable doubt, that NOA did not believe on reasonable grounds that NOC was at least 18 years old at the time of the alleged sexual penetration, then consent will not be a defence, and will not be relevant to your determination of the accused's guilt.

[*If the prosecution has conceded either consent or belief in consent, add the following shaded section*.]

The prosecution does not dispute that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "NOA believed that NOC was consenting"]. Therefore, if the prosecution fails to prove either that NOA did not believe that NOC was aged 18 or older at the time of the alleged sexual penetration, or that NOA did not have reasonable grounds to believe that NOC was aged 18 or older at the time of the alleged sexual penetration, then you will find the accused not guilty.

[*If either consent or belief in consent is in issue, add the following shaded section*.]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

If, however, you find that this has not been proven, then you will need to determine whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged act of sexual penetration and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the sexual penetration if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the sexual penetration. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the penetration, then you must find NOA not guilty of this offence.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to sexual penetration. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following darker shaded section*.]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the sexual penetration at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where evidence is given about the lack of resistance or injury or about past consensual sex, add the following darker shaded section*.]

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury;
- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proven beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to take part in the act of sexual penetration, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of the alleged penetration, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged penetration.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing arguments.*]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged sexual penetration the accused was aware either:

- that the complainant was not consenting; or
- that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

Belief in consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Onus and standard of proof

Remember, you may not need to consider the issue of consent. You will only need to consider this issue if the prosecution fails to prove:

(1) That NOA did not believe that NOC was aged 18 or older at the time of the alleged sexual penetration; or

(2) That NOA did not have reasonable grounds to believe that NOC was aged 18 or older at the time of the alleged sexual penetration.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a 16 or 17 year old child, the prosecution must prove to you beyond reasonable doubt:

One – that NOA took part in an act of sexual penetration with the complainant; and

Two – that NOA intended to take part in that act of sexual penetration; and

Three – that NOC was either 16 or 17 years of age at the time that the act of sexual penetration took place; and

Four – that NOA and NOC were not married at the relevant time; and

Five – that NOC was under NOA's care, supervision or authority at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child aged 16 or 17.

If you decide that each of these elements have been proved beyond reasonable doubt, you must decide if the prosecution has also proved, to the same standard:

- That NOA did not believe that NOC was aged 18 or older at the relevant time; or
- That NOA had no reasonable grounds to believe that NOC was aged 18 or older at the relevant time.

If the prosecution has proved one of these matters, and you find that all of the elements have been proved by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if the prosecution has not proved either of these matters, you must then decide if the prosecution has proved, beyond reasonable doubt, that NOC did not consent to the act of sexual penetration and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the following shaded section*.]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the following shaded section*.]

If the prosecution cannot prove these matters, then you must find NOA not guilty of sexual penetration of a child aged of 16 or 17.

Last updated: 14 May 2015

7.3.15.5 Checklist: Sexual Penetration of a 16- or 17-Year-Old Child (1/1/92–30/6/17) Consent in Issue

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The Elements

Five elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with the complainant; and
2. The accused intended to take part in that act of sexual penetration; and
3. The complainant was either 16 or 17 years of age at the time that the act of sexual penetration took place; and

4. The accused was not married to the complainant at that time; and

5. The complainant was under the care, supervision or authority of the accused at that time.

Accused's Acts

1. Did the accused take part in an act of sexual penetration with the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child

Accused's Intention

2. Did the accused intend to take part in that act of sexual penetration with the complainant?

If Yes, then go to 3

If No, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child

The Complainant's Age

3. Was the complainant either 16 or 17 years of age at the time that the act of sexual penetration took place?

If Yes, then go to 4

If No, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child

No Marital Relationship

4. Were the accused and the complainant married to each other at the time that the act of sexual penetration took place?

If No, then go to 5

If Yes, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child

Relationship of Care, Supervision or Authority

5. Was the complainant in a relationship of care, supervision or authority with the accused at the time that the act of sexual penetration took place?

If Yes, then go to 6

If No, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child

Relevance of Consent

[*This section of the checklist can be used if the accused alleged that s/he believed on reasonable grounds that the complainant was 18 or older and consented to the act of sexual penetration. If consent is in issue because the accused believed on reasonable grounds that s/he was married to the complainant, it will need to be modified as necessary.*]

[Use this section if the offence was allegedly committed on or after 1 December 2006.]

Consent is only relevant if you are satisfied the defence has proven, on the balance of probabilities,

both that:

6. The accused believed that the complainant was aged 18 or older at the time the act of sexual penetration took place; and

7. The accused's belief that the complainant was aged 18 or older was based on reasonable grounds.

[Use this section if the offence was allegedly committed before 1 December 2006]

Consent is relevant unless you are satisfied the prosecution has proven beyond reasonable doubt that either:

6. The accused did not believe that the complainant was aged 18 or older at the time the act of sexual penetration took place; or

7. The accused did not have reasonable grounds to believe that the complainant was aged 18 or older.

Lack of Consent

If consent is relevant, the prosecution must prove, beyond reasonable doubt, that:

8. The complainant did not consent to taking part in the act of sexual penetration; and

9. The accused was aware that the complainant was not or might not be consenting.

Consent

8. Did the sexual penetration occur without the complainant's consent?

If Yes, then go to 9

If No, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child (as long as you answered yes to questions 6 and 7)

Awareness of Lack of Consent

9. At the time of sexual penetration, was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes, then the accused is guilty of sexual penetration of a 16 or 17 year-old child (as long as you also answered yes to questions 1, 2, 3, 5 and 8, and no to question 4)

If No, then the accused is not guilty of sexual penetration of a 16 or 17 year-old child (as long as you answered yes to questions 6 and 7)

Last updated: 21 August 2008

7.3.16 Sexual Assault of a Child under 16 (From 1/7/17)

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Commencement Information

1. The current s 49D offence came into force on 1 July 2017.

2. Prior to 1 July 2017, *Crimes Act 1958* s 47 contained a composite offence of an indecent act "with or in the presence of" a child under 16. Following the amendments introduced by the *Crimes Amendment (Sexual Offences) Act 2016*, the offence was split so that section 49D addresses sexual touching and section 49F addresses sexual activity in the presence of the child.
3. For offences committed before 1 July 2017, see 7.3.17 Indecent Act with a Child Under 16 (1/1/92–30/6/17).
4. For offences involving sexual activity, see 7.3.21 Sexual activity in the presence of a child under 16 (From 1/7/17).

Elements

5. The elements of the offence are set out in s 49D(1) of the *Crimes Act 1958*. The prosecution must prove that:

   i) The accused (A) intentionally:

      - touched another person (B);
      - caused or allowed B to touch A; or
      - caused B to touch or to continue to touch themselves, another person (C) or to be touched, or to continue to be touched, by C;

   ii) B was a child under the age of 16 years;

   iii) The touching was sexual;

   iv) The touching was contrary to community standards of acceptable conduct.

Intentional touching

6. The first element that the prosecution must prove is that the accused intentionally touched another person, or caused the other person to touch someone. The term "touching" is defined in *Crimes Act 1958* s 35B as touching that may be done:

   (a) with any part of the body; or
   (b) with anything else; or
   (c) through anything, including anything worn by the person doing the touching or by the person touched.

7. This element may also be proved where the accused causes another person to touch the complainant (*Crimes Act 1958* s 49D(1)).
8. The fault element for this element is basic or general intention. Where relevant, the prosecution must prove that the touching was intentional in the sense that it was deliberate rather than inadvertent or accidental.
9. For more information on this element, see 7.3.5 Sexual Assault (From 1/7/15).

Child Under 16

10. The second element requires the prosecution to prove that the complainant was under the age of 16 at the time the relevant act took place (*Crimes Act 1958* s 49D(1)).

Sexual Touching

11. The third element requires the prosecution to prove that the touching was sexual (*Crimes Act 1958* s 49D(1)).
12. Touching can be "sexual" because of:

(a) the area of the body that is touched or used in the touching, including (but not limited to) the genital or anal region, the buttocks or, in the case of a female or a person who identifies as a female, the breasts; or
(b) the fact that the person doing the touching seeks or gets sexual arousal or sexual gratification from the touching; or
(c) any other aspect of the touching, including the circumstances in which it is done (*Crimes Act 1958* s 35B(2)).

13. For more information on this element, see 7.3.5 Sexual Assault (From 1/7/15).

Touching contrary to community standards of acceptable conduct

14. The fourth element is that the touching is contrary to community standards of acceptable conduct (*Crimes Act 1958* s 49D(1)).

15. Section 49D(3) of the *Crimes Act 1958* provides that:

> Whether or not the touching is contrary to community standards of acceptable conduct depends on the circumstances.

16. The Act specifies that the circumstances include the purpose of the touching and whether the accused seeks or gets sexual arousal or gratification from the touching. However, the circumstances do not include whether the complainant consented to the touching or whether the accused believed the complainant consented to the touching (*Crimes Act 1958* s 49D(4)).

Statutory defences and exemption

Similarity in age

17. Section 49U of the *Crimes Act 1958* provides that it is a defence to an offence against section 49D(1) if, at the time of the conduct:

    i) A was not more than 2 years older than B; and

    ii) B was 12 years of age or more.

18. In relation to this defence, the accused's actual age must not exceed the child's by more than 24 months. The availability of the defence is not determined by a measure limited to whole–years (*Stannard v DPP* (2010) 28 VR 84).

19. To disprove this defence, the prosecution must rebut one or more limbs of section 49U.

20. Unlike the former s 47, a similarity in age is not used as a threshold requirement before consent is relevant. This means that the jury does not need to consider consent, or a reasonable belief in consent, as part of the similarity in age defence.

Reasonable belief as to age

21. Section 49W of the *Crimes Act 1958* provides that it is a defence to an offence against section 49D(1) if, at the time of the conduct:

    i) B was 12 years of age or more; and

    ii) A reasonably believed that B was 16 years of age or more.

22. The accused bears the burden of proving, on the balance of probabilities, that he or she reasonably believed that B was 16 years of age or more (*Crimes Act 1958* s 49W(4)).

23. The Note to section 49W states that:

> Whether or not A reasonably believed that B … was 16 years of age or more depends

on the circumstances. The circumstances include any steps that A took to find out [B's] age.

24. The Note also specifies that the accused has an evidential burden to establish that B was 12 years of age or more.

25. Unlike the former s 47, a reasonable belief in age is not used as a threshold requirement before consent is relevant. This means that the jury does not need to consider consent, or a reasonable belief in consent, as part of the belief in age defence.

Honest and reasonable mistake not a defence in some circumstances

26. Section 49ZC(2) of the *Crimes Act 1958* provides that an honest and reasonable mistaken belief that the touching was not sexual or was not contrary to community standards of acceptable conduct is not a defence.

27. The combined effect of sections 49D(4) and 49ZC(2) is that while the accused's beliefs can make a touching sexual or contrary to community standards, the accused's beliefs cannot operate to excuse otherwise prohibited conduct.

Last updated: 1 July 2017

7.3.16.1 Charge: Sexual Assault of a Child under 16 (From 1/7/17)

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I must now direct you about the crime of sexual assault of a child under 16. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused intentionally touched another person, NOC.[695]

Two – NOC was under the age of 16 years.

Three – The touching was sexual.

Four – The touching was contrary to community standards of acceptable conduct.

I will now explain each of these elements in more detail

Actions of the accused

Warning! This charge is designed for cases where the prosecution relies on s 49D(1)(a)(i). This direction on the first element must be modified if the prosecution relies on other limbs of s 49D(1)(a).

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that NOA intentionally touched NOC.

[695] This statement of the element must be modified if the prosecution relies on the other limbs of s 49D(1)(a). The words "touched the complainant" may be replaced with "caused or allowed the complainant to touch the accused" or "caused the complainant to touch himself/herself" or "caused the complainant to touch another person" or "caused the complainant to be touched by another person".

[*If the evidence or arguments have placed the intentional or voluntary nature of the acts in issue, add the following shaded section*.[696]]

For this element to be met, the act of [*describe relevant act of touching*] must have been done intentionally.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves intention in the circumstance of the case, e.g.* "NOA touched the outside of NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the touching"].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Child under the age of 16

The second element relates to the age of the complainant, NOC. The prosecution must prove that s/he was under the age of 16 when the alleged touching occurred.

In this case, there is no dispute that NOC was under 16 at that time. The main issue in this case is [*insert relevant issue*].[697]

Sexual touching

The third element that the prosecution must prove is that the alleged act of touching was sexual.

The law says that touching can be sexual because of the area of the body involved, of either the person being touched or the person doing the touching, such as the genital or anal area, or the buttocks or breasts.

Or the touching can be sexual because the person doing the touching wants to get or gets sexual gratification from the touching.

Finally, any other aspect of the touching, including the circumstances in which it happened, can also make the touching sexual.

The question of whether or not the touching was sexual is for you to decide.

In this case, the prosecution alleged that the touching was sexual because [*insert evidence and arguments*]. [*If relevant add*: The defence responded [*insert evidence and arguments*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's touching of NOC was sexual.

Contrary to community standards of acceptable conduct

The fourth element that the prosecution must prove is that the alleged touching was contrary to community standards of acceptable conduct.

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[696] Because of how the offence is defined, the issue of intention is likely inseparable from the question of voluntariness. Where the issue is raised, the judge should direct the jury on the specific matters the jury must consider to find that the accused's conduct was voluntary and intentional (e.g. disproof of accident or proof that the accused was conscious).

[697] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

The law says that whether touching is contrary to community standards depends on the circumstances, and that this includes the purpose of the touching and whether NOA seeks or gets sexual arousal or sexual gratification from the touching.

The law also says that whether NOC consented to the touching and whether NOA believed that NOC consented to the touching are not relevant to whether the touching was contrary to community standards.

[*Refer to relevant prosecution and defence evidence and arguments.*]

Defences

Similarity in Age

[*If the accused relies on the similarity in age defence in Crimes Act 1958 s 49U, add the following shaded section.*]

For this offence, the law recognises a defence which may be termed "similarity in age". There are two parts to this defence.

First, the accused must be no more than 2 years older than the complainant. In this case, that requirement is met.[698]

Second, the complainant must have been 12 years old or more at the time of the alleged conduct. It is this part of the defence which is in dispute.

As I told you at the start of the trial, the prosecution must prove the accused's guilt. This means the prosecution must prove that at the time of the alleged conduct, NOC was not aged 12 years or older. In other words, the prosecution must prove that at the time of the touching, NOC was aged 11 years or younger.

[*Refer to relevant prosecution and defence evidence and arguments.*]

Reasonable belief in Age

[*If the accused relies on the belief in age defence in Crimes Act 1958 s 49W, add the following shaded section.*]

The law states that the accused does not commit this offence if, at the time s/he touched NOC, the accused reasonably believed that NOC was aged 16 years or more. There are two parts to this defence.

First, at the time of the conduct, NOC was aged 12 or more. There is no issue in this case that NOC was aged 12 or more at the time of the conduct.[699]

Second, NOA must have reasonably believed that NOC was aged 16 or more. It is a matter for you to decide whether NOA held this belief, and whether it was reasonable. As part of deciding this issue, you should consider what steps NOA took to find out NOC's age.

Unlike the elements of the offence, this is a matter which the accused must prove. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that NOC was aged 16 or more on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he believed NOC was aged 16 or more and

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[698] If the prosecution contests this matter, then the charge will need to be modified accordingly.

[699] If the age of the child is in dispute, then this direction must be modified. The prosecution bears the onus of rebutting this threshold requirement, once the accused has satisfied the evidential burden.

this belief was reasonable. Unlike the prosecution, s/he does not need to prove this matter beyond reasonable doubt.

[*Identify relevant evidence and arguments.*]

Consent not a defence

To protect children under the age of 16, Parliament has specifically stated that consent is not relevant to this offence. You do not need to consider the issue of whether or not NOC agreed to be touched by NOA.

Summary

To summarise, before you can find NOA guilty of sexual assault of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA intentionally touched NOC; and
- Two – NOC is a child under the age of 16 years; and
- Three – that the touching was sexual; and
- Four – that the touching was contrary to community standards of acceptable conduct.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual assault of a child under the age of 16.

Last updated: 1 July 2017

7.3.16.2 Checklist: Sexual Assault of a Child under 16 (From 1/7/17)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally touched the complainant; and

2. The complainant was under the age of 16; and

3. The touching was sexual; and

4. The touching was contrary to community standards of acceptable conduct.

Intentional touching

1. Did the accused intentionally touch NOC?

If Yes then go to 2

If No, then the accused is not guilty of Sexual Assault of a child under 16

Complainant under the age of 16

2. At the time of the act, was NOC under the age of 16?

If Yes then go to 3

If No, then the accused is not guilty of Sexual Assault of a child under 16

Sexual touching

3. Was the touching sexual?

Consider – Touching may be sexual because of the area of body touched, the fact that the person doing it seeks or gets sexual arousal or gratification from the touching, or any other reason.

If Yes then go to 4

If No, then the accused is not guilty of Sexual Assault of a child under 16

Contrary to community standards of acceptable conduct

4. Was the touching contrary to community standards of acceptable conduct?

Consider – Relevant matters include the circumstances of the touching and whether the accused was seeking or got sexual arousal or gratification

Consider – Whether NOC consented to the touching or whether NOA believed NOC consented to the touching is not relevant to this element

If Yes then the accused is guilty of Sexual Assault of a child under 16 (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of Sexual Assault of a child under 16

Last updated: 1 July 2017

7.3.17 Indecent Act with a Child under 16 (1/1/92–30/6/17)

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Commencement Information

1. For offences alleged to have been committed before 1 July 2017, s 47 contained the offence of indecent act with a child under 16.
2. This offence came into force on 5 August 1991, replacing the former offences specified in s 44(3) (indecent assault on a person under the age of 16 years) and s 50 (gross indecency).
3. The offence applies to any acts committed on or after 5 August 1991 and before 1 July 2017 (*Crimes Act 1958* s 585A(2)).
4. If an offence is alleged to have been committed between dates, one date before and one date on or after 5 August 1991, the offence is alleged to have been committed before 5 August 1991 (*Crimes Act 1958* s 585A(4)).
5. The offence was amended on 22 October 2014 by section 5 of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*. This amendment removed reference to the accused and the complaint not being married.
6. The current s 47(2) and s 47(3) apply only to offences committed on or after 1 December 2006. Their impact is considered below in the discussion of Statutory defences and exemptions.

Indecent Acts

7. An indecent act is one which "right-minded persons would consider to be contrary to community standards of decency" (*DPP v Scott* [2004] VSC 129; *Curtis v R* [2011] VSCA 102).

8. Although two teenagers of the same age kissing each other may not, of itself, be an indecent act, *instigating* two teenagers to kiss for the accused's sexual gratification may be (*Curtis v R* [2011] VSCA 102).

9. For the purposes of s 47, an "indecent act" includes an indecent assault (*R v TSR* (2002) 5 VR 627).

10. See 7.3.6 Indecent Assault (1/1/92 – 30/6/15) for further guidance on the meaning of indecency.

"Wilfully"

11. Section 47 provides that a person must not "wilfully" commit, or "wilfully" be in any way a party to the commission of an indecent act with or in the presence of a child under the age of 16.

12. There has been much dispute over the meaning of the word "wilfully", and it appears that its meaning varies according to the particular statutory provision in which it appears (for a general discussion of the term, see *Ianella v French* (1968) 119 CLR 84; *Bergin v Brown* [1990] VR 888).

13. Although the meaning of the word "wilfully" in the context of s 47 has not been determined, it seems likely that it means intentionally (see, e.g. *R v Papamitrou* (2004) 7 VR 375, which casts doubt on the relevance of recklessness to s 47).

14. Although it has not been judicially determined, it seems likely that the accused must have not only wilfully committed the relevant indecent act, but have wilfully committed it with or in the presence of a child.

"With or in the presence of"

15. Under s 47, the relevant act must be committed "with" or "in the presence of" a child under the age of 16.

16. The use of the words "with" and "in the presence of" does not create two separate offences. Section 47 creates a single offence that deals with indecent acts involving children under the age of 16 (*R v Coffey* (2003) 6 VR 543; *R v ADJ* [2005] VSCA 102).

17. A count that specifies that an act was committed "with or in the presence of" a child would therefore not be bad for duplicity (*R v Coffey* (2003) 6 VR 543).

18. Committing an act "with" a child does not require the child to have co-operated, consented or participated in the act. The offence may be constituted by an indecent act committed against the child, regardless of whether or not they were consenting or approving (*R v TSR* (2002) 5 VR 627).

19. For an act to have been committed "with" a child (cf. "in the presence of" a child), there must have been physical contact between the parties. Speaking indecently to a child over the telephone is therefore incapable of constituting an offence under s 47, as it is neither "with" a child nor in their presence (*R v Alexander and McKenzie* (2002) 6 VR 53. See also *R v Coffey* (2003) 6 VR 543).

20. No physical contact is required for an act to have been committed "in the presence of" a child. An act committed in front of a child is committed in their presence (*R v Alexander and McKenzie* (2002) 6 VR 53; [2002] VSCA 183; *R v Coffey* (2003) 6 VR 543; *R v Barnes* [2003] VSCA 156).

21. While an accused who encourages a child to perform an indecent act in front of them will be a party to the commission of an indecent act "in the presence of" a child (*R v Coffey* (2003) 6 VR 543), there is no need for there to be an act of encouragement to satisfy this element of the offence. The words "in the presence of" do not require anything more than mere presence or proximity (*R v ADJ* [2005] VSCA 102).

22. In South Australia it has been held (in relation to a similar offence) that "in the presence of" simply requires that the child be present. It is not necessary that the child saw the indecent act or was aware of it. The offence will be established even if the child was asleep at the time (*R v AWL* [2003] SASC 416).

Child under 16

23. The jury should determine the complainant's age having regard to the evidence in the case, or if no other sufficient evidence is presented, to the complainant's appearance (*Crimes Act 1958* s 411).

Consent

24. Section 47(2) states that consent is not a defence to a charge of committing an indecent act with a child under 16, unless at the time of the alleged offence:
    - The accused believed on reasonable grounds that the child was 16 or older; or
    - The accused was not more than 2 years older than the child; or
    - The accused believed on reasonable grounds that he or she was married to the child.
25. The prosecution does not have to address the question of consent as part of its case – it is a matter for the defence to raise (*R v TSR* (2002) 5 VR 627).
26. For information on this defence, see 7.3.13 Sexual Penetration of a child under 16 (1/1/92–30/6/17), where the equivalent defence under s 45(4) is discussed.

Last updated: 30 November 2017

7.3.17.1 Charge: Indecent Act with a Child under 16 (22/10/14–30/6/17) Consent not in issue

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This charge can be used for offences of indecent act with a child under 16 alleged to have been committed on or after 22/10/2014 where consent is not in issue.

I must now direct you about the crime of [*committing/being a party to the commission of*] an indecent act with a child under the age of 16. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused [*committed the alleged act/was a party to the commission of the alleged act*].

Two – the accused [*wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act*].

Three – the act occurred in indecent circumstances.

Four – the act was done [*with/in the presence of*] the complainant.

Five – the complainant was under the age of 16 when the act took place.

I will now explain each of these elements in more detail

Actions of the accused

The first element relates to what the accused did. S/he must have [*committed the act alleged by the prosecution/been a party in any way to the act alleged by the prosecution*].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Wilful

The second element relates to the accused person's state of mind. The prosecution must prove that the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act]. That is, you must be satisfied that the accused's participation in the act was deliberate not accidental.

Indecent circumstances

The third element that the prosecution must prove is that the alleged act occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body NOA touched, what NOA used to touch NOC or from the circumstances of the act. Beyond the requirement of a sexual connotation, the question of whether or not the circumstances were indecent is for you to decide.

In this case, the prosecution alleged that NOA's act occurred in indecent circumstances because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's act occurred in indecent circumstances.

With/In the Presence of the complainant

The fourth element that the prosecution must prove is that the alleged act was intentionally done [with/in the presence of] the complainant.

In this case the prosecution submitted that [*insert evidence about the way in which the act was committed with or in the presence of the complainant*]. The defence responded [*insert relevant evidence and/or arguments*].

[*If it is alleged that the act was committed* in the presence of *the complainant, add the following shaded text*: For this element to be satisfied, you do not need to find that there was any physical contact between NOA and NOC. This element will be met if the prosecution can prove, beyond reasonable doubt, that NOC was present at the place where the alleged act was committed and NOA was aware of that fact.]

Child under the Age of 16

The fifth element relates to the complainant. The prosecution must prove that s/he was under the age of 16 at the time that the alleged indecent act took place.

In this case, there is no dispute that NOC was under 16 at the time the alleged indecent act took place. The main issue in this case is [*insert relevant issue*].[700]

Consent

To protect children under the age of 16, Parliament has created a number of offences where consent is not relevant. This is one of those offences, so you do not need to consider the issue of whether or not NOC agreed to take part in the alleged indecent act.

Summary

To summarise, before you can find NOA guilty of [*committing/being a party to the commission of*] an indecent act with a child under 16, the prosecution must prove to you beyond reasonable doubt:

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[700] If the complainant's age is disputed, this section will need to be modified accordingly.

- One – that NOA [committed [*insert relevant act*]/was a party to the commission of [*insert relevant act*]; and
- Two – that NOA [wilfully committed/was wilfully a party to] the alleged indecent act; and
- Three – that this act occurred in indecent circumstances; and
- Four – that this act was done [with/in the presence of] NOC; and
- Five – that NOC was under the age of 16 when this act took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a child under 16.

Last updated: 27 April 2016

7.3.17.2 Checklist: Indecent Act with a Child under 16 (22/10/14–30/6/17) Consent Not in Issue

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Five elements that the prosecution must prove beyond reasonable doubt:

1. The accused [committed/was a party to the commission of] the alleged act; and
2. The accused [wilfully committed/was wilfully a party to] the act; and
3. The act occurred in indecent circumstances; and
4. The accused did the act [with/in the presence of] the complainant; and
5. The complainant was under the age of 16 at the time the act was committed.

Accused's Acts

1. [Did the accused commit/Was the accused a party to the commission of] the alleged act?

If Yes, then go to 2

If No, then the accused is not guilty of committing an indecent act with a child under 16

Accused's Mental State

2. [Did the accused wilfully commit/Was the accused wilfully a party to] the act?

If Yes, then go to 3

If No, then the accused is not guilty of committing an indecent act with a child under 16

Indecent Circumstances

3. Did the act occur in indecent circumstances?

Consider – sexual connotation

If Yes, then go to 4

If No, then the accused is not guilty of committing an indecent act with a child under 16

Complainant's Involvement

4. Did the act take place [with/in the presence of] the complainant?

If Yes, then go to 5

If No, then the accused is not guilty of committing an indecent act with a child under 16

Complainant's Age

5. Was the complainant under the age of 16 at the time the act was committed?

If Yes, then the accused is guilty of committing an indecent act with a child under 16 (as long as you answered yes to questions 1, 2, 3 and 4)

If No, then the accused is not guilty of committing an indecent act with a child under 16

Last updated: 22 January 2016

7.3.17.3 Charge: Indecent Act with a Child under 16 (1/1/92–21/10/14) Consent Not in Issue

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This charge can be used for offences of indecent act with a child under 16 alleged to have been committed between 5/8/1991 and 21/10/2014 where consent is not in issue.

I must now direct you about the crime of [committing/being a party to the commission of] an indecent act with a child under the age of 16. To prove this crime, the prosecution must prove the following 6 elements beyond reasonable doubt:

One – the accused [committed the alleged act/was a party to the commission of the alleged act].

Two – the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act].

Three – the act occurred in indecent circumstances.

Four – the act was done [with/in the presence of] the complainant.

Five – the complainant was under the age of 16 when the act took place.

Six – the accused was not married to the complainant at the time the alleged act took place.

I will now explain each of these elements in more detail.

Actions of the accused

The first element relates to what the accused did. S/he must have [committed the act alleged by the prosecution/been a party in any way to the act alleged by the prosecution].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Wilful

The second element relates to the accused person's state of mind. The prosecution must prove that the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act]. That is, you must be satisfied that the accused's participation in the act was deliberate not accidental.

Indecent circumstances

The third element that the prosecution must prove is that the alleged act occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body NOA touched, what NOA used to touch NOC or from the circumstances of the act. Beyond the requirement of a sexual connotation, the question of whether or not the circumstances were indecent is for you to decide.

In this case, the prosecution alleged that NOA's act occurred in indecent circumstances because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's act occurred in indecent circumstances.

With/In the Presence of the complainant

The fourth element that the prosecution must prove is that the alleged act was intentionally done [with/in the presence of] the complainant.

In this case the prosecution submitted that [*insert evidence about the way in which the act was committed with or in the presence of the complainant*]. The defence responded [*insert relevant evidence and/or arguments*].

[*If it is alleged that the act was committed in the presence of the complainant, add the following shaded text:* For this element to be satisfied, you do not need to find that there was any physical contact between NOA and NOC. This element will be met if the prosecution can prove, beyond reasonable doubt, that NOC was present at the place where the alleged act was committed and NOA was aware of that fact.]

Child under the Age of 16

The fifth element relates to the complainant. The prosecution must prove that s/he was under the age of 16 at the time that the alleged indecent act took place.

In this case, there is no dispute that NOC was under 16 at the time the alleged indecent act took place. The main issue in this case is [*insert relevant issue*].[701]

Accused not married to the complainant

The sixth element that the prosecution must prove is that the accused was not married to the complainant at the time the alleged act took place.

In this case, the defence has not disputed the prosecution's claim that s/he was not married to NOC at the time that the alleged act took place. The main issue in this case is [*insert relevant issue*].[702]

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[701] If the complainant's age is disputed, this section will need to be modified accordingly.

[702] If it is alleged that the accused and complainant were married, this section will need to be modified accordingly.

Consent

To protect children under the age of 16, Parliament has created a number of offences where consent is not relevant. This is one of those offences, so you do not need to consider the issue of whether or not NOC agreed to take part in the alleged indecent act.

Summary

To summarise, before you can find NOA guilty of [committing/being a party to the commission of] an indecent act with a child under 16, the prosecution must prove to you beyond reasonable doubt:

One – that NOA [committed [*insert relevant act*]/was a party to the commission of [*insert relevant act*]]; and

Two – that NOA [wilfully committed/was wilfully a party to] the alleged indecent act; and

Three – that this act occurred in indecent circumstances; and

Four – that this act was done [with/in the presence of] NOC; and

Five – that NOC was under the age of 16 when this act took place; and

Six – that NOA was not married to NOC at the time that this act took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a child under 16.

Last updated: 27 April 2016

7.3.17.4 Checklist: Indecent Act with a Child under 16 (1/1/92–21/10/14) Consent Not in Issue

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Six elements that the prosecution must prove beyond reasonable doubt:

1. The accused [committed/was a party to the commission of] the alleged act; and
2. The accused [wilfully committed/was wilfully a party to] the act; and
3. The act occurred in indecent circumstances; and
4. The accused did the act [with/in the presence of] the complainant; and
5. The complainant was under the age of 16 at the time the act was committed; and
6. The accused was not married to the complainant at the time the act was committed.

Accused's Acts

1. [Did the accused commit/Was the accused a party to the commission of] the alleged act?

    If Yes, then go to 2

    If No, then the accused is not guilty of committing an indecent act with a child under 16

Accused's mental state

2. [Did the accused wilfully commit/Was the accused wilfully a party to] the act?

    If Yes, then go to 3

If No, then the accused is not guilty of committing an indecent act with a child under 16

Indecent Circumstances

3. Did the act occur in indecent circumstances?

Consider – sexual connotation

If Yes, then go to 4

If No, then the accused is not guilty of committing an indecent act with a child under 16

Complainant's Involvement

4. Did the act take place [with/in the presence of] the complainant?

If Yes, then go to 5

If No, then the accused is not guilty of committing an indecent act with a child under 16

Complainant's Age

5. Was the complainant under the age of 16 at the time the act was committed?

If Yes, then go to 6

If No, then the accused is not guilty of committing an indecent act with a child under 16

No Marital Relationship

6. Were the accused and the complainant married to each other at the time that the act took place?

If Yes, then the accused is not guilty of committing an indecent act with a child under 16

If No, then the accused is guilty of committing an indecent act with a child under 16 (as long as you answered yes to questions 1, 2, 3, 4 and 5)

Last updated: 22 January 2016

7.3.17.5 Charge: Indecent Act with a Child under 16 (1/7/15–30/6/17) Consent in Issue

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This charge can be used for offences of indecent act with a child under 16 alleged to have been committed between 1/07/2015 and 30/06/2017 where consent is in issue.

I must now direct you about the crime of [committing/being a party to the commission of] an indecent act with a child under the age of 16. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused [committed the alleged act/was a party to the commission of the alleged act].

Two – the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act].

Three – the act occurred in indecent circumstances.

Four – the act was done [with/in the presence of] the complainant.

Five – the complainant was under the age of 16 when the act took place.

I will now explain each of these elements in more detail

Actions of the accused

The first element relates to what the accused did. S/he must have [committed the act alleged by the prosecution/been a party in any way to the act alleged by the prosecution].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Wilful

The second element relates to the accused person's state of mind. The prosecution must prove that the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act]. That is, you must be satisfied that the accused's participation in the act was deliberate not accidental.

Indecent circumstances

The third element that the prosecution must prove is that the alleged act occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body NOA touched, what NOA used to touch NOC or from the circumstances of the act. Beyond the requirement of a sexual connotation, the question of whether or not the circumstances were indecent is for you to decide.

In this case, the prosecution alleged that NOA's act occurred in indecent circumstances because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's act occurred in indecent circumstances.

With/In the Presence of the complainant

The fourth element that the prosecution must prove is that the alleged act was intentionally done [with/in the presence of] the complainant.

In this case the prosecution submitted that [*insert evidence about the way in which the act was committed with or in the presence of the complainant*]. The defence responded [*insert relevant evidence and/or arguments*].

[*If it is alleged that the act was committed* in the presence of *the complainant, add the following shaded text:* For this element to be satisfied, you do not need to find that there was any physical contact between NOA and NOC. This element will be met if the prosecution can prove, beyond reasonable doubt, that NOC was present at the place where the alleged act was committed and NOA was aware of that fact.]

Child under the Age of 16

The fifth element relates to the complainant. The prosecution must prove that s/he was under the age of 16 at the time that the alleged indecent act took place.

In this case, there is no dispute that NOC was under 16 at the time the alleged indecent act took place. The main issue in this case is [*insert relevant issue*].[703]

Consent

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 16 or older (s 47(2)(a)). If the issue is s 47(2)(b) (accused not more than 2 years older than the complainant) or s 47(2)(c) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See Indecent Act with a Child under 16 (1/1/92 – 30/6/17) for guidance.

Warning! It is not clear whether *Crimes Act 1958* s 322T affects the relevance of intoxication to this defence. Judges should seek submissions from the parties on this issue where relevant.

Belief that complainant was aged 16 or more

Even if you find that the prosecution has proven all five elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 16 years old at the time of the alleged indecent act.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this belief is a matter which the accused must prove on the balance of probabilities. That is, the accused must prove that it is more likely than not that s/he believed on reasonable grounds that NOC was aged 16 or over for consent to be available as a defence.

So, by contrast to proof of the elements of the offence(s), where the prosecution must satisfy you beyond reasonable doubt of them, for the defence of reasonable belief to be established to your satisfaction, it is for the accused, not the prosecution to prove the existence of a reasonable belief in age.

And the standard to which the defence must do this is a lesser standard than proof beyond reasonable doubt, it is proof on the balance of probabilities. That is, the accused must satisfy you that it is more likely than not that he believed, on reasonable grounds, that the complainant was 16 or over.

In this case [*insert relevant evidence and competing arguments*].

[*If the prosecution has conceded either consent or belief in consent, add the shaded section*.]

As it is not in issue in this case that the indecent act was consensual, if the accused satisfied you, on the balance of probabilities that s/he believed, on reasonable grounds, that at the time of the alleged indecent act, that the complainant was 16 or over, then your verdict in respect of that charge will be not guilty. If however, the accused does not satisfy you on the balance of probabilities that at the time he believed the complainant was 16 or over, and that his belief was based on reasonable grounds, then despite the fact that the act was consensual, this defence will fail.

[*If either consent or belief in consent is in issue, add the shaded section*.]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

[703] If the complainant's age is disputed, this section will need to be modified accordingly.

If, however, you find that the NOA has proven that s/he believed on reasonable grounds that NOC was at least 16 years old at the time of the alleged indecent act, then you will need to determine whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged indecent act and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the indecent act if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the indecent act. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the alleged indecent act, then you must find NOA not guilty of this offence.

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs.*]

The law says that a person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

The law says that where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following darker shaded section*.]

In some circumstances the law says that the complainant did not freely agree, or consent, to an act. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep or unconscious;

(e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;

(f) the person is incapable of understanding the sexual nature of the act;

(g) the person is mistaken about the sexual nature of the act;

(h) the person is mistaken about the identity of any other person involved in the act;

(i) the person mistakenly believes that the act is for medical or hygienic purposes;

(j) if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes;

(k) the person does not say or do anything to indicate consent to the act;

(l) having initially given consent to the act, the person later withdraws consent to the act taking place or continuing].

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting.

However, you do not need to consider this question only by reference to these particular

circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following darker shaded section.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to an indecent act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the alleged indecent act at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where a party requests a direction about the absence of physical resistance or protest, lack of physical injury or past consensual sexual conduct, add the following shaded section as relevant to the facts in issue.*]

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury;
- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proven beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to the alleged indecent act, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of that act, or not said and done at the time of the alleged act, as well as the evidence s/he gave in court about [his/her] state of mind at that time.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing arguments.*]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged indecent act the accused was aware either:

- that the complainant was not consenting; or
- that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

[Warning! If this element is in issue, the judge should invite submissions on how to direct the jury about this issue. With the repeal of Crimes Act 1958 s 37AA, it may not be prudent to use 7.3.1.3.1 Charge: Belief in consent (Pre 1/07/2015).]

Onus and standard of proof

Remember, you may not need to consider the issue of consent. The process that you must follow is this. First, you must decide if the prosecution has proven the five elements of the offence beyond reasonable doubt. That is, the prosecution must prove that NOA [wilfully committed/was wilfully a party to] an indecent act [with/in the presence of] the complainant, that NOC was under the age of 16 at the relevant time.

Next, if you find that the prosecution has proven each of these elements beyond reasonable doubt, and the accused has raised the issue as to belief in age, you must then decide if NOA has proven, on the balance of probabilities, that s/he believed that NOC was at least 16 years old, and that that belief was based on reasonable grounds. If the accused cannot prove both of these matters, then NOA will be guilty of this offence, as long as the prosecution have proven each of the first five elements of the offence beyond reasonable doubt.

If, however, you find that the accused has proven these matters as to belief in age on the balance of probabilities, you must then decide whether the prosecution has proven, beyond reasonable doubt, the two additional elements that NOC did not consent, and that NOA was aware that s/he was not or might not be consenting. If the prosecution cannot prove both of these things, then you must find NOA not guilty of this offence. It is only if you are satisfied that they have been proven beyond reasonable doubt, together with each of the first five elements of the offence, that you can convict NOA of indecent act with a child under 16.

Summary

To summarise, before you can find NOA guilty of [committing/being a party to the commission of] an indecent act with a child under 16, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA [committed [*insert relevant act*]/was a party to the commission of [*insert relevant act*]]; and
- Two – that NOA [wilfully committed/was wilfully a party to] the alleged indecent act; and
- Three – that this act occurred in indecent circumstances; and
- Four – that this act was done [with/in the presence of] NOC; and
- Five – that NOC was under the age of 16 when this act took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a child under 16.

If you decide that each of these elements have been proven beyond reasonable doubt, you must decide if the accused has proven, on the balance of probabilities:

- That NOA believed that NOC was aged 16 or older at the relevant time; and
- That NOA had reasonable grounds for that belief.

If the accused has not proven both of these matters on the balance of probabilities, and you find that all of the elements have been proven by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if you find that both of these matters have been proven by the accused on the balance of probabilities, you must then decide if the prosecution has proven, beyond reasonable doubt, that NOC did not consent to the indecent act and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the shaded section.*]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent*, *e.g.* "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the shaded section.*]

If the prosecution cannot prove these matters, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a child under 16.

Last updated: 30 November 2017

7.3.17.6 Charge: Indecent Act with a Child under 16 (22/10/14–30/6/15) Consent in Issue

Click here to obtain a Word version of this document for adaptation

This charge can be used for offences of indecent act with a child under 16 alleged to have been committed between 22/10/2014 and 30/06/2015 where consent is in issue.

I must now direct you about the crime of [committing/being a party to the commission of] an indecent act with a child under the age of 16. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused [committed the alleged act/was a party to the commission of the alleged act].

Two – the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act].

Three – the act occurred in indecent circumstances.

Four – the act was done [with/in the presence of] the complainant.

Five – the complainant was under the age of 16 when the act took place.

I will now explain each of these elements in more detail

Actions of the accused

The first element relates to what the accused did. S/he must have [committed the act alleged by the prosecution/been a party in any way to the act alleged by the prosecution].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Wilful

The second element relates to the accused person's state of mind. The prosecution must prove that the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act]. That is, you must be satisfied that the accused's participation in the act was deliberate not accidental.

Indecent circumstances

The third element that the prosecution must prove is that the alleged act occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body NOA touched, what NOA used to touch NOC or from the circumstances of the act. Beyond the requirement of a sexual connotation, the question of whether or not the circumstances were indecent is for you to decide.

In this case, the prosecution alleged that NOA's act occurred in indecent circumstances because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's act occurred in indecent circumstances.

With/In the Presence of the complainant

The fourth element that the prosecution must prove is that the alleged act was intentionally done [with/in the presence of] the complainant.

In this case the prosecution submitted that [*insert evidence about the way in which the act was committed with or in the presence of the complainant*]. The defence responded [*insert relevant evidence and/or arguments*].

[*If it is alleged that the act was committed in the presence of the complainant, add the following shaded text*: For this element to be satisfied, you do not need to find that there was any physical contact between NOA and NOC. This element will be met if the prosecution can prove, beyond reasonable doubt, that NOC was present at the place where the alleged act was committed and NOA was aware of that fact.]

Child under the Age of 16

The fifth element relates to the complainant. The prosecution must prove that s/he was under the age of 16 at the time that the alleged indecent act took place.

In this case, there is no dispute that NOC was under 16 at the time the alleged indecent act took place. The main issue in this case is [*insert relevant issue*].[704]

Consent

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 16 or older (s 47(2)(a)). If the issue is s 47(2)(b) (accused not more than 2 years older than the complainant) or s 47(2)(c) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See Indecent Act with a Child under 16 (1/1/92 – 30/6/17) for guidance.

[704] If the complainant's age is disputed, this section will need to be modified accordingly.

Warning! For offences alleged to have been committed on or after 1 November 2014, it is not clear whether *Crimes Act 1958* s 322T affects the relevance of intoxication to this defence. Judges should seek submissions from the parties on this issue where relevant.

Belief that complainant was aged 16 or more

Even if you find that the prosecution has proven all five elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 16 years old at the time of the alleged indecent act.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this belief is a matter which the accused must prove on the balance of probabilities. That is, the accused must prove that it is more likely than not that s/he believed on reasonable grounds that NOC was aged 16 or over for consent to be available as a defence.

So, by contrast to proof of the elements of the offence(s), where the prosecution must satisfy you beyond reasonable doubt of them, for the defence of reasonable belief to be established to your satisfaction, it is for the accused, not the prosecution to prove the existence of a reasonable belief in age.

And the standard to which the defence must do this is a lesser standard than proof beyond reasonable doubt, it is proof on the balance of probabilities. That is, the accused must satisfy you that it is more likely than not that he believed, on reasonable grounds, that the complainant was 16 or over.

In this case [*insert relevant evidence and competing arguments*].

[*If the prosecution has conceded either consent or belief in consent, add the shaded section*.]

As it is not in issue in this case that the indecent act was consensual, if the accused satisfied you, on the balance of probabilities that s/he believed, on reasonable grounds, that at the time of the alleged indecent act, that the complainant was 16 or over, then your verdict in respect of that charge will be not guilty. If however, the accused does not satisfy you on the balance of probabilities that at the time he believed the complainant was 16 or over, and that his belief was based on reasonable grounds, then despite the fact that the act was consensual, this defence will fail.

[*If either consent or belief in consent is in issue, add the shaded section*.]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

If, however, you find that the NOA has proven that s/he believed on reasonable grounds that NOC was at least 16 years old at the time of the alleged indecent act, then you will need to determine whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged indecent act and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the indecent act if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the indecent act. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the alleged indecent act, then you must find NOA not guilty of this offence.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to an indecent act. These circumstances include [*insert relevant section(s) from the following and apply to the evidence*:

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following darker shaded section.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the alleged indecent act at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where evidence is given about the absence of physical resistance, lack of physical injury or past consensual sex, add the following darker shaded section if relevant to the facts in issue*.]

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury;
- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proven beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to the alleged indecent act, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of that act, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged act.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing*

arguments.]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged indecent act the accused was aware either:

- that the complainant was not consenting; or
- that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

Belief in Consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Onus and standard of proof

Remember, you may not need to consider the issue of consent. The process that you must follow is this. First, you must decide if the prosecution has proven the five elements of the offence beyond reasonable doubt. That is, the prosecution must prove that NOA [wilfully committed/was wilfully a party to] an indecent act [with/in the presence of] the complainant, that NOC was under the age of 16 at the relevant time.

Next, if you find that the prosecution has proven each of these elements beyond reasonable doubt, and the accused has raised the issue as to belief in age, you must then decide if NOA has proven, on the balance of probabilities, that s/he believed that NOC was at least 16 years old, and that that belief was based on reasonable grounds. If the accused cannot prove both of these matters, then NOA will be guilty of this offence, as long as the prosecution have proven each of the first five elements of the offence beyond reasonable doubt.

If, however, you find that the accused has proven these matters as to belief in age on the balance of probabilities, you must then decide whether the prosecution has proven, beyond reasonable doubt, the two additional elements that NOC did not consent, and that NOA was aware that s/he was not or might not be consenting. If the prosecution cannot prove both of these things, then you must find NOA not guilty of this offence. It is only if you are satisfied that they have been proven beyond reasonable doubt, together with each of the first five elements of the offence, that you can convict NOA of indecent act with a child under 16.

Summary

To summarise, before you can find NOA guilty of [committing/being a party to the commission of] an indecent act with a child under 16, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA [committed [*insert relevant act*]/was a party to the commission of [*insert relevant act*]]; and
- Two – that NOA [wilfully committed/was wilfully a party to] the alleged indecent act; and

- Three – that this act occurred in indecent circumstances; and
- Four – that this act was done [with/in the presence of] NOC; and
- Five – that NOC was under the age of 16 when this act took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a child under 16.

If you decide that each of these elements have been proven beyond reasonable doubt, you must decide if the accused has proven, on the balance of probabilities:

- That NOA believed that NOC was aged 16 or older at the relevant time; and
- That NOA had reasonable grounds for that belief.

If the accused has not proven both of these matters on the balance of probabilities, and you find that all of the elements have been proven by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if you find that both of these matters have been proven by the accused on the balance of probabilities, you must then decide if the prosecution has proven, beyond reasonable doubt, that NOC did not consent to the indecent act and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the shaded section*.]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the shaded section*.]

If the prosecution cannot prove these matters, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a child under 16.

Last updated: 30 November 2017

7.3.17.7 Checklist: Indecent Act with a Child under 16 (22/10/14–30/6/17) Consent in Issue

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Five elements that the prosecution must prove beyond reasonable doubt:

1. The accused [committed/was a party to the commission of] the alleged act; and
2. The accused [wilfully committed/was wilfully a party to] the act; and
3. The act occurred in indecent circumstances; and
4. The accused did the act [with/in the presence of] the complainant; and
5. The complainant was under the age of 16 at the time the act was committed.

Accused's Acts

1. [Did the accused commit/Was the accused a party to the commission of] the alleged act?

If Yes, then go to 2

If No, then the accused is not guilty of committing an indecent act with a child under 16

Accused's Mental State

2. [Did the accused wilfully commit/Was the accused wilfully a party to] the act?

If Yes, then go to 3

If No, then the accused is not guilty of committing an indecent act with a child under 16

Indecent Circumstances

3. Did the act occur in indecent circumstances?

Consider – sexual connotation

If Yes, then go to 4

If No, then the accused is not guilty of committing an indecent act with a child under 16

Complainant's Involvement

4. Did the act take place [with/in the presence of] the complainant?

If Yes, then go to 5

If No, then the accused is not guilty of committing an indecent act with a child under 16

Complainant's Age

5. Was the complainant under the age of 16 at the time the act was committed?

If Yes, then go to 6

If No, then the accused is not guilty of committing an indecent act with a child under 16

Relevance of Consent

[*This section of the checklist can be used if the accused alleged that s/he believed on reasonable grounds that the complainant was 16 or older and consented to the indecent act. If consent is in issue because the accused alleged that s/he is not more than 2 years older than the complainant, or that s/he believed on reasonable grounds that s/he was married to the complainant, it will need to be modified as necessary.*]

Consent is only relevant if you are satisfied the defence has proven, on the balance of probabilities, both that:

6. The accused believed that the complainant was aged 16 or older at the time the indecent act took place; and

7. The accused's belief that the complainant was aged 16 or older was based on reasonable grounds.

If Yes to both questions, then go to 8

If No to either question, then the accused is guilty of committing an indecent act with a child under 16 (as long as you answered yes to questions 1, 2, 3, 4 and 5)

Lack of Consent

If consent is relevant, the prosecution must prove, beyond reasonable doubt, that:

8. The complainant did not consent to the alleged indecent act; and

9. The accused was aware that the complainant was not or might not be consenting.

Consent

8. Did the indecent act occur without the complainant's consent?

If Yes, then go to 9

If No, then the accused is not guilty of committing an indecent act with a child under 16 (as long as you answered yes to questions 7 and 8)

Awareness of Lack of Consent

9. At the time of alleged indecent act, was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes, then the accused is guilty of committing an indecent act with a child under 16 (as long as you answered yes to questions 1, 2, 3, 4, 5 and 8)

If No, then the accused is not guilty of committing an indecent act with a child under 16 (as long as you answered yes to questions 7 and 8)

Last updated: 22 January 2016

7.3.17.8 Charge: Indecent Act with a Child under 16 (1/12/06–21/10/14) Consent in Issue

Click here to obtain a Word version of this document for adaptation

This charge can be used for offences of indecent act with a child under 16 alleged to have been committed between 1/12/2006 and 21/10/2014 where consent is in issue.

I must now direct you about the crime of [committing/being a party to the commission of] an indecent act with a child under the age of 16. To prove this crime, the prosecution must prove the following 6 elements beyond reasonable doubt:

One – the accused [committed the alleged act/was a party to the commission of the alleged act].

Two – the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act].

Three – the act occurred in indecent circumstances.

Four – the act was done [with/in the presence of] the complainant.

Five – the complainant was under the age of 16 when the act took place.

Six – the accused was not married to the complainant at the time the alleged act took place.

I will now explain each of these elements in more detail.

Actions of the accused

The first element relates to what the accused did. S/he must have [committed the act alleged by the prosecution/been a party in any way to the act alleged by the prosecution].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Wilful

The second element relates to the accused person's state of mind. The prosecution must prove that the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act]. That is, you must be satisfied that the accused's participation in the act was deliberate not accidental.

Indecent circumstances

The third element that the prosecution must prove is that the alleged act occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body NOA touched, what NOA used to touch NOC or from the circumstances of the act. Beyond the requirement of a sexual connotation, the question of whether or not the circumstances were indecent is for you to decide.

In this case, the prosecution alleged that NOA's act occurred in indecent circumstances because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's act occurred in indecent circumstances.

With/In the Presence of the complainant

The fourth element that the prosecution must prove is that the alleged act was intentionally done [with/in the presence of] the complainant.

In this case the prosecution submitted that [*insert evidence about the way in which the act was committed with or in the presence of the complainant*]. The defence responded [*insert relevant evidence and/or arguments*].

[*If it is alleged that the act was committed in the presence of the complainant, add the following shaded text:* For this element to be satisfied, you do not need to find that there was any physical contact between NOA and NOC. This element will be met if the prosecution can prove, beyond reasonable doubt, that NOC was present at the place where the alleged act was committed and NOA was aware of that fact.]

Child under the Age of 16

The fifth element relates to the complainant. The prosecution must prove that s/he was under the age of 16 at the time that the alleged indecent act took place.

In this case, there is no dispute that NOC was under 16 at the time the alleged indecent act took place. The main issue in this case is [*insert relevant issue*].[705]

Accused not married to the complainant

The sixth element that the prosecution must prove is that the accused was not married to the complainant at the time the alleged act took place.

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[705] If the complainant's age is disputed, this section will need to be modified accordingly.

In this case, the defence has not disputed the prosecution's claim that s/he was not married to NOC at the time that the alleged act took place. The main issue in this case is [*insert relevant issue*].[706]

Consent

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 16 or older (s 47(2)(a)). If the issue is s 47(2)(b) (accused not more than 2 years older than the complainant) or s 47(2)(c) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See 7.3.17 Indecent Act with a Child under 16 (1/1/92 – 30/6/17) for guidance.

Belief that complainant was aged 16 or more

Even if you find that the prosecution has proved all six elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 16 years old at the time of the alleged indecent act.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this belief is a matter which the accused must prove on the balance of probabilities. That is, the accused must prove that it is more likely than not that s/he believed on reasonable grounds that NOC was aged 16 or over for consent to be available as a defence.

So, by contrast to proof of the elements of the offence(s), where the prosecution must satisfy you beyond reasonable doubt of them, for the defence of reasonable belief to be established to your satisfaction, it is for the accused, not the prosecution to prove the existence of a reasonable belief in age.

And the standard to which the defence must do this is a lesser standard than proof beyond reasonable doubt, it is proof on the balance of probabilities. That is, the accused must satisfy you that it is more likely than not that he believed, on reasonable grounds, that the complainant was 16 or over.

In this case [*insert relevant evidence and competing arguments*].

[*If the prosecution has conceded either consent or belief in consent, add the shaded section*.]

As it is not in issue in this case that the indecent act was consensual, if the accused satisfied you, on the balance of probabilities that s/he believed, on reasonable grounds, that at the time of the alleged indecent act, that the complainant was 16 or over, then your verdict in respect of that charge will be not guilty. If however, the accused does not satisfy you on the balance of probabilities that at the time he believed the complainant was 16 or over, and that his belief was based on reasonable grounds, then despite the fact that the act was consensual, this defence will fail.

[*If either consent or belief in consent is in issue, add the shaded section*.]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

If, however, you find that the NOA has proven that s/he believed on reasonable grounds that NOC was at least 16 years old at the time of the alleged indecent act, then you will need to determine

[706] If it is alleged that the accused and complainant were married, this section will need to be modified accordingly.

whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged indecent act and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the indecent act if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the indecent act. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the alleged indecent act, then you must find NOA not guilty of this offence.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to an indecent act. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proved.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following darker shaded section.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the alleged indecent act at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where evidence is given about the absence of physical resistance, lack of physical injury or past consensual sex, add the following darker shaded section if relevant to the facts in issue.*]

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury;
- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or

with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proved beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to the alleged indecent act, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of that act, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged act.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing arguments.*]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged indecent act the accused was aware either:

- that the complainant was not consenting; or
- that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

Belief in consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* Charge: Belief in consent.]

Onus and standard of proof

Remember, you may not need to consider the issue of consent. The process that you must follow is this. First, you must decide if the prosecution has proved the six elements of the offence beyond reasonable doubt. That is, the prosecution must prove that NOA [wilfully committed/was wilfully a party to] an indecent act [with/in the presence of] the complainant, that NOC was under the age of 16 at the relevant time and that NOA and NOC were not married at the relevant time.

Next, if you find that the prosecution has proved each of these elements beyond reasonable doubt, and the accused has raised the issue as to belief in age, you must then decide if NOA has proved, on the balance of probabilities, that s/he believed that NOC was at least 16 years old, and that that belief was based on reasonable grounds. If the accused cannot prove both of these matters, then NOA will be guilty of this offence, as long as the prosecution have proved each of the first six elements of the offence beyond reasonable doubt.

If, however, you find that the accused has proved these matters as to belief in age on the balance of probabilities, you must then decide whether the prosecution has proved, beyond reasonable doubt, the two additional elements that NOC did not consent, and that NOA was aware that s/he was not or might not be consenting. If the prosecution cannot prove both of these things, then you must find NOA not guilty of this offence. It is only if you are satisfied that they have been proved beyond

reasonable doubt, together with each of the first six elements of the offence, that you can convict NOA of indecent act with a child under 16.

Summary

To summarise, before you can find NOA guilty of [committing/being a party to the commission of] an indecent act with a child under 16, the prosecution must prove to you beyond reasonable doubt:

One – that NOA [committed [*insert relevant act*]/was a party to the commission of [*insert relevant act*]]; and

Two – that NOA [wilfully committed/was wilfully a party to] the alleged indecent act; and

Three – that this act occurred in indecent circumstances; and

Four – that this act was done [with/in the presence of] NOC; and

Five – that NOC was under the age of 16 when this act took place; and

Six – that NOA was not married to NOC at the time that this act took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a child under 16.

If you decide that each of these elements have been proved beyond reasonable doubt, you must decide if the accused has proved, on the balance of probabilities:

- That NOA believed that NOC was aged 16 or older at the relevant time; and
- That NOA had reasonable grounds for that belief.

If the accused has not proved both of these matters on the balance of probabilities, and you find that all of the elements have been proved by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if you find that both of these matters have been proved by the accused on the balance of probabilities, you must then decide if the prosecution has proved, beyond reasonable doubt, that NOC did not consent to the indecent act and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the shaded section.*]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the shaded section.*]

If the prosecution cannot prove these matters, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a child under 16.

Last updated: 27 April 2016

7.3.17.9 Charge: Indecent Act with a Child under 16 (1/1/92–1/12/06) Consent in Issue

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This charge can be used for offences of indecent act with a child under 16 alleged to have been committed between 5/8/1991 and 30/11/2006 where consent is in issue.

I must now direct you about the crime of [committing/being a party to the commission of] an indecent act with a child under the age of 16. To prove this crime, the prosecution must prove the following six elements beyond reasonable doubt:

One – the accused [committed the alleged act/was a party to the commission of the alleged act].

Two – the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act].

Three – the act occurred in indecent circumstances.

Four – the act was done [with/in the presence of] the complainant.

Five – the complainant was under the age of 16 when the act took place.

Six – the accused was not married to the complainant at the time the alleged act took place.

I will now explain each of these elements in more detail.

Actions of the accused

The first element relates to what the accused did. S/he must have [committed the act alleged by the prosecution/been a party in any way to the act alleged by the prosecution].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Wilful

The second element relates to the accused person's state of mind. The prosecution must prove that the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act]. That is, you must be satisfied that the accused's participation in the act was deliberate not accidental.

Indecent circumstances

The third element that the prosecution must prove is that the alleged act occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body NOA touched, what NOA used to touch NOC or from the circumstances of the act. Beyond the requirement of a sexual connotation, the question of whether or not the circumstances were indecent is for you to decide.

In this case, the prosecution alleged that NOA's act occurred in indecent circumstances because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's act occurred in indecent circumstances.

With/In the Presence of the complainant

The fourth element that the prosecution must prove is that the alleged act was intentionally done [with/in the presence of] the complainant.

In this case the prosecution submitted that [*insert evidence about the way in which the act was committed with or in the presence of the complainant*]. The defence responded [*insert relevant evidence and/or arguments*].

[*If it is alleged that the act was committed in the presence of the complainant, add the following shaded text:* For this element to be satisfied, you do not need to find that there was any physical contact between NOA and NOC. This element will be met if the prosecution can prove, beyond reasonable doubt, that NOC was present at the place where the alleged act was committed and NOA was aware of that fact.]

Child under the Age of 16

The fifth element relates to the complainant. The prosecution must prove that the s/he was under the age of 16 at the time that the alleged indecent act took place.

In this case, there is no dispute that NOC was under 16 at the time the alleged indecent act took place. The main issue in this case is [*insert relevant issue*].[707]

Accused not married to the complainant

The sixth element that the prosecution must prove is that the accused was not married to the complainant at the time the alleged act took place.

In this case, the defence has not disputed the prosecution's claim that s/he was not married to NOC at the time that the alleged act took place. The main issue in this case is [*insert relevant issue*].[708]

Consent

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 16 or older (s 47(2)(a)). If the issue is s 47(2)(b) (accused not more than 2 years older than the complainant) or s 47(2)(c) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See 7.3.17 Indecent Act with a Child under 16 (1/1/92 – 30/6/17) for guidance.

Belief that complainant was aged 16 or more

Even if you find that the prosecution has proven all six elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 16 years old at the time of the alleged indecent act.

As a result, the prosecution must prove beyond reasonable doubt either:

(1) That NOA did not believe that NOC was aged 16 or older at the time of the alleged indecent act; or

(2) That NOA did not have reasonable grounds to believe that NOC was aged 16 or older at the time of the alleged indecent act.

For there to be reasonable grounds for a belief, the belief must be based on facts which could have caused a reasonable person to believe the same thing. So to prove this second alternative the prosecution must prove that even if NOA may have believed NOC was 16 or older, a reasonable person in his/her situation could not have reached that conclusion based on the facts known to NOA.

In this case the prosecution alleged [*insert relevant evidence and/or arguments*]. In response, the defence submitted [*insert relevant evidence and/or arguments*].

If the prosecution has proven beyond reasonable doubt, that NOA did not believe on reasonable grounds that NOC was at least 16 years old at the time of the alleged indecent, then consent will not be a defence, and will not be relevant to your determination of the accused's guilt. In this case [*insert relevant evidence and competing arguments*].

[*If the prosecution has conceded either consent or belief in consent, add the shaded section*.]

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[707] If the complainant's age is disputed, this section will need to be modified accordingly.

[708] If it is alleged that the accused and complainant were married, this section will need to be modified accordingly.

If, however, you find that this has not been proven, then you will find the accused not guilty. This is because the prosecution does not dispute that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "NOA believed that NOC was consenting"].

[*If either consent or belief in consent is in issue, add the shaded section.*]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

If, however, you find that this has not been proven, then you will need to determine whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged indecent act and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the indecent act if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the alleged indecent act. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the act, then you must find NOA not guilty of this offence.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to an indecent act. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following darker shaded section.*]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the

alleged indecent act at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where evidence is given about the absence of physical resistance, lack of physical injury or past consensual sex, add the following darker shaded section if relevant to the facts in issue.*]

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury;
- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proven beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to take part in the alleged indecent act, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of the alleged indecent act, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged indecent act.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing arguments.*]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged indecent act the accused was aware either:

- that the complainant was not consenting; or
- that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

Belief in consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Onus and standard of proof

Remember, you may not need to consider the issue of consent.

You will only need to consider this issue if the prosecution fails to prove:

(1) That NOA did not believe that NOC was aged 16 or older at the time of the alleged indecent act; or

(2) That NOA did not have reasonable grounds to believe that NOC was aged 16 or older at the time of the alleged indecent act.

Summary

To summarise, before you can find NOA guilty of [committing/being a party to the commission of] an indecent act with a child under 16, the prosecution must prove to you beyond reasonable doubt:

One – that NOA [committed [*insert relevant act*]/was a party to the commission of [*insert relevant act*]]; and

Two – that NOA [wilfully committed/was wilfully a party to] the alleged indecent act; and

Three – that this act occurred in indecent circumstances; and

Four – that this act was done [with/in the presence of] NOC; and

Five – that NOC was under the age of 16 when this act took place; and

Six – that NOA was not married to NOC at the time that this act took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a child under 16.

If you decide that each of these elements have been proven beyond reasonable doubt, you must decide if the prosecution has also proved, to the same standard:

- That NOA did not believe that NOC was aged 16 or older at the relevant time; or
- That NOA had no reasonable grounds to believe that NOC was aged 16 or older at the relevant time.

If the prosecution has proven one of these matters, and you find that all of the elements have been proved by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if the prosecution has not proved either of these matters, you must then decide if the prosecution has proved, beyond reasonable doubt, that NOC did not consent to the commission of the indecent act and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the shaded section.*]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent,* e.g. "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the shaded section.*]

If the prosecution cannot prove these matters, then you must find NOA not guilty of [committing/being party to the commission of] an indecent act with a child under the age of 16.

Last updated: 27 April 2016

7.3.17.10 Checklist: Indecent Act with a Child under 16 (1/1/92–21/10/14) Consent in Issue

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Six elements that the prosecution must prove beyond reasonable doubt:

1. The accused [committed/was a party to the commission of] the alleged act; and
2. The accused [wilfully committed/was wilfully a party to] the act; and
3. The act occurred in indecent circumstances; and

4. The accused did the act [with/in the presence of] the complainant; and
5. The complainant was under the age of 16 at the time the act was committed; and
6. The accused was not married to the complainant at the time the act was committed.

Accused's Acts

1. [Did the accused commit/Was the accused a party to the commission of] the alleged act?

If Yes, then go to 2

If No, then the accused is not guilty of committing an indecent act with a child under 16

Accused's Mental State

2. [Did the Accused wilfully commit/Was the accused wilfully a party to] the act?

If Yes, then go to 3

If No, then the accused is not guilty of committing an indecent act with a child under 16

Indecent Circumstances

3. Did the act occur in indecent circumstances?

Consider – sexual connotation

If Yes, then go to 4

If No, then the accused is not guilty of committing an indecent act with a child under 16

Complainant's Involvement

4. Did the act take place [with/in the presence of] the complainant?

If Yes, then go to 5

If No, then the accused is not guilty of committing an indecent act with a child under 16

Complainant's Age

5. Was the complainant under the age of 16 at the time the act was committed?

If Yes, then go to 6

If No, then the accused is not guilty of committing an indecent act with a child under 16

No Marital Relationship

6. Were the accused and the complainant married to each other at the time that the act took place?

If No, then go to 7

If Yes, then the accused is not guilty of committing an indecent act with a child under 16

Relevance of Consent

[*This section of the checklist can be used if the accused alleged that s/he believed on reasonable grounds that the complainant was 16 or older and consented to the indecent act. If consent is in issue because the accused alleged that s/he is not more than 2 years older than the complainant, or that s/he believed on reasonable grounds that s/he was married to the complainant, it will need to be modified as necessary.*]

[Use this section if the offence was allegedly committed on or after 1 December 2006.]

Consent is only relevant if you are satisfied the defence has proven, on the balance of probabilities, both that:

7. The accused believed that the complainant was aged 16 or older at the time the indecent act took place; and

8. The accused's belief that the complainant was aged 16 or older was based on reasonable grounds.

[Use this section if the offence was allegedly committed before 1 December 2006]

Consent is relevant unless you are satisfied the prosecution has proven beyond reasonable doubt that either:

7. The accused did not believe that the complainant was aged 16 or older at the time the indecent act took place; or

8. The accused did not have reasonable grounds to believe that the complainant was aged 16 or older.

Lack of Consent

If consent is relevant, the prosecution must prove, beyond reasonable doubt, that:

9. The complainant did not consent to the alleged indecent act; and

10. The accused was aware that the complainant was not or might not be consenting.

Consent

9. Did the indecent act occur without the complainant's consent?

If Yes, then go to 10

If No, then the accused is not guilty of committing an indecent act with a child under 16 (as long as you answered yes to questions 7 and 8)

Awareness of Lack of Consent

10. At the time of alleged indecent act, was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes, then the accused is guilty of committing an indecent act with a child under 16 (as long as you answered yes to questions 1, 2, 3, 4, 5 and 9, and no to question 6)

If No, then the accused is not guilty of committing an indecent act with a child under 16 (as long as you answered yes to questions 7 and 8)

Last updated: 22 January 2016

7.3.18 Sexual Assault of a Child Aged 16 or 17 under Care, Supervision or Authority (From 1/7/17)

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Commencement Information

1. The current s 49E offence came into force on 1 July 2017.
2. Prior to 1 July 2017, *Crimes Act 1958* s 49 contained a composite offence of an indecent act "with or in the presence of" a child aged 16 or 17. Following the amendments introduced by the *Crimes Amendment (Sexual Offences) Act 2016*, the offence was split so that section 49E addresses sexual touching and section 49G addresses sexual activity in the presence of the child.
3. For offences committed before 1 July 2017, see 7.3.19 Indecent Act with a 16 or 17 year old Child (1/12/06 – 30/6/17).
4. For offences involving sexual activity in the presence of a child, see 7.3.22 Sexual activity in the presence of a child aged 16 or 17 under care, supervision or authority (From 1/7/17).

Elements

5. The elements of the offence are set out in s 49E(1) of the *Crimes Act 1958*. The prosecution must prove that:

   i) The accused (A) intentionally:

      - touched another person (B);
      - caused or allowed B to touch A; or
      - caused B to touch or to continue to touch themselves, another person (C) or to be touched, or to continue to be touched, by C;

   ii) B was a child aged 16 or 17 years;

   iii) B was under the accused's care, supervision or authority;

   iv) The touching was sexual;

   v) The touching was contrary to community standards of acceptable conduct.

Intentional touching

6. The first element that the prosecution must prove is that the accused intentionally touched another person, or caused the other person to touch someone. The term "touching" is defined in *Crimes Act 1958* s 35B as touching that may be done:

   (a) with any part of the body; or
   (b) with anything else; or
   (c) through anything, including anything worn by the person doing the touching or by the person touched.

7. This element may also be proved where the accused causes another person to touch the complainant (*Crimes Act 1958* s 49E(1)).
8. The fault element for this element is basic or general intention. Where relevant, the prosecution must prove that the touching was intentional in the sense that it was deliberate rather than inadvertent or accidental.

9. For more information on this element, see 7.3.5 Sexual Assault (From 1/7/15).

Child aged 16 or 17

10. The second element requires the prosecution to prove that the complainant was aged 16 or 17 at the time the relevant act took place (*Crimes Act 1958* s 49E(1)).

Care, supervision or authority

11. The third element the prosecution must prove is that the complainant was under the care, supervision or authority of the accused (*Crimes Act 1958* s 49E(1)).
12. For information on when a relationship of care, supervision or authority will exist, see 7.3.14 Sexual Penetration of a 16 or 17 Year Old Child (From 1/7/17).

Sexual Touching

13. The fourth element requires the prosecution to prove that the touching was sexual (*Crimes Act 1958* s 49E(1)).
14. Touching can be "sexual" because of:

> (a) the area of the body that is touched or used in the touching, including (but not limited to) the genital or anal region, the buttocks or, in the case of a female or a person who identifies as a female, the breasts; or
> (b) the fact that the person doing the touching seeks or gets sexual arousal or sexual gratification from the touching; or
> (c) any other aspect of the touching, including the circumstances in which it is done (Crimes Act 1958 s 35B(2)).

15. For more information on this element, see 7.3.5 Sexual Assault (From 1/7/15).

Touching contrary to community standards of acceptable conduct

16. The fifth element is that the touching is contrary to community standards of acceptable conduct (*Crimes Act 1958* s 49E(1)).
17. Section 49E(3) of the *Crimes Act 1958* provides that:

> Whether or not the touching is contrary to community standards of acceptable conduct depends on the circumstances.

18. The Act specifies that the circumstances include the purpose of the touching and whether the accused seeks or gets sexual arousal or gratification from the touching. However, the circumstances do not include whether the complainant consented to the touching or whether the accused believed the complainant consented to the touching (*Crimes Act 1958* s 49E(4)).

Statutory defences and exemption

Marriage or domestic partnership

19. Section 49Y of the *Crimes Act 1958* provides an exception to the offence in s 49E(1). This exception applies if, at the time of the alleged offence –

(a) A and B are married to each other and the marriage is recognised as valid under the *Marriage Act 1961* of the Commonwealth; or

(b) A–

(i) is not more than 5 years older than B; and

(ii) is B's domestic partner and the domestic partnership commenced before B came under A's care, supervision or authority.

Reasonable belief as to age

20. Section 49X of the *Crimes Act 1958* provides that it is a defence to an offence against section 49E(1) if, at the time of the conduct, the accused reasonably believed that the child was 18 years of age or more (*Crimes Act 1958* s 49X(1))

21. The accused bears the burden of proving, on the balance of probabilities, that he or she reasonably believed that B was 18 years of age or more (*Crimes Act 1958* s 49X(4)).

22. The Note to section 49X states that:

> Whether or not A reasonably believed that B … was 18 years of age or more depends on the circumstances. The circumstances include any steps that A took to find out [B's] age.

Reasonable belief as to marriage or domestic partnership

23. Section 49Z of the *Crimes Act 1958* provides a defence to the offence in s 49E(1) which applies if, at the time of the alleged offence –

(a) A reasonably believed that A and B are married to each other and that the marriage is recognised as valid under the *Marriage Act 1961* of the Commonwealth; or

(b) A–

(i) was not more than 5 years older than B; and

(ii) reasonably believed that A was B's domestic partner and that the domestic partnership commenced before B came under A's care, supervision or authority.

24. The accused bears the burden of proving, on the balance of probabilities, the reasonable belief referred to in the section (*Crimes Act 1958* s 49Z(3)).

25. The Note to the section specifies that the accused has an evidential burden in relation to the relative ages of the accused and the complainant.

Reasonable belief as to care, supervision or authority

26. Section 49ZA provides a defence to a charge under s 49E(1) that applies if, at the time of the conduct constituting the offence, the accused reasonably believed that the complainant was not under his or her care, supervision or authority.

27. The accused bears the burden of proving, on the balance of probabilities, that he or she held this reasonable belief (*Crimes Act 1958* s 49ZA(3)).

28. This is a new defence, as the law did not previously require the prosecution to prove that A knew or believed that B was under his or her care, supervision or authority. Instead, the law required the prosecution to show only that A was aware of the primary facts which gave rise to the relevant relationship (compare *Lydgate v R* (2014) 46 VR 78, [113] (Beach JA)).

Honest and reasonable mistake not a defence in some circumstances

29. Section 49ZC(2) of the *Crimes Act 1958* provides that an honest and reasonable mistaken belief that the touching was not sexual or was not contrary to community standards of acceptable conduct is not a defence.

30. The combined effect of sections 49E(4) and 49ZC(2) is that while the accused's beliefs can make a touching sexual or contrary to community standards, the accused's beliefs cannot operate to excuse otherwise prohibited conduct.

Last updated: 1 July 2017

7.3.18.1 Charge: Sexual Assault of a Child Aged 16 or 17 under Care, Supervision or Authority (From 1/7/17)

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I must now direct you about the crime of sexual assault of a child aged 16 or 17. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused intentionally touched another person, NOC.[709]

Two – NOC was aged 16 or 17 years.

Three – NOC was under NOA's care, supervision or authority.

Four – The touching was sexual.

Five – The touching was contrary to community standards of acceptable conduct.

I will now explain each of these elements in more detail

Actions of the accused

Warning! This charge is designed for cases where the prosecution relies on s 49E(1)(a)(i). This direction on the first element must be modified if the prosecution relies on other limbs of s 49E(1)(a).

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that NOA intentionally touched NOC.

[*If the evidence or arguments have placed the intentional or voluntary nature of the acts in issue, add the following shaded section.*[710]]

For this element to be met, the act of [*describe relevant act of touching*] must have been done intentionally.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the*

[709] This statement of the element must be modified if the prosecution relies on the other limbs of s 49E(1)(a). The words "touched another person, NOC" may be replaced with "caused or allowed the complainant to touch the accused" or "caused the complainant to touch himself/herself" or "caused the complainant to touch another person" or "caused the complainant to be touched by another person".

[710] Because of how the offence is defined, the issue of intention is likely inseparable from the question of voluntariness. Where the issue is raised, the judge should direct the jury on the specific matters the jury must consider to find that the accused's conduct was voluntary and intentional (e.g. disproof of accident or proof that the accused was conscious).

finding that proves intention in the circumstance of the case, e.g. "NOA touched the outside of NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the touching"].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Child under aged 16 or 17

The second element relates to the age of the complainant, NOC. The prosecution must prove that s/he was aged of 16 or 17 when the alleged touching occurred.

In this case, there is no dispute that NOC was aged 16 or 17 at that time. The main issue in this case is [*insert relevant issue*].[711]

Care, supervision or authority

The third element that the prosecution must prove is that, at the time that the sexual touching took place, the complainant was under the care, supervision or authority of the accused.

[*If care, supervision or authority is not in issue, add the following shaded section*.]

In this case it was conceded by the defence that NOA was NOC's [*describe relationship*] and that the complainant was therefore under the care, supervision or authority of the accused [at the relevant time]. While it is for you to determine whether this was the case, you should have no difficulty finding that this element has been proven.

[*If care, supervision or authority is in issue and the prosecution relies on a prescribed relationship, add the following shaded section*.]

Parliament has defined a number of relationships where a child is deemed to be under the care, supervision and authority of another person. This includes [*name relevant relationships from s 37 list*].

In this case the prosecution alleged that NOA was NOC's [*describe relationship*]. [*Insert prosecution evidence*]. The defence responded [*insert relevant evidence and/or arguments*].

If you find beyond reasonable doubt that NOA was NOC's [*identify relationship*] at the time of the alleged offence(s), then you will find this element has been proven.

[*If care, supervision or authority is in issue and the prosecution does not rely on a standing relationship, add the following shaded section*.]

The words "care, supervision or authority" all describe different types of relationships where the accused is in a position to exploit or take advantage of that relationship to influence the child to engage in an act of sexual touching. You should take this into account when deciding whether the prosecution has proved that the complainant was under the accused's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add:* You do not need to find that the alleged act of touching was actually connected with, or influenced by, the relationship of care, supervision or authority or that NOA was actually exploiting his/her position of advantage. It is sufficient if you are satisfied that an established

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[711] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

relationship of care, supervision or authority existed between NOA and NOC that *could have* been connected with, or influenced the child to engage in, the act of sexual touching, and that the relationship existed on the day on which the touching took place.]

In this case the prosecution alleged that NOC was under NOA's [care/supervision/authority]. [*Insert prosecution evidence*]. The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOC was under NOA's care, supervision or authority at the time that the sexual touching took place.

[*If the accused may be unaware of the facts giving rise to a relationship of care, supervision or authority, add the following shaded section*.]

The law states that NOA must know and be aware of the facts that give rise to a relationship of care, supervision or authority. For example, if a teacher with a large number of students did not recognise the complainant was a member of one of his/her classes, then you could not find this element proved.

[*Insert relevant prosecution and defence evidence and arguments*.]

[*If the accused raises the defence in Crimes Act 1958 s 49ZA of a reasonable belief as to no care, supervision or authority, add the following shaded section*.]

This element requires you to look at the facts and decide whether NOC was under NOA's care, supervision or authority. The prosecution does not need to prove that NOA thought NOC was under his/her care, supervision or authority.

However, the law provides that NOA has a defence to this charge if s/he can show that s/he reasonably believed that NOC was not under his/her care, supervision or authority.

Unlike the elements of the offence, this is a matter which the accused must prove. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that NOC was not under his/her care, supervision or authority on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he believed that NOC was not under his/her care, supervision or authority and that this belief was reasonable. Unlike the prosecution, s/he does not need to prove this matter beyond reasonable doubt.

[*Refer to relevant evidence and arguments*.]

Sexual touching

The fourth element that the prosecution must prove is that the alleged act of touching was sexual.

The law says that touching can be sexual because of the area of the body involved, of either the person being touched or the person doing the touching, such as the genital or anal area, or the buttocks or breasts.

Or the touching can be sexual because the person doing the touching wants to get or gets sexual gratification from the touching.

Finally, any other aspect of the touching, including the circumstances in which it happened, can also make the touching sexual.

The question of whether or not the touching was sexual is for you to decide.

In this case, the prosecution alleged that the touching was sexual because [*insert evidence and arguments*]. [*If relevant add*: The defence responded [*insert evidence and arguments*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's touching of NOC was sexual.

Contrary to community standards of acceptable conduct

The fifth element that the prosecution must prove is that the alleged touching was contrary to community standards of acceptable conduct.

The law says that whether touching is contrary to community standards depends on the circumstances, and that this includes the purpose of the touching and whether NOA seeks or gets sexual arousal or sexual gratification from the touching.

The law also says that whether NOC consented to the touching and whether NOA believed that NOC consented to the touching are not relevant to whether the touching was contrary to community standards.

[*Refer to relevant prosecution and defence evidence and arguments*.]

Defences

Reasonable belief as to age

[*If the accused relies on the belief in age defence in Crimes Act 1958 s 49X, add the following shaded section*.]

For this offence, the law recognises a defence which may be termed "reasonable belief in age".

This defence is available if the accused had a reasonable belief that at the time of the act, the complainant was 18 years of age or more.

Unlike the elements of the offence, this is a matter which the accused must prove. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that NOC was aged 18 or more on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he believed that NOC was aged 18 or more and that this belief was reasonable. Unlike the prosecution, s/he does not need to prove this matter beyond reasonable doubt.

Marriage or domestic partnership

[*If the accused relies on the domestic partnership defence in Crimes Act 1958 s 49Y, add the following shaded section*.]

For this offence, the law recognises a defence which may be termed "domestic partnership".

There are three parts to the defence.

First, NOA must be no more than 5 years older than NOC. This applies here.

Second, NOA must be NOC's domestic partner. The law recognises that two people are in a domestic partnership if they are not married but are living as a couple on a genuine domestic basis.[712]

To decide whether two people are domestic partners, you must consider all the circumstances of the relationship, including [*add the following factors from Relationships Act 2008* s 35(2), *as relevant*:

(a) the degree of mutual commitment to a shared life;

[712] If there is evidence of a registered domestic relationship, this part of the direction must be modified accordingly.

(b) the duration of the relationship;

(c) the nature and extent of common residence;

(d) whether or not a sexual relationship exists;

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(f) the ownership, use and acquisition of property;

(g) the care and support of children;

(h) the reputation and public aspects of the relationship.

[*Refer to relevant evidence and arguments.*]

Third, the domestic partnership must have started before NOC came under NOA's care, supervision or authority.

[*Refer to relevant evidence and arguments.*]

Remember, while I called this a defence, it is the prosecution's role to prove guilt. This means that the prosecution must show that this defence of domestic partnership does not apply. In other words, you cannot find NOA guilty unless the prosecution can prove beyond reasonable doubt either that NOA was not NOC's domestic partner, or that the domestic partnership started after NOC came under NOA's care, supervision or authority.

Reasonable belief as to marriage or domestic partnership

[*If the accused relies on the reasonable belief in domestic partnership defence in Crimes Act 1958 s 49Z, add the following shaded section*.]

For this offence, the law recognises a defence which may be termed "reasonable belief in domestic partnership".[713]

There are three parts to this defence.

First, NOA must be no more than 5 years older than NOC. This applies here.

Second, NOA must have reasonably believed that s/he was in a domestic partnership with NOC.

The law recognises that two people are in a domestic partnership if they are not married but are living as a couple on a genuine domestic basis.[714]

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[713] Section 49Z also creates a reasonable belief in marriage defence. If the accused relies on this defence the directions must be modified accordingly.

[714] Section 35 defines a domestic partner also as a person who is in a registered domestic relationship with the person. If the accused relies on this limb of the definition the directions must be modified accordingly.

To decide whether two people are domestic partners, you must consider all the circumstances of the relationship, including [*add the following factors from Relationships Act 2008* s 35(2), *as relevant*:

(a) the degree of mutual commitment to a shared life;

(b) the duration of the relationship;

(c) the nature and extent of common residence;

(d) whether or not a sexual relationship exists;

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(f) the ownership, use and acquisition of property;

(g) the care and support of children;

(h) the reputation and public aspects of the relationship.

Third, NOA must have reasonably believed that this domestic partnership started before NOC came under his/her care, supervision or authority.

[*Refer to relevant evidence and arguments.*]

Unlike the elements of the offence, the accused must prove these matters. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that s/he was in a domestic partnership with NOC which started before NOC came under his/her care, supervision or authority on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he believed that s/he was in a domestic partnership with NOC which started before NOC came under his/her care, supervision or authority, and that this belief was reasonable. Unlike the prosecution, s/he does not need to prove this matter beyond reasonable doubt.

Summary

To summarise, before you can find NOA guilty of sexual assault of a child aged 16 or 17, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA intentionally touched NOC; and
- Two – NOC was aged 16 or 17 years; and
- Three – NOC was under NOA's care, supervision or authority; and
- Four – that the touching was sexual; and
- Five – that the touching was contrary to community standards of acceptable conduct.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual assault of a child aged 16 or 17.

Last updated: 1 July 2017

7.3.18.2 Checklist: Sexual Assault of a Child Aged 16 or 17 under Care, Supervision or Authority (From 1/7/17)

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally touched the complainant; and

2. The complainant was under the age of 16; and

3. The complainant was under the accused's care, supervision or authority; and

4. The touching was sexual; and

5. The touching was contrary to community standards of acceptable conduct.

Intentional touching

1. Did the accused intentionally touch NOC?

If Yes then go to 2

If No, then the accused is not guilty of Sexual Assault of a child aged 16 or 17 under care, supervision or authority

Complainant under the age of 16

2. At the time of the act, was NOC under the age of 16?

If Yes then go to 3

If No, then the accused is not guilty of Sexual Assault of a child aged 16 or 17 under care, supervision or authority

Care, supervision or authority

3. At the time of the act, was NOC under NOA's care, supervision or authority?

If Yes then go to 4

If No, then the accused is not guilty of Sexual Assault of a child aged 16 or 17 under care, supervision or authority

Sexual touching

4. Was the touching sexual?

Consider – Touching may be sexual because of the area of body touched, the fact that the person doing it seeks or gets sexual arousal or gratification from the touching, or any other reason.

If Yes then go to 5

If No, then the accused is not guilty of Sexual Assault of a child aged 16 or 17 under care, supervision or authority

Contrary to community standards of acceptable conduct

5. Was the touching contrary to community standards of acceptable conduct?

Consider – Relevant matters include the circumstances of the touching and whether the accused was seeking or got sexual arousal or gratification

Consider – Whether NOC consented to the touching or whether NOA believed NOC consented to the touching is not relevant to this element

If Yes then the accused is guilty of Sexual Assault of a child aged 16 or 17 under care, supervision or authority (as long as you also answered Yes to Questions 1, 2, 3 and 4)

If No, then the accused is not guilty of Sexual Assault of a child aged 16 or 17 under care, supervision or authority

Last updated: 1 July 2017

7.3.19 Indecent Act with a 16- or 17-Year-Old Child (1/12/06–30/6/17)

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Commencement Information

1. For offences alleged to have been committed before 1 July 2017, s 49 contained the offence of indecent act with a child aged 16 or 17.
2. This offence came into operation on 1 December 2006, replacing the former offence of indecent act with a child aged 16.
3. The offence applies to any acts committed on or after 1 December 2006 and before 1 July 2017.

Elements and defences

4. The offence of committing an indecent act with a 16 or 17 year old child is the same as that of committing an indecent act with a child under the age of 16 (s 47), with four exceptions:
   i) The child must be 16 or 17 years of age;
   ii) The child must be under the care, supervision or authority of the accused;
   iii) Consent is a defence if the accused believed on reasonable grounds that the child was aged 18 or older; and
   iv) An age gap of 2 years or less does not permit a defence of consent.
5. The elements and defence of the s 49 offence mirror components of the offences contrary to ss 47 and 48 of the *Crimes Act 1958*.
6. Guidance in the interpretation of the s 49 terms "indecent act", "wilfully" and "with or in the presence of" can thus be taken from the case law in relation to s 47. See 7.3.17 Indecent Act with a Child Under the Age of 16 (1/1/92 – 30/6/17 for a summary of the relevant law in this area.
7. Similarly, the consideration of the terms "care, supervision or authority" in the s 48 cases will offer guidance for their interpretation in the s 49 context. See 7.3.15 Sexual Penetration of a 16 or 17 Year Old Child (1/1/92 – 30/6/17) for a summary of the law in this area.
8. The definition and mandatory directions in respect of consent and the accused's awareness of non-consent in ss 36, 37, 37AA and 37AAA of the *Crimes Act* 1958 apply to this offence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information in relation to these matters. See 7.3.17 Indecent Act with a Child Under the Age of 16 (1/1/92 – 30/6/17) for a discussion of the procedure to be used if consent is in issue.

Last updated: 30 November 2017

7.3.19.1 Charge: Indecent Act with a 16- or 17-Year-Old Child (1/12/06 – 30/6/17) Consent Not in Issue

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This charge can be used for trials commenced after 1/1/08 involving offences alleged to have been committed on or after 1/12/06 where consent is not in issue. If consent is in issue, use 7.3.19.3 Charge: Indecent act with a 16 or 17 year old child (1/12/06 – 30/6/17) – Consent in issue instead.

I must now direct you about the crime of [committing/being a party to the commission of] an indecent act with a 16 or 17 year old child.

The law says that the age of consent for sexual acts is normally 16. However, for persons aged 16 or 17, the law has created this specific offence to protect young people from exploitation by persons in positions of care, supervision or authority.

To prove this crime, the prosecution must prove the following 7 elements beyond reasonable doubt:

One – the accused [committed the alleged act/was a party to the commission of the alleged act].

Two – the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act].

Three – the act occurred in indecent circumstances.

Four – the act was intentionally done [with/in the presence of] the complainant.

Five – at the time the alleged act took place, the complainant was under the care, supervision or authority of the accused.

Six – the complainant was 16 or 17 years old when the act took place.

Seven – the accused was not married to the complainant at the time the alleged act took place.

I will now explain each of these elements in more detail.

Actions of the accused

The first element relates to what the accused did. S/he must have [committed the act alleged by the prosecution/been a party in any way to the act alleged by the prosecution].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Wilful

The second element relates to the accused person's state of mind. The prosecution must prove that the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act]. That is, you must be satisfied that the accused's participation in the act was deliberate not accidental.

Indecent circumstances

The third element that the prosecution must prove is that the alleged act occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body NOA touched, what NOA used to touch NOC or from the circumstances of the act. Beyond the requirement of a sexual connotation, the question of whether or not the circumstances were indecent is for you to decide.

In this case, the prosecution alleged that NOA's act occurred in indecent circumstances because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's act occurred in indecent circumstances.

With/In the presence of the complainant

The fourth element that the prosecution must prove is that the alleged act was intentionally done [with/in the presence of] the complainant.

In this case the prosecution submitted that [*insert evidence about the way in which the act was committed with or in the presence of the complainant*]. The defence responded [*insert relevant evidence and/or arguments*].

[*If it is alleged that the act was committed in the presence of the complainant, add the shaded text*.]

For this element to be satisfied, you do not need to find that there was any physical contact between NOA and NOC. This element will be met if the prosecution can prove, beyond reasonable doubt, that NOC was present at the place where the alleged act was committed, and NOA was aware of that fact.

Care, Supervision and Authority

The fifth element that the prosecution must prove is that, at the time that the alleged indecent act took place, the complainant was under the care, supervision or authority of the accused.

[*If care, supervision or authority is not in issue, add the following shaded section*.]

In this case it was conceded by the defence that NOA was NOC's [*describe relationship*] and that the complainant was thus under the care, supervision or authority of the accused [at the relevant time]. While it is for you to determine whether this was the case, you should have no difficulty finding that this element has been proved.

[*If care, supervision or authority is in issue and s 49(4) applies, add the direction from the following shaded section*.][715]

Parliament has defined a number of relationships where a child is deemed to be under the care, supervision and authority of another person. This includes [*name relevant relationships from s 49(4) list*].

In this case the prosecution alleged that NOA was NOC's [*describe relationship*]. [*Insert prosecution evidence.*] The defence responded [*insert relevant evidence and/or arguments*].

If you find beyond reasonable doubt that NOA was NOC's [*identify relationship*] at the time of the alleged offence(s), then you will find this element has been proved.

[*If care, supervision or authority is in issue and s 49(4) does not apply, add the shaded section*.]

The words "care, supervision or authority" all describe different types of relationships where the accused is in a position to exploit or take advantage of that relationship to influence the child to take

[715] Note: If the prosecution relies on s 49(4) and the phrase 'care, supervision or authority' as alternatives, this charge will need to be modified.

part in act in indecent circumstances.[716] You should take this into account when deciding whether the prosecution has proved that the complainant was under the accused's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add*: You do not need to find that the alleged act was actually connected with, or influenced by, the relationship of care, supervision or authority or that NOA was actually exploiting his/her position of advantage. It is sufficient if you are satisfied that an established relationship of care, supervision or authority existed between NOA and NOC that could have been connected with, or influenced the child to engage in, the alleged act, and that the relationship existed on the day on which the act took place.]

In this case the prosecution alleged that NOC was under NOA's [care/supervision/authority]. [*Insert prosecution evidence.*] The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOC was under NOA's care, supervision or authority at the time that the alleged act took place.

[*If the accused may be unaware of the facts giving rise to a relationship of care, supervision or authority, add the following shaded section*.]

The law states that NOA must know and be aware of the facts that give rise to a relationship of care, supervision or authority. For example, if a teacher with a large number of students did not recognise the complainant was a member of one of his/her classes, then you could not find this element proved.

[*Insert relevant prosecution and defence evidence and arguments*.]

16 or 17 year old child

The sixth element relates to the complainant. The prosecution must prove that the s/he was 16 or 17 years old at the time that the alleged indecent act took place.

In this case, there is no dispute that NOC was [16/17/16 or 17] at the time the alleged indecent act took place. The main issue in this case is [*insert relevant issue*].[717]

Accused not married to the complainant

The seventh element that the prosecution must prove is that the accused was not married to the complainant at the time the alleged indecent act took place.

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[716] This charge is designed for cases where the accused committed an indecent act with the complainant. In cases where the act is committed in the presence of the complainant, the charge will need to be modified.

[717] If the complainant's age is disputed, this section will need to be modified accordingly.

In this case, the defence has not disputed the prosecution's claim that s/he was not married to NOC at the time that the alleged act took place. The main issue in this case is [*insert relevant issue*].[718]

Consent is not a defence

[*This charge is designed for use in cases where consent is not in issue. Use one of the charges listed at the beginning of this document if consent or a precondition for consideration of consent (belief in age or marriage to complainant) is contested.*]

To protect children, Parliament has created a number of offences where consent is not relevant. This is one of those offences, so you do not need to consider the issue of whether or not NOC agreed to take part in the alleged indecent act.

Summary

To summarise, before you can find NOA guilty of [committing/being a party to the commission of] an indecent act with a 16 or 17 year old child, the prosecution must prove to you beyond reasonable doubt:

One – that NOA [committed [*insert relevant act*]/was a party to the commission of [*insert relevant act*]]; and

Two – that NOA [wilfully committed/was wilfully a party to] the alleged indecent act; and

Three – that this act occurred in indecent circumstances; and

Four – that this act was done [with/in the presence of] NOC; and

Five – that NOC was under the care, supervision or authority of NOA at the time that this act took place; and

Six – that NOC was 16 or 17 years old when this act took place; and

Seven – that NOA was not married to NOC at the time that this act took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a 16 or 17 year old child.

Last updated: 27 April 2016

7.3.19.2 Checklist: Indecent Act with a 16- or 17-Year-Old Child (1/12/06–30/6/17) Consent Not in Issue

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This checklist may be used for offences alleged to have been committed on or after 1 December 2006.

For offences alleged to have been committed prior to 1 December 2006, see: 7.3.20.2 Checklist: Indecent Act With a 16 Year Old Child (5/8/91–30/11/6) – Consent not in Issue.

Seven elements the prosecution must prove beyond reasonable doubt:

1. The accused [committed/was a party to the commission of] the alleged act; and
2. The accused [wilfully committed/was wilfully a party to] the act; and

[718] If it is alleged that the accused and complainant were married, this section will need to be modified accordingly.

3. The act occurred in indecent circumstances; and
4. The accused did the act [with/in the presence of] the complainant; and
5. The complainant was under the care, supervision or authority of the accused at the time the act was committed; and
6. The complainant was 16 or 17 years old at the time the act was committed; and
7. The accused was not married to the complainant at the time the act was committed.

Accused's Acts

1. [Did the accused commit/Was the accused a party to the commission of] the alleged act?

If Yes, then go to 2

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Accused's Mental State

2. [Did the accused wilfully commit/Was the accused wilfully a party to] the act?

If Yes, then go to 3

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Indecent Circumstances

3. Did the act occur in indecent circumstances?

Consider – sexual connotation

If Yes, then go to 4

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Complainant's Involvement

4. Did the act take place [with/in the presence of] the complainant?

If Yes, then go to 5

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Care, Supervision or Authority

5. Was the complainant under the care, supervision or authority of the accused at the time that the act took place?

If Yes, then go to 6

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Complainant's Age

6. Was the complainant 16 or 17 years old at the time the act was committed?

If Yes, then go to 7

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

No Marital Relationship

7. Were the accused and the complainant married to each other at the time that the act took place?

If Yes, then the accused is guilty of committing an indecent act with a 16 or 17 year old child (as long as you also answered yes to questions 1, 2, 3, 4 and 5, and no to question 6)

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Last updated: 1 March 2007

7.3.19.3 Charge: Indecent Act with a 16- or 17-Year-Old Child (1/12/06–30/6/17) Consent in Issue

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This charge can be used for trials commenced after 1/1/08 involving offences alleged to have been committed on or after 1/12/06 where consent is in issue. If consent is not in issue, use 7.3.19.1 Charge: Indecent act with a 16 or 17 year old child (1/12/06–30/6/17) – Consent Not in issue instead.

I must now direct you about the crime of [committing/being a party to the commission of] an indecent act with a 16 or 17 year old child.

The law says that the age of consent for sexual acts is normally 16. However, for persons aged 16 or 17, the law has created this specific offence to protect young people from exploitation by persons in positions of care, supervision or authority.

To prove this crime, the prosecution must prove the following 7 elements beyond reasonable doubt:

One – the accused [committed the alleged act/was a party to the commission of the alleged act].

Two – the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act].

Three – the act occurred in indecent circumstances.

Four – the act was intentionally done [with/in the presence of] the complainant.

Five – at the time the alleged act took place, the complainant was under the care, supervision or authority of the accused.

Six – the complainant was 16 or 17 years old when the act took place.

Seven – the accused was not married to the complainant at the time the alleged act took place.

I will now explain each of these elements in more detail.

Actions of the accused

The first element relates to what the accused did. S/he must have [committed the act alleged by the prosecution/been a party in any way to the act alleged by the prosecution].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Wilful

The second element relates to the accused person's state of mind. The prosecution must prove that the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act]. That is, you must be satisfied that the accused's participation in the act was deliberate not accidental.

Indecent circumstances

The third element that the prosecution must prove is that the alleged act occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body NOA touched, what NOA used to touch NOC or from the circumstances of the act. Beyond the requirement of a sexual connotation, the question of whether or not the circumstances were indecent is for you to decide.

In this case, the prosecution alleged that NOA's act occurred in indecent circumstances because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's act occurred in indecent circumstances.

With/In the presence of the complainant

The fourth element that the prosecution must prove is that the alleged act was intentionally done [with/in the presence of] the complainant.

In this case the prosecution submitted that [*insert evidence about the way in which the act was committed with or in the presence of the complainant*]. The defence responded [*insert relevant evidence and/or arguments*].

[*If it is alleged that the act was committed in the presence of the complainant, add the following shaded text.*]

For this element to be satisfied, you do not need to find that there was any physical contact between NOA and NOC. This element will be met if the prosecution can prove, beyond reasonable doubt, that NOC was present at the place where the alleged act was committed, and NOA was aware of that fact.

Care, Supervision and Authority

The fifth element that the prosecution must prove is that, at the time that the alleged indecent act took place, the complainant was under the care, supervision or authority of the accused.

[*If care, supervision or authority is not in issue, add the following shaded section.*]

In this case it was conceded by the defence that NOA was NOC's [*describe relationship*] and that the complainant was thus under the care, supervision or authority of the accused [at the relevant time]. While it is for you to determine whether this was the case, you should have no difficulty finding that this element has been proved.

[*If care, supervision or authority is in issue and s 49(4) applies, add the direction from the following shaded section*.]

[Note: If the prosecution relies on s 49(4) and the common law as alternatives, this charge will need to be modified.]

Parliament has defined a number of relationships where a child is deemed to be under the care, supervision and authority of another person. This includes [*name relevant relationships from s 49(4) list*].

In this case the prosecution alleged that NOA was NOC's [*describe relationship*]. [*Insert prosecution evidence*]. The defence responded [*insert relevant evidence and/or arguments*].

If you find beyond reasonable doubt that NOA was NOC's [*identify relationship*] at the time of the alleged offence(s), then you will find this element has been proved.

[*If care, supervision or authority is in issue and s 49(4) does not apply, add the shaded section*.]

The words "care, supervision or authority" all describe different types of relationships where the accused is in a position to exploit or take advantage of that relationship to influence the child to take part in act in indecent circumstances.[719] You should take this into account when deciding whether the prosecution has proved that the complainant was under the accused's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add*: You do not need to find that the alleged act was actually connected with, or influenced by, the relationship of care, supervision or authority or that NOA was actually exploiting his/her position of advantage. It is sufficient if you are satisfied that an established relationship of care, supervision or authority existed between NOA and NOC that could have been connected with, or influenced the child to engage in, the alleged act, and that the relationship existed on the day on which the act took place.]

In this case the prosecution alleged that NOC was under NOA's [care/supervision/authority]. [*Insert prosecution evidence*]. The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOC was under NOA's care, supervision or authority at the time that the alleged act took place.

[*If the accused may be unaware of the facts giving rise to a relationship of care, supervision or authority, add the following shaded section*.]

The law states that NOA must know and be aware of the facts that give rise to a relationship of care, supervision or authority. For example, if a teacher with a large number of students did not recognise the complainant was a member of one of his/her classes, then you could not find this element proved.

[*Insert relevant prosecution and defence evidence and arguments*.]

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[719] This charge is designed for cases where the accused committed an indecent act with the complainant. In cases where the act is committed in the presence of the complainant, the charge will need to be modified.

16 or 17 year old child

The sixth element relates to the complainant. The prosecution must prove that s/he was 16 or 17 years old at the time that the alleged indecent act took place.

In this case, there is no dispute that NOC was [16 or 17] at the time the alleged indecent act took place. The main issue in this case is [*insert relevant issue*].[720]

Accused not married to the complainant

The seventh element that the prosecution must prove is that the accused was not married to the complainant at the time the alleged indecent act took place.

In this case, the defence has not disputed the prosecution's claim that s/he was not married to NOC at the time that the alleged act took place. The main issue in this case is [*insert relevant issue*].[721]

Consent

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 18 or older (s 49(2)(a)). If the issue is s 49(2)(b) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See 7.3.19 Indecent Act with a 16 or 17 year old Child (1/12/06 – 30/6/17) for guidance.

Warning! For offences alleged to have been committed on or after 1 November 2014, it is not clear whether *Crimes Act 1958* s 322T affects the relevance of intoxication to this defence. Judges should seek submissions from the parties on this issue where relevant.

Belief that complainant was aged 18 or more

Even if you find that the prosecution has proved all seven elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 18 years old at the time of the alleged indecent act.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this belief is a matter which the accused must prove on the balance of probabilities. That is, the accused must prove that it is more likely than not that s/he believed on reasonable grounds that NOC was aged 18 or over for consent to be available as a defence.

So, by contrast to proof of the elements of the offence(s), where the prosecution must satisfy you beyond reasonable doubt of them, for the defence of reasonable belief to be established to your satisfaction, it is for the accused, not the prosecution to prove the existence of a reasonable belief in age.

And the standard to which the defence must do this is a lesser standard than proof beyond reasonable doubt, it is proof on the balance of probabilities. That is, the accused must satisfy you that it is more likely than not that he believed, on reasonable grounds, that the complainant was 18 or over.

In this case [*insert relevant evidence and competing arguments*].

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[720] If the complainant's age is disputed, this section will need to be modified accordingly.

[721] If it is alleged that the accused and complainant were married, this section will need to be modified accordingly.

[*If the prosecution has conceded either consent or belief in consent, add the shaded section*].

As it is not in issue in this case that the indecent act was consensual, if the accused satisfied you, on the balance of probabilities that s/he believed, on reasonable grounds, that at the time of the alleged indecent act, that the complainant was 18 or over, then your verdict in respect of that charge will be not guilty. If however, the accused does not satisfy you on the balance of probabilities that at the time he believed the complainant was 18 or over, and that his belief was based on reasonable grounds, then despite the fact that the act was consensual, this defence will fail.

[*If either consent or belief in consent is in issue, add the shaded section*.]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

If, however, you find that the NOA has proved that s/he believed on reasonable grounds that NOC was at least 18 years old at the time of the alleged indecent act, then you will need to determine whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged indecent act and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the indecent act if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the indecent act. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the alleged indecent act, then you must find NOA not guilty of this offence.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to an indecent act. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proved.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following shaded section*.]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without

that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the alleged indecent act at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where evidence is given about the lack of resistance or injury or about past consensual sex, add the following section.*]

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury*;*
- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proved beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to the alleged indecent act you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of that act, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged act.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing arguments.*]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged indecent act the accused was aware either:

- that the complainant was not consenting; or
- that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

Belief in consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Onus and standard of proof

Remember, you may not need to consider the issue of consent. The process that you must follow is this. First, you must decide if the prosecution has proved the seven elements of the offence beyond reasonable doubt. That is, the prosecution must prove that the accused [committed/was party to the

commission] of an act in indecent circumstances with the complainant, that the act was intentionally done [with/in the presence of] the complainant, that NOC was aged 16 or 17 years old at the time, that NOA [committed the act wilfully/was wilfully a party to the act], that NOA was not married to NOC and that NOC was under NOA's care, supervision or authority. If the prosecution cannot prove all seven of these elements, then you must find NOA not guilty of this offence.

Next, if you find that the prosecution has proved each of these elements beyond reasonable doubt, and the accused has raised the issue as to belief in age, you must then decide if NOA has proved, on the balance of probabilities, that s/he believed that NOC was at least 18 years old, and that that belief was based on reasonable grounds. If the accused cannot prove both of these matters, then NOA will be guilty of this offence, as long as the prosecution have proved each of the first seven elements of the offence beyond reasonable doubt.

If, however, you find that the accused has proved these matters as to belief in age on the balance of probabilities, you must then decide whether the prosecution has proved, beyond reasonable doubt, the two additional elements that NOC did not consent, and that NOA was aware that s/he was not or might not be consenting. If the prosecution cannot prove both of these things, then you must find NOA not guilty of this offence. It is only if you are satisfied that they have been proved beyond reasonable doubt, together with each of the first seven elements of the offence, that you can convict NOA of [committing/being party to the commission of] an indecent act with a child aged 16 or 17.

Summary

To summarise, before you can find NOA guilty of [committing/being a party to the commission of] an indecent act with a 16 or 17 year old child, the prosecution must prove to you beyond reasonable doubt:

One – that NOA [committed [*insert relevant act*]/was a party to the commission of [*insert relevant act*]]; and

Two – that NOA [wilfully committed/was wilfully a party to] the alleged indecent act; and

Three – that this act occurred in indecent circumstances; and

Four – that this act was done [with/in the presence of] NOC; and

Five – That NOC was under the care, supervision or authority of NOA at the time that this act took place; and

Six – that NOC was 16 or 17 years old when this act took place; and

Seven – that NOA was not married to NOC at the time that this act took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a 16 or 17 year old child.

If you decide that each of these elements have been proved beyond reasonable doubt, you must decide if the accused has proved, on the balance of probabilities:

- That NOA believed that NOC was aged 18 or older at the relevant time; and
- That NOA had reasonable grounds for that belief.

If the accused has not proved both of these matters on the balance of probabilities, and you find that all of the elements have been proved by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if you find that both of these matters have been proved by the accused on the balance of probabilities, you must then decide if the prosecution has proved, beyond reasonable doubt, that NOC did not consent to the indecent act and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the shaded section*.]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the shaded section*.]

If the prosecution cannot prove these matters, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a 16 or 17 year old child.

Last updated: 30 November 2017

7.3.19.4 Checklist: Indecent Act with a 16- or 17-Year-Old Child (1/12/06–30/6/17) Consent in Issue

Click here to obtain a Word version of this document for adaptation

This checklist may be used for offences alleged to have been committed on or after 1 December 2006.

For offences alleged to have been committed prior to 1 December 2006, see: 7.3.20.4 Checklist: Indecent Act With a 16 Year Old Child (5/8/91–30/11/06 – Consent in Issue.

Seven elements the prosecution must prove beyond reasonable doubt:

1. The accused [committed/was a party to the commission of] the alleged act; and
2. The accused [wilfully committed/was wilfully a party to] the act; and
3. The act occurred in indecent circumstances; and
4. The accused did the act [with/in the presence of] the complainant; and
5. The complainant was under the care, supervision or authority of the accused at the time the act was committed.
6. The complainant was 16 or 17 years old at the time the act was committed; and
7. The accused was not married to the complainant at the time the act was committed.

Accused's Acts

1. [Did the accused commit/Was the accused a party to the commission of] the alleged act?

If Yes, then go to 2

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Accused's Mental State

2. [Did the accused wilfully commit/Was the accused wilfully a party to] the act?

If Yes, then go to 3

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Indecent Circumstances

3. Did the act occur in indecent circumstances?

Consider – sexual connotation

If Yes, then go to 4

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Complainant's Involvement

4. Did the act take place [with/in the presence of] the complainant?

If Yes, then go to 5

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Care, Supervision or Authority

5. Was the complainant under the care, supervision or authority of the accused at the time that the act took place?

If Yes, then go to 6

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Complainant's Age

6. Was the complainant 16 or 17 years old at the time the act was committed?

If Yes, then go to 7

If No, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

No Marital Relationship

7. Were the accused and the complainant married to each other at the time that the act took place?

If No, then go to 8

If Yes, then the accused is not guilty of committing an indecent act with a 16 or 17 year old child

Relevance of Consent

[*This section of the checklist can be used if the accused alleged that s/he believed on reasonable grounds that the complainant was 18 or older and consented to the alleged indecent act. If consent is in issue because the accused submitted that s/he believed on reasonable grounds that s/he was married to the complainant, it will need to be modified as necessary.*]

Consent is only relevant if the defence has proven, on the balance of probabilities, that:

8. The accused believed that the complainant was aged 18 or older at the time the alleged indecent act

took place; and

9. The accused's belief that the complainant was aged 18 or older was based on reasonable grounds.

Accused's Belief

8. Did the accused believe that the complainant was aged 18 or older at the time the alleged indecent act took place?

If Yes, then go to 9

If No, then consent is not relevant and the accused is guilty of committing an indecent act with a 16 or 17 year old child (as long as you answered yes to questions 1, 2, 3, 4, 5 and 7, and no to question 6)

Reasonable Grounds for Belief

9. Was the accused's belief that the complainant was aged 18 or older based on reasonable grounds?

Consider – Was the belief based on facts which would have caused a reasonable person to believe the same thing?

If Yes, then consent is relevant. Go to 10

If No, then consent is not relevant and the accused is guilty of committing an indecent act with a 16 or 17 year old child (as long as you answered yes to questions 1, 2, 3, 4, 5 and 7, and no to question 6)

Lack of Consent

If consent is relevant, the prosecution must prove, beyond reasonable doubt, that:

10. The complainant did not consent to the alleged indecent act; and

11. The accused was aware that the complainant was not or might not be consenting.

Consent

10. Did the indecent act occur without the complainant's consent?

If Yes, then go to 11

If No, then the Accused is not guilty of committing an indecent act with a 16 or 17 year old child (as long as you answered yes to questions 8 and 9)

Awareness of Lack of Consent

11. At the time of alleged indecent act, was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes, then the accused is guilty of committing an indecent act with a 16 or 17 year old child (as long as you answered yes to questions 1, 2, 3, 4, 5, 7 and 10, and no to question 6)

If No, then the Accused is not guilty of committing an indecent act with a 16 or 17 year old

child (as long as you answered yes to questions 8 and 9)

Last updated: 1 March 2007

7.3.20 Indecent Act with a 16-Year-Old Child (5/8/91–30/11/06)

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Warning: This topic only relates to offences alleged to have been committed between 5 August 1991 and 1 December 2006.

Commencement Information

1. The offence of indecent act with a child aged 16 contrary to s 49 of the *Crimes Act 1958* came into force on 5 August 1991. This offence applies to any acts committed between that date and 1 December 2006 (*Crimes Act 1958* s 585A(2)).
2. If an offence is alleged to have been committed between two dates, one before and one on or after 5 August 1991, the offence is alleged to have been committed before 5 August 1991 (*Crimes Act 1958* s 585A(4)).
3. A new s 49 was substituted by the *Crimes (Sexual Offences) Act 2006*. It creates the offence of indecent act with a child aged 16 or 17 and applies to all offences committed on or after 1 December 2006 (See 7.3.19 Indecent Act with a 16 or 17 year old child (1/12/06 – 30/6/17).

Elements and defences

4. The offence of committing an indecent act with a 16 year old child is the same as that of committing an indecent act with a child under the age of 16 (s 47), with four exceptions:
   i) The child must be 16 years of age;
   ii) The child must be under the care, supervision or authority of the accused;
   iii) Consent is a defence if the accused believed on reasonable grounds that the child was aged 17 or older; and
   iv) An age gap of 2 years or less does not permit a defence of consent.
5. There have been no reported cases specifically examining the operation of s 49. However the elements and defence of the s 49 offence mirror components of the offences contrary to ss 47 and 48 of the *Crimes Act 1958*.

Indecent Act elements

6. Guidance in the interpretation of the terms "indecent act", "wilfully" and "with or in the presence of" in s 49 can thus be taken from the case law in relation to s 47. See 7.3.17 Indecent Act with a Child under 16 (1/1/92 – 30/6/17) for a summary of the relevant law in this area.

"Care, supervision or authority"

7. Similarly, the consideration of the terms "care, supervision or authority" in the s 47A and s 48 cases will offer guidance for their interpretation in the s 49 context. However, care should be taken in considering cases decided on the basis of the new s 48(4) and s 49(4) inserted on 1 December 2006. See 7.3.13 Sexual Penetration of a Child under 16 (1/1/92 – 30/6/17).

Consent

8. Consent will not be a defence to a charge of committing an indecent act with a child aged 16 unless, at the time of the alleged offence, the accused believed on reasonable grounds that:
   - The complainant was aged 17 or older; or

- S/he was married to the complainant (*Crimes Act 1958* s 49(2)).

9. Where consent is in issue, the onus is on the prosecution to disprove the defence beyond reasonable doubt (*R v Mark & Elmazovski* [2006] VSCA 251; *R v Deblasis* (2007) 19 VR 128. Cf *R v Douglas* [1985] VR 721).

10. Thus, if consent is in issue, the prosecution must prove either:

    - That at the time of the alleged offence, the accused did not believe, on reasonable grounds, that the child was aged 17 or older, nor that s/he was married to the child; or
    - That the complainant did not consent.

Accused's awareness of the absence of consent

11. If consent is in issue, it is likely, but not absolutely certain, that the prosecution will also need to prove *mens rea* in respect of consent. The charge book charge is drafted on the basis that proof of *mens rea* is a requirement, and it is the same *mens rea* as was traditionally applied to the consent element of rape and indecent assault. If this is wrong, the charge will need to be adapted. See 7.3.13 Sexual Penetration of a Child under 16 (1/1/92–30/6/17) for a more detailed discussion of this issue.

Directions about consent and awareness of non-consent

12. The definition and mandatory directions in respect of consent in ss 36 and 37, and s 37AAA of the *Crimes Act* 1958 apply to this offence. If *mens rea* in respect of consent is an implied requirement for this offence, then the directions in s 37AA may also need to be given. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information in relation to these matters.

Last updated: 18 March 2008

7.3.20.1 Charge: Indecent Act with a 16-Year-Old Child (5/8/91 – 30/11/06) Consent Not in Issue

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This charge can be used for trials commenced on or after 1/1/2008 involving offences alleged to have been committed between 5/8/1991 and 30/11/06 where consent is not in issue. If consent is in issue, use 7.3.20.3 Charge: Indecent act with a 16 year old child (Consent in issue) instead.

I must now direct you about the crime of [committing/being a party to the commission of] an indecent act with a 16 year old child.

The law says that the age of consent for sexual acts is normally 16. However, for persons aged 16 or 17, the law has created this specific offence to protect such young people from exploitation by persons in positions of care, supervision or authority.

To prove this crime, the prosecution must prove the following 7 elements beyond reasonable doubt:

One – the accused [committed the alleged act/was a party to the commission of the alleged act].

Two – the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act].

Three – the act occurred in indecent circumstances.

Four – the act was intentionally done [with/in the presence of] the complainant.

Five – at the time the alleged act took place, the complainant was under the care, supervision or authority of the accused.

Six – the complainant was 16 years old when the act took place.

Seven – the accused was not married to the complainant at the time the alleged act took place.

I will now explain each of these elements in more detail.

Actions of the accused

The first element relates to what the accused did. [S/he] must have [committed the act alleged by the prosecution/been a party in any way to the act alleged by the prosecution].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Wilful

The second element relates to the accused person's state of mind. The prosecution must prove that the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act]. That is, you must be satisfied that the accused's participation in the act was deliberate not accidental.

Indecent circumstances

The third element that the prosecution must prove is that the alleged act occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body NOA touched, what NOA used to touch NOC or from the circumstances of the act. Beyond the requirement of a sexual connotation, the question of whether or not the circumstances were indecent is for you to decide.

In this case, the prosecution alleged that NOA's act occurred in indecent circumstances because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's act occurred in indecent circumstances.

With/In the presence of the complainant

The fourth element that the prosecution must prove is that the alleged act was intentionally done [with/in the presence of] the complainant.

In this case the prosecution submitted that [*insert evidence about the way in which the act was committed with or in the presence of the complainant*]. The defence responded [*insert relevant evidence and/or arguments*].

[*If it is alleged that the act was committed in the presence of the complainant, add the following shaded section*.]

For this element to be satisfied, you do not need to find that there was any physical contact between NOA and NOC. This element will be met if the prosecution can prove, beyond reasonable doubt, that NOC was present at the place where the alleged act was committed, and NOA was aware of that fact.

Care, Supervision and Authority

The fifth element that the prosecution must prove is that, at the time that the alleged indecent act took place, the complainant was under the care, supervision or authority of the accused.

[*If care, supervision or authority is not in issue, add the following shaded section*.]

In this case it was conceded by the defence that NOA was NOC's [*describe relationship*] and that the complainant was thus under the care, supervision or authority of the accused [at the relevant time]. While it is for you to determine whether this was the case, you should have no difficulty finding that this element has been proven.

[*If care, supervision or authority is in issue add the shaded section*.]

The words "care, supervision or authority" all describe different types of relationships where the accused is in a position to exploit or take advantage of that relationship to influence the child to take part in act in indecent circumstances.[722] You should take this into account when deciding whether the prosecution has proved that the complainant was under the accused's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add*: You do not need to find that the alleged act was actually connected with, or influenced by, the relationship of care, supervision or authority or that NOA was actually exploiting his/her position of advantage. It is sufficient if you are satisfied that an established relationship of care, supervision or authority existed between NOA and NOC that could have been connected with, or influenced the child to engage in, the alleged act, and that the relationship existed on the day on which the act took place.]

In this case the prosecution alleged that NOC was under NOA's [care/supervision/authority]. [*Insert prosecution evidence*]. The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOC was under NOA's care, supervision or authority at the time that the alleged act took place.

16 Year old child

The sixth element relates to the complainant. The prosecution must prove that s/he was 16 years old at the time that the alleged indecent act took place.

In this case, there is no dispute that NOC was 16 at the time the alleged indecent act took place. The main issue in this case is [*insert relevant issue*].[723]

Accused not married to the complainant

The seventh element that the prosecution must prove is that the accused was not married to the complainant at the time the alleged indecent act took place.

In this case, the defence has not disputed the prosecution's claim that s/he was not married to NOC at the time that the alleged act took place. The main issue in this case is [*insert relevant issue*].[724]

Consent is not a defence

[*This charge is designed for use in cases where consent is not in issue. Use one of the charges listed at the beginning of this document if consent or a precondition for consideration of consent (belief in age or marriage to complainant) is contested.*]

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[722] This charge is designed for cases where the accused committed an indecent act with the complainant. In cases the act is committed in the presence of, the charge will need to be modified.

[723] If the complainant's age is disputed, this section will need to be modified accordingly.

[724] If it is alleged that the accused and complainant were married, this section will need to be modified accordingly.

To protect children, Parliament has created a number of offences where consent is not relevant. This is one of those offences, so you do not need to consider the issue of whether or not NOC agreed to take part in the alleged indecent act.

Summary

To summarise, before you can find NOA guilty of [committing/being a party to the commission of] an indecent act with a 16 year old child, the prosecution must prove to you beyond reasonable doubt:

One – that NOA [committed [*insert relevant act*]/was a party to the commission of [*insert relevant act*]]; and

Two – that NOA [wilfully committed/was wilfully a party to] the alleged indecent act; and

Three – that this act occurred in indecent circumstances; and

Four – that this act was done [with/in the presence of] NOC; and

Five – That NOC was under the care, supervision or authority of NOA at the time that this act took place; and

Six – that NOC was 16 years old when this act took place; and

Seven – that NOA was not married to NOC at the time that this act took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a 16 year old child.

Last updated: 27 April 2016

7.3.20.2 Checklist: Indecent Act with a 16-Year-Old Child (5/8/91–30/11/06) Consent Not in Issue

Click here to obtain a Word version of this document for adaptation

This checklist may be used for offences alleged to have been committed before 1 December 2006.

For offences alleged to have been committed on or after 1 December 2006, see: 7.3.19.2 Checklist: Indecent Act With a 16 or 17 Year Old Child (1/12/06–30/6/17) – Consent Not in Issue.

Seven elements the prosecution must prove beyond reasonable doubt:

1. The accused [committed/was a party to the commission of] the alleged act; and
2. The accused [wilfully committed/was wilfully a party to] the act; and
3. The act occurred in indecent circumstances; and
4. The accused did the act [with/in the presence of] the complainant; and
5. The complainant was under the care, supervision or authority of the accused at the time the act was committed; and
6. The complainant was 16 years old at the time the act was committed; and
7. The accused was not married to the complainant at the time the act was committed.

Accused's Acts

1. [Did the accused commit/Was the accused a party to the commission of] the alleged act?

    If Yes, then go to 2

    If No, then the accused is not guilty of committing an indecent act with a 16 year old child

Accused's Mental State

2. [Did the accused wilfully commit/Was the accused wilfully a party to] the act?

If Yes, then go to 3

If No, then the accused is not guilty of committing an indecent act with a 16 year old child

Indecent Circumstances

3. Did the act occur in indecent circumstances?

Consider – sexual connotation

If Yes, then go to 4

If No, then the accused is not guilty of committing an indecent act with a 16 year old child

Complainant's Involvement

4. Did the act take place [with/in the presence of] the complainant?

If Yes, then go to 5

If No, then the accused is not guilty of committing an indecent act with a 16 year old child

Care, Supervision or Authority

5. Was the complainant under the care, supervision or authority of the accused at the time that the act took place?

If Yes, then go to 6

If No, then the accused is not guilty of committing an indecent act with a 16 year old child

Complainant's Age

6. Was the complainant 16 years old at the time the act was committed?

If Yes, then go to 7

If No, then the accused is not guilty of committing an indecent act with a 16 year old child

No Marital Relationship

7. Were the accused and the complainant married to each other at the time that the act took place?

If Yes, then the accused is not guilty of committing an indecent act with a 16 year old child

If No, then the accused is guilty of committing an indecent act with a 16 year old child (as long as you also answered yes to questions 1,2,3,4,5 and 6)

Last updated: 5 September 2012

7.3.20.3 Charge: Indecent Act with a 16-Year-Old Child (5/8/91–30/11/06) Consent in Issue

Click here to obtain a Word version of this document for adaptation

This charge can be used for trials commenced on or after 1/1/2008 involving offences alleged to have been committed between 5/8/1991 and 30/11/06 where consent is in issue. If consent is not in issue, use 7.3.20.1 Charge: Indecent act with a 16 year old child (5/8/91–30/11/06) – Consent not in issue instead.

I must now direct you about the crime of [committing/being a party to the commission of] an indecent act with a 16 year old child.

The law says that the age of consent for sexual acts is normally 16. However, the law has created this specific offence to protect a person aged 16 from exploitation by persons in positions of care, supervision or authority.

To prove this crime, the prosecution must prove the following 7 elements beyond reasonable doubt:

One – the accused [committed the alleged act/was a party to the commission of the alleged act].

Two – the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act].

Three – the act occurred in indecent circumstances.

Four – the act was intentionally done [with/in the presence of] the complainant.

Five – at the time the alleged act took place, the complainant was under the care, supervision or authority of the accused.

Six – the complainant was 16 years old when the act took place.

Seven – the accused was not married to the complainant at the time the alleged act took place.

I will now explain each of these elements in more detail.

Actions of the accused

The first element relates to what the accused did. [S/he] must have [committed the act alleged by the prosecution/been a party in any way to the act alleged by the prosecution].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Wilful

The second element relates to the accused person's state of mind. The prosecution must prove that the accused [wilfully committed the alleged indecent act/was wilfully a party to the alleged indecent act]. That is, you must be satisfied that the accused's participation in the act was deliberate not accidental.

Indecent circumstances

The third element that the prosecution must prove is that the alleged act occurred in indecent circumstances.

Indecent is an ordinary, everyday word, and it is for you to determine whether the circumstances were indecent.

However, the law says that indecent circumstances must involve a sexual connotation. This may arise from the area of the complainant's body NOA touched, what NOA used to touch NOC or from the circumstances of the act. Beyond the requirement of a sexual connotation, the question of whether or not the circumstances were indecent is for you to decide.

In this case, the prosecution alleged that NOA's act occurred in indecent circumstances because [*insert evidence*]. [*If relevant add*: The defence responded [*insert evidence*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that NOA's act occurred in indecent circumstances.

With/In the presence of the complainant

The fourth element that the prosecution must prove is that the alleged act was intentionally done [with/in the presence of] the complainant.

In this case the prosecution submitted that [*insert evidence about the way in which the act was committed with or in the presence of the complainant*]. The defence responded [*insert relevant evidence and/or arguments*].

[*If it is alleged that the act was committed in the presence of the complainant, add the following shaded text*.]

For this element to be satisfied, you do not need to find that there was any physical contact between NOA and NOC. This element will be met if the prosecution can prove, beyond reasonable doubt, that NOC was present at the place where the alleged act was committed, and NOA was aware of that fact.

Care, Supervision and Authority

The fifth element that the prosecution must prove is that, at the time that the alleged indecent act took place, the complainant was under the care, supervision or authority of the accused.

[*If care, supervision or authority is not in issue, add the following shaded section*.]

In this case it was conceded by the defence that NOA was NOC's [*describe relationship*] and that the complainant was thus under the care, supervision or authority of the accused [at the relevant time]. While it is for you to determine whether this was the case, you should have no difficulty finding that this element has been proven.

[*If care, supervision or authority is in issue add the following shaded section.]*

The words "care, supervision or authority" all describe different types of relationships where the accused is in a position to exploit or take advantage of that relationship to influence the child to take part in an act in indecent circumstances.[725] You should take this into account when deciding whether the prosecution has proved that the complainant was under the accused's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add:* You do not need to find that the alleged act was actually connected with, or influenced by, the relationship of care, supervision or authority or that NOA was actually exploiting his/her position of advantage. It is sufficient if you are satisfied that an established relationship of care, supervision or authority existed between NOA and NOC that could have been connected with, or influenced the child to engage in, the alleged act, and that the relationship existed on the day on which the act took place.]

In this case the prosecution alleged that NOC was under NOA's [care/supervision/authority]. [*Insert*

[725] This charge is designed for cases where the accused committed an indecent act with the complainant. In cases the act is committed in the presence of, the charge will need to be modified.

prosecution evidence.] The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOC was under NOA's care, supervision or authority at the time that the alleged act took place.

16 Year old child

The sixth element relates to the complainant. The prosecution must prove that the s/he was 16 years old at the time that the alleged indecent act took place.

In this case, there is no dispute that NOC was 16 at the time the alleged indecent act took place. The main issue in this case is [*insert relevant issue*].[726]

Accused not married to the complainant

The seventh element that the prosecution must prove is that the accused was not married to the complainant at the time the alleged indecent act took place.

In this case, the defence has not disputed the prosecution's claim that s/he was not married to NOC at the time that the alleged act took place. The main issue in this case is [*insert relevant issue*].[727]

Consent

This charge addresses consent coupled with a belief on reasonable grounds that the child was aged 17 or older (s 49(2)(a)). If the issue is s 47(2)(b) (accused believed on reasonable grounds that s/he was married to the complainant) the charge will need to be adapted accordingly. See 7.3.20 Indecent act with a 16 year old child (5/8/91 – 30/11/06) for guidance.

Belief that complainant was aged 17 or more

Even if you find that the prosecution has proven all seven elements of this offence, NOA will not necessarily be guilty of this offence. This is because, in certain circumstances, consent will be a defence.

The law states that consent is available as a defence if the accused believed on reasonable grounds that the complainant was at least 17 years old at the time of the alleged indecent act.

As a result, the prosecution must prove beyond reasonable doubt either:

1. That NOA did not believe that NOC was aged 17 or older at the time of the alleged indecent act; or

2. That NOA did not have reasonable grounds to believe that NOC was aged 17 or older at the time of the alleged indecent act.

For there to be reasonable grounds for a belief, the belief must be based on facts which could have caused a reasonable person to believe the same thing. So to prove this second alternative the prosecution must prove that even if NOA may have believed NOC was 17 or older, a reasonable person in his/her situation could not have reached that conclusion based on the facts known to NOA.

In this case the prosecution alleged [*insert relevant evidence and/or arguments*]. In response, the defence submitted [*insert relevant evidence and/or arguments*].

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[726] If the complainant's age is disputed, this section will need to be modified accordingly.

[727] If it is alleged that the accused and complainant were married, this section will need to be modified accordingly.

If the prosecution has proven beyond reasonable doubt, that NOA did not believe on reasonable grounds that NOC was at least 17 years old at the time of the alleged indecent act, then consent will not be a defence, and will not be relevant to your determination of the accused's guilt.

[*If the prosecution has conceded either consent or belief in consent, add the shaded section*.]

If, however, you find that this has not been proven, then you will find the accused not guilty. This is because the prosecution does not dispute that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "NOA believed that NOC was consenting"].

[*If either consent or belief in consent is in issue, add the shaded section*.]

Warning: It is an unresolved question whether the prosecution must prove that the accused was aware that the complainant was not consenting or might not be consenting. This Charge Book requires proof of awareness of non-consent as a matter of prudence. See 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15) for more information.

If, however, you find that this has not been proven, then you will need to determine whether the prosecution have proved two additional elements: first, that NOC did not consent to the alleged indecent act and second, that NOA was aware that NOC was not or might not be consenting.

Definition of consent

Dealing with the first of these additional elements, consent is a state of mind. The law says that consent means free agreement. So NOC will not have consented to the indecent act if s/he did not freely agree to take part in that act.

It is for the prosecution to prove, beyond reasonable doubt, that the complainant did not freely agree to the indecent act. So if consent is relevant to your determination, and the prosecution cannot prove beyond reasonable doubt that NOC did not freely agree to the alleged indecent act, then you must find NOA not guilty of this offence.

The law identifies a number of circumstances where the complainant is deemed not to freely agree, or consent, to an indecent act. These circumstances include [*insert relevant section(s) from the following and apply to the evidence:*

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because s/he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOC, you must find that s/he was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting, then this element will be proven.

[*If there is evidence that the complainant did not say or do anything to indicate agreement, add the following shaded section*.]

The law also says that the fact that a person did not say or do anything to indicate free agreement to a

sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement.

This means that if you accept that NOC did not say or do anything to indicate free agreement to the alleged indecent act at the time of that act, you may find on that basis that s/he did not consent to that act.

[*Where evidence is given about the lack of resistance or injury or about past consensual sex, add the following section*.]

The law also says the complainant is not to be regarded as having freely agreed just because:

- [*if relevant*] s/he did not protest or physically resist the accused;
- [*if relevant*] s/he did not sustain physical injury;
- [*if relevant*] s/he agreed to engage in another sexual act on that occasion with the accused or with any other person, or that s/he agreed to engage in another sexual act with the accused or another person on an earlier occasion.

However, these are relevant factors for you to consider. You must consider the action or lack of action of NOC, together with all the surrounding circumstances, in order to decide whether the prosecution has proven beyond reasonable doubt that NOC did not consent.

In determining whether NOC did not freely agree to take part in the alleged indecent act, you must consider all of the relevant evidence, including what s/he is alleged to have said and done at the time of that act, as well as the evidence s/he gave in court about [his/her] state of mind at that time. You can also consider what s/he did not say or do at the time of the alleged act.

In this case, the prosecution alleged that NOC did not consent. [*Insert relevant evidence and competing arguments.*]

If the prosecution fails to prove to you beyond reasonable doubt this first additional element that NOC did not consent, then you must find NOA not guilty.

Awareness of Lack of Consent

Turning now to the second additional element, if consent is available as a defence, the prosecution must also prove beyond reasonable doubt that at the time of the alleged indecent act the accused was aware either:

● that the complainant was not consenting; or

● that the complainant might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these state(s) of mind about the complainant's consent, then you must find NOA not guilty of this offence.

Belief in consent

[*If evidence is led or an assertion is made that the accused believed that the complainant was consenting, add one of the directions in* 7.3.1.3.1 Charge: Belief in consent.]

Onus and standard of proof

Remember, you may not need to consider the issue of consent. You will only need to consider this issue if the prosecution fails to prove:

(1) That NOA did not believe that NOC was aged 17 or older at the time of the alleged indecent act; or

(2) That NOA did not have reasonable grounds to believe that NOC was aged 17 or older at the time of the alleged indecent act.

Summary

To summarise, before you can find NOA guilty of [committing/being a party to the commission of] an indecent act with a 16 year old child, the prosecution must prove to you beyond reasonable doubt:

One – that NOA [committed [*insert relevant act*]/was a party to the commission of [*insert relevant act*]]; and

Two – that NOA [wilfully committed/was wilfully a party to] the alleged indecent act; and

Three – that this act occurred in indecent circumstances; and

Four – that this act was done [with/in the presence of] NOC; and

Five – That NOC was under the care, supervision or authority of NOA at the time that this act took place; and

Six – that NOC was 16 years old when this act took place; and

Seven – that NOA was not married to NOC at the time that this act took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a 16 year old child.

If you decide that each of these elements have been proved beyond reasonable doubt, you must decide if the prosecution has also proved, to the same standard:

- That NOA did not believe that NOC was aged 17 or older at the relevant time; or
- That NOA had no reasonable grounds to believe that NOC was aged 17 or older at the relevant time.

If the prosecution has proved one of these matters, and you find that all of the elements have been proved by the prosecution beyond reasonable doubt, then NOA will be guilty of the offence. However, if the prosecution has not proved either of these matters, you must then decide if the prosecution has proved, beyond reasonable doubt, that NOC did not consent to the indecent act and that NOA was aware that NOC was not or might not be consenting.

[*If the prosecution conceded either consent or belief in consent, add the shaded section.*]

Since the prosecution does not dispute the accused's claim that [*insert basis of concession about consent, e.g.* "NOC was consenting" or "s/he believed that NOC was consenting"], you must, if you reach this point, find NOA not guilty of this offence.

[*If either consent or belief in consent is in issue, add the shaded section.*]

If the prosecution cannot prove these matters, then you must find NOA not guilty of [committing/being a party to the commission of] an indecent act with a child aged of 16.

Last updated: 27 April 2016

7.3.20.4 Checklist: Indecent Act with a 16-Year-Old Child (5/8/91–30/11/06) Consent in Issue

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This checklist may be used for offences alleged to have been committed before 1 December 2006.

For offences alleged to have been committed on or after 1 December 2006, see: 7.3.19.4 Checklist: Indecent Act With a 16 or 17 Year Old Child (1/12/06–30/6/17) – Consent in Issue.

Seven elements the prosecution must prove beyond reasonable doubt:

1. The accused [committed/was a party to the commission of] the alleged act; and
2. The accused [wilfully committed/was wilfully a party to] the act; and
3. The act occurred in indecent circumstances; and
4. The accused did the act [with/in the presence of] the complainant; and
5. The complainant was under the care, supervision or authority of the accused at the time the act was committed; and
6. The complainant was 16 years old at the time the act was committed; and
7. The accused was not married to the complainant at the time the act was committed; and

Accused's Acts

1. [Did the accused commit/Was the accused a party to the commission of] the alleged act?

If Yes, then go to 2

If No, then the accused is not guilty of committing an indecent act with a 16 year old child

Accused's Mental State

2. [Did the accused wilfully commit/Was the accused wilfully a party to] the act?

If Yes, then go to 3

If No, then the accused is not guilty of committing an indecent act with a 16 year old child

Indecent Circumstances

3. Did the act occur in indecent circumstances?

Consider – sexual connotation

If Yes, then go to 4

If No, then the accused is not guilty of committing an indecent act with a 16 year old child

Complainant's Involvement

4. Did the act take place [with/in the presence of] the complainant?

If Yes, then go to 5

If No, then the accused is not guilty of committing an indecent act with a 16 year old child

Care, Supervision or Authority

5. Was the complainant under the care, supervision or authority of the accused at the time that the act took place?

If Yes, then go to 6

If No, then the accused is not guilty of committing an indecent act with a 16 year old child

Complainant's Age

6. Was the complainant 16 years old at the time the act was committed?

If Yes, then go to 7

If No, then the accused is not guilty of committing an indecent act with a 16 year old child

No Marital Relationship

7. Were the accused and the complainant married to each other at the time that the act took place?

If Yes, then the accused is not guilty of committing an indecent act with a 16 year old child

If No, then go to 8

Relevance of Consent

[*This section of the checklist can be used if the accused alleged that s/he believed on reasonable grounds that the complainant was 17 or older and consented to the alleged indecent act. If consent is in issue because the accused alleged that s/he believed on reasonable grounds that s/he was married to the complainant, it will need to be modified as necessary.*]

Consent is relevant unless you are satisfied the prosecution has proven, beyond reasonable doubt that either:

8. The accused did not believe that the complainant was aged 17 or older at the time the alleged indecent act took place; or

9. The accused did not have reasonable grounds to believe that the complainant was aged 17 or older.

Accused's Belief

8. Did the accused believe that the complainant was aged 17 or older at the time the alleged indecent act took place?

If Yes, then go to 9

If No, then consent is not relevant and the accused is guilty of committing an indecent act with a 16 year old child (as long as you answered yes to questions 1, 2, 3, 4, 5 and 7, and no to question 6)

Reasonable Grounds for Belief

9. Was the accused's belief that the complainant was aged 17 or older based on reasonable grounds?

Consider – Was the belief based on facts which would have caused a reasonable person to believe the same thing?

If Yes, then consent is relevant. Go to 10

If No, then consent is not relevant and the accused is guilty of committing an indecent act with a 16 year old child (as long as you answered yes to questions 1, 2, 3, 4, 5 and 7, and no to question 6)

Lack of Consent

If consent is relevant, the prosecution must prove, beyond reasonable doubt, that:

10. The complainant did not consent to the alleged indecent act; and

11. The accused was aware that the complainant was not or might not be consenting.

Consent

10. Did the indecent act occur without the complainant's consent?

If Yes, then go to 11

If No, then the Accused is not guilty of committing an indecent act with a 16 year old child (as long as you answered yes to questions 8 and 9)

Awareness of Lack of Consent

11. At the time of alleged indecent act, was the accused aware that the complainant was not consenting or that s/he might not be consenting?

If Yes, then the accused is guilty of committing an indecent act with a 16 year old child (as long as you answered yes to questions 1, 2, 3, 4, 5, 7 and 10, and no to question 6)

If No, then the Accused is not guilty of committing an indecent act with a 16 year old child (as long as you answered yes to questions 8 and 9)

Last updated: 5 September 2012

7.3.21 Sexual Activity in the Presence of a Child under 16 (From 1/7/17)

Click here to obtain a Word version of this document

Commencement Information

1. Section 49F came into force on 1 July 2017.
2. Prior to 1 July 2017, *Crimes Act 1958* s 47 contained a composite offence of an indecent act "with or in the presence of" a child under 16. Following the amendments introduced by the *Crimes Amendment (Sexual Offences) Act 2016*, the offence was split so that section 49D addresses sexual touching and section 49F addresses sexual activity in the presence of the child.
3. For offences committed before 1 July 2017, see 7.3.17 Indecent Act with a Child Under 16 (1/1/92 – 30/6/17).
4. For offences involving sexual touching, see 7.3.16 Sexual Assault of a child under 16 (From 1/7/17).

Elements

5. The elements of the offence are set out in s 49F(1) of the *Crimes Act 1958*. The prosecution must prove that:

   i) The accused (A) intentionally engages in an activity;

ii) The activity is sexual;

iii) Another person (B) is present when A engages in the activity;

iv) A knows B is, or probably is, present when A engages in the activity;

v) B is a child under the age of 16 years;

vi) Engaging in the activity in the presence of B is contrary to community standards of acceptable conduct.

Intentional activity

6. The first element that the prosecution must prove is that the accused intentionally engaged in an activity.
7. The fault element for this element is basic or general intention. Where relevant, the prosecution must prove that the accused engaged in the activity intentionally in the sense that his or her conduct was deliberate rather than inadvertent or accidental.
8. The *Crimes Act 1958* does not provide a definition for the word "activity". Dictionary definitions of activity include:
    - "the state of being active: behaviour or actions of a particular kind" (Merriam-Webster)
    - "the state or quality of being active; a specific deed, action, function or sphere of action" (Dictionary.com)
    - "A thing that a person or group does or has done" (English Oxford Living Dictionaries).

Activity is sexual

9. The second element is that the activity is sexual (*Crimes Act 1958* s 49F(1)).
10. Section 35D of the Act specifies that an activity may be sexual due to:

    (a) The area of the body that is involved in the region, including genital or anal region, buttocks, breasts;

    (b) The fact that the person engaging in the activity seeks or gets sexual arousal or gratification from the activity; or

    (c) Any other aspect of the activity, including the circumstances in which it is engaged in.

11. Section 35D contains an example of a sexual activity: "A watches pornography in the presence of A's daughter (B) and her friend (C)".[728]
12. Section 49ZC(c) of the Crimes Act 1958 provides that an honest and reasonable mistaken belief that the activity is not sexual is not a defence.

Presence of another person

13. The third element is that another person, B, is present when A engages in the activity (*Crimes Act 1958* s 49F(1)).

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[728] See *Interpretation of Legislation Act 1984* s 36A on the interpretation and operation of examples.

14. Section 49F(5) states that a person may be present:

    (a) in person; or

    (b) by means of an electronic communication within the meaning of the *Electronic Transactions (Victoria) Act 2000* that is received by B in real time or close to real time.

15. Section 3 of the *Electronic Transactions (Victoria) Act 2000* defines an "electronic communication" as:

    (a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both; or

    (b) a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system;

16. According to the Explanatory Memorandum for the Crimes Amendment (Sexual Offences) Bill 2016, this provision allows the offence to apply "where A engages in sexual activity while communicating with B over the internet. This updates the offence to cover offending using new technologies".

Knowledge of B's presence

17. The fourth element is that the accused knew that B was, or probably was, present when he or she engaged in the activity (*Crimes Act 1958* s 49F(1)).

18. According to the Explanatory Memorandum for the Crimes Amendment (Sexual Offences) Bill 2016, this replaces the previous fault element of "wilful" in the former *Crimes Act 1958* s 47, which was a source of uncertainty.

19. In relation to the former *Crimes Act 1958* s 47, it was thought that 'wilful' meant that the accused must have intended that the child be present at the time of the relevant act and that recklessness was not sufficient (*R v Papamitrou* (2004) 7 VR 375, [43]).

20. In contrast, *Crimes Act 1958* s 49G provides that recklessness, in the form of the accused knowing that it is probable that the child is present, is sufficient for this element.

Child Under 16

21. The fifth element requires the prosecution to prove that the complainant was under the age of 16 at the time the relevant activity took place (*Crimes Act 1958* s 49F(1)).

Engaging in activity in presence of B contrary to community standards of acceptable conduct

22. The sixth element is that engaging in the activity in the presence of the complainant is contrary to community standards of acceptable conduct (*Crimes Act 1958* s 49F(1)).

23. Section 49F(3) of the *Crimes Act 1958* provides that:

    > Whether or not engaging in the activity in the presence of B is contrary to community standards of acceptable conduct depends on the circumstances

24. The Act specifies that the circumstances include the purpose of the activity and whether the accused seeks or gets sexual arousal or gratification from engaging in the activity or from the presence of B. However, the circumstances do not include whether:

    - B consents to being present when A engages in the activity;
    - B consents to A engaging in the activity;
    - A believes that B consents to being present when A engages in the activity;

- A believes that B consents to A engaging in the activity (*Crimes Act 1958* s 49F(4)).

25. Section 49ZC(c) of the Crimes Act 1958 provides that an honest and reasonable mistaken belief that engaging in the activity in the presence of the complainant was not contrary to community standards of acceptable conduct is not a defence.

Statutory defences and exemption

Similarity in age

26. Section 49U of the *Crimes Act 1958* provides that it is a defence to an offence against section 49F(1) if, at the time of the conduct:

    (a) A was not more than 2 years older than B; and

    (b) B was 12 years of age or more.

27. In relation to this defence, the accused's actual age must not exceed the child's by more than 24 months. The availability of the defence is not determined by a measure limited to whole–years (*Stannard v DPP* (2010) 28 VR 84).

28. To disprove this defence, the prosecution must rebut one or more limbs of section 49V.

29. This defence does not involve a consideration of whether the child consented or whether the accused had a reasonable belief that the child consented. Compare 7.3.12 Sexual Penetration of a Child Under 16 (From 1/7/17).

Reasonable belief as to age

30. Section 49W of the *Crimes Act 1958* provides that it is a defence to an offence against section 49D(1) if, at the time of the conduct:

    (a) B was 12 years of age or more; and

    (b) A reasonably believed that B was 16 years of age or more.

31. The accused bears the burden of proving, on the balance of probabilities, that he or she reasonably believed that B was 16 years of age or more (*Crimes Act 1958* s 49W(4)).

32. The Note to section 49W states that:

> Whether or not A reasonably believed that B … was 16 years of age or more depends on the circumstances. The circumstances include any steps that A took to find out [B's] age.

33. The Note also specifies that the accused has an evidential burden to establish that B was 12 years of age or more.

34. Unlike the former s 47, a reasonable belief in age is not used as a threshold requirement before consent is relevant. This means that the jury does not need to consider consent, or a reasonable belief in consent, as part of this belief in age defence.

Extraterritorial conduct

35. Subsections (6) and (7) of section 49F give the offence extraterritorial operation.

36. Subsection (6) provides that some or all of the conduct constituting the offence can occur outside Victoria, provided B was in Victoria at the time of the conduct.

37. Similarly, subsection (7) provides that some or all of the conduct constituting the offence can occur outside Victoria, provided A was in Victoria at the time of the conduct.

Last updated: 1 July 2017

7.3.21.1 Charge: Sexual Activity in Presence of Child under 16 (From 1/7/17)

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I must now direct you about the crime of sexual activity in the presence of a child under 16. To prove this crime, the prosecution must prove the following 6 elements beyond reasonable doubt:

One – The accused intentionally engaged in an activity.

Two – The activity was sexual.

Three – NOC was present during that activity.

Four – NOA knew that NOC was or probably was present during that activity.

Five – NOC was under the age of 16 years.

Six – Engaging in the activity in the presence of NOC was contrary to community standards of acceptable conduct.

I will now explain each of these elements in more detail.

Engaging in activity

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that NOA [*identify relevant activity*].

[*If the evidence or arguments have placed the intentional or voluntary nature of the acts in issue, add the following shaded section*.[729]]

For this element to be met, the act of [*describe relevant activity*] must have been done intentionally.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves intention in the circumstance of the case, e.g.* "NOA touched the outside of NO3P's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the touching"].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Sexual activity

The second element that the prosecution must prove is that [*identify relevant activity*] is a sexual activity.

The law says that an activity can be sexual because of the area of the body involved, including the genital or anal region, the buttocks or, in the case of a woman, the breasts.

Or the activity can be sexual because the person engaging in the activity seeks or gets sexual arousal or gratification from the activity.

Finally, any other aspect of the activity, including the circumstances in which it happened, can also make the activity sexual.

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[729] Because of how the offence is defined, the issue of intention is likely inseparable from the question of voluntariness. Where the issue is raised, the judge should direct the jury on the specific matters the jury must consider to find that the accused's conduct was voluntary and intentional (e.g. disproof of accident or proof that the accused was conscious).

The question of whether or not the activity was sexual is for you to decide.

In this case, the prosecution alleged that the activity was sexual because [*insert evidence and arguments*]. [*If relevant add*: The defence responded [*insert evidence and arguments*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that [*identify relevant activity*] is a sexual activity.

Presence of complainant

The third element that the prosecution must prove is that NOC was present when NOA [*identify relevant activity*].

The law states that a person can be present during an activity by either being present in person, or by means of an electronic communication that is received in real time. In other words, a person can be present by phone or by web cam, for example.

In this case, the prosecution argues that NOC was present when NOA [*identify relevant activity*] because [*identify evidence and arguments*]. [*If relevant, add:* The defence responded [*insert evidence and arguments*].]

Knowledge of Accused

The fourth element requires that you reach a conclusion about NOA's state of mind. The prosecution must prove that NOA knew that NOC was present, or knew that NOC was probably present, when s/he [*identify relevant activity*].

[*Identify relevant prosecution and defence evidence and arguments.*]

Child under the age of 16

The fifth element relates to the age of the complainant, NOC. The prosecution must prove that s/he was under the age of 16 when the activity occurred.

In this case, there is no dispute that NOC was under 16 at that time. The main issue in this case is [*insert relevant issue*].[730]

Contrary to community standards of acceptable conduct

The sixth element that the prosecution must prove is that [*identify relevant activity*] in NOC's presence was contrary to community standards of acceptable conduct.

The law says that whether engaging in an activity in the presence of NOC is contrary to community standards depends on the circumstances, and that this includes the purpose of the activity and whether NOA seeks or gets sexual arousal or sexual gratification from engaging in the activity or from NOC's presence.

The law also says that whether NOC consented to NOA [*identify relevant activity*] or whether NOC consented to being present when NOA [*identify relevant activity*] are not relevant to whether [*identify relevant activity*] in NOC's presence was contrary to community standards. Similarly, whether NOA believed that NOC consented to NOA [*identify relevant activity*] or whether NOA believed that NOC consented to being present when NOA [*identify relevant activity*] are not relevant to this element.

[*Refer to relevant prosecution and defence evidence and arguments.*]

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[730] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

Defences

Similarity in Age

[*If the accused relies on the similarity in age defence in Crimes Act 1958 s 49U, add the following shaded section.*]

For this offence, the law recognises a defence which may be termed "similarity in age". There are two parts to this defence.

First, the accused must be no more than 2 years older than the complainant. In this case, that requirement is met.[731]

Second, the complainant must have been 12 years old or more at the time of the alleged conduct. It is this part of the defence which is in dispute.

As I told you at the start of the trial, the prosecution must prove the accused's guilt. This means the prosecution must prove that at the time of the alleged conduct, NOC was not aged 12 years or older. In other words, the prosecution must prove that at the time of the activity, NOC was aged 11 years or younger.

[*Refer to relevant prosecution and defence evidence and arguments.*]

Reasonable belief in Age

[*If the accused relies on the belief in age defence in Crimes Act 1958 s 49W, add the following shaded section.*]

The law states that the accused does not commit this offence if, at the time s/he [*describe relevant activity*], the accused reasonably believed that the accused was aged 16 years or more. There are two parts to this defence.

First, at the time of the activity, NOC was aged 12 or more. There is no issue in this case that NOC was aged 12 or more at the time of the conduct.[732]

Second, NOA reasonably believed that NOC was aged 16 or more. It is a matter for you to decide whether NOA held this belief, and whether it was reasonable. As part of deciding this issue, you should consider what steps NOA took to find out NOC's age.

Unlike the elements of the offence, this is a matter which the accused must prove. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that NOC was aged 16 or more on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he believed that NOC was aged 16 or more and that this belief was reasonable. Unlike the prosecution, s/he does not need to prove this matter beyond reasonable doubt.

[*Identify relevant evidence and arguments.*]

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[731] If the prosecution contests this matter, then the charge will need to be modified accordingly.

[732] If the age of the child is in dispute, then this direction must be modified. The prosecution bears the onus of rebutting this threshold requirement, once the accused has satisfied the evidential burden.

Summary

To summarise, before you can find NOA guilty of sexual activity in the presence of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

- One – the accused intentionally engaged in an activity.
- Two – the activity was sexual.
- Three – NOC was present during that activity.
- Four – NOA knew that NOC was, or probably was, present during that activity.
- Five – NOC was under the age of 16 years.
- Six – Engaging in the activity in the presence of NOC was contrary to community standards of acceptable conduct.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual activity in the presence of a child under the age of 16.

Last updated: 1 July 2017

7.3.21.2 Checklist: Sexual Activity in Presence of Child under 16 (From 1/7/17)

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Six elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally engaged in an activity; and

2. The activity was sexual; and

3. The complainant was present during that activity; and

4. The accused knew that the complainant was or probably was present during that activity; and

5. The complainant was under the age of 16; and

6. Engaging in the activity in the presence of the complainant was contrary to community standards of acceptable conduct.

Intentional activity

1. Did the accused intentionally [*identify relevant activity*]?

If Yes then go to 2

If No, then the accused is not guilty of Sexual Activity in Presence of Child under 16

Sexual activity

2. Is [*identify relevant activity*] a sexual activity?

Consider – An activity may be sexual because of the area of body involved, the fact that the person doing it seeks or gets sexual arousal or gratification from the activity, or any other reason.

If Yes then go to 3

If No, then the accused is not guilty of Sexual Activity in Presence of Child under 16

Presence of complainant

3. Was NOC present when NOA [*identify relevant activity*]?

If Yes then go to 4

If No, then the accused is not guilty of Sexual Activity in Presence of Child under 16

Accused knew that complainant present

4. Did NOA know that NOC was or probably was present when s/he [*identify relevant activity*]?

If Yes then go to 5

If No, then the accused is not guilty of Sexual Activity in Presence of Child under 16

Complainant under the age of 16

5. At the time of the act, was NOC under the age of 16?

If Yes then go to 6

If No, then the accused is not guilty of Sexual Activity in Presence of Child under 16

Contrary to community standards of acceptable conduct

6. Is it contrary to community standards of acceptable conduct for NOA to [*identify relevant activity*] in the presence of NOC?

Consider – Relevant matters include the purpose of the activity and whether the accused was seeking or got sexual arousal or gratification from engaging in the activity in the presence of the complainant

Consider – Whether NOC consented to being present or the activity or whether NOA believed NOC consented to being present or the activity is not relevant to this element

If Yes then the accused is guilty of Sexual Activity in Presence of Child under 16 (as long as you also answered Yes to Questions 1, 2, 3, 4 and 5)

If No, then the accused is not guilty of Sexual Activity in Presence of Child under 16

Last updated: 1 July 2017

7.3.22 Sexual Activity in the Presence of a Child Aged 16 or 17 under Care, Supervision or Authority (From 1/7/17)

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Commencement Information

1. Section 49G came into force on 1 July 2017.

2. Prior to 1 July 2017, *Crimes Act 1958* s 49 contained a composite offence of an indecent act "with or in the presence of" a child aged 16 or 17. Following the amendments introduced by the *Crimes Amendment (Sexual Offences) Act 2016*, the offence was split so that section 49E addresses sexual touching and section 49G addresses sexual activity in the presence of the child.
3. For offences committed before 1 July 2017, see 7.3.19 Indecent Act with a Child aged 16 or 17 (1/12/06 – 30/6/17).
4. For offences involving sexual touching, see 7.3.18 Sexual Assault of a child aged 16 or 17 (From 1/7/17).

Elements

5. The elements of the offence are set out in s 49G(1) of the *Crimes Act 1958*. The prosecution must prove that:

   i) The accused (A) intentionally engages in an activity;

   ii) The activity is sexual;

   iii) Another person (B) is present when A engages in the activity;

   iv) A knows B is, or probably is, present when A engages in the activity;

   v) B is a child aged 16 or 17;

   vi) B is under A's care, supervision or authority; and

   vii) Engaging in the activity in the presence of B is contrary to community standards of acceptable conduct.

Intentional activity

6. The first element that the prosecution must prove is that the accused intentionally engaged in an activity.
7. The fault element for this element is basic or general intention. Where relevant, the prosecution must prove the accused engaged in the activity intentionally, in the sense that his or her conduct was deliberate rather than inadvertent or accidental.
8. The *Crimes Act 1958* does not provide a definition for the word "activity". Dictionary definitions of activity include
   - "the state of being active: behaviour or actions of a particular kind" (Merriam-Webster)
   - "the state or quality of being active; a specific deed, action, function or sphere of action" (Dictionary.com)
   - "A thing that a person or group does or has done" (English Oxford Living Dictionaries).

Activity is sexual

9. The second element is that the activity is sexual (*Crimes Act 1958* s 49G(1)).
10. Section 35D of the Act specifies that an activity may be sexual due to:

(a) The area of the body that is involved in the region, including genital or anal region, buttocks, breasts;

(b) The fact that the person engaging in the activity seeks or gets sexual arousal or gratification from the activity; or

(c) Any other aspect of the activity, including the circumstances in which it is engaged in.

11. Section 35D contains an example of a sexual activity: "A watches pornography in the presence of A's daughter (B) and her friend (C)".[733]

12. Section 49ZC(c) of the Crimes Act 1958 provides that an honest and reasonable mistaken belief that the activity is not sexual is not a defence.

Presence of another person

13. The third element is that another person, B, is present when A engages in the activity (*Crimes Act 1958* s 49G(1)).

14. Section 49G(5) states that a person may be present:

(a) In person; or

(b) By means of an electronic communication within the meaning of the *Electronic Transactions (Victoria) Act 2000* that is received by B in real time or close to real time.

15. Section 3 of the *Electronic Transactions (Victoria) Act 2000* defines an "electronic communication" as:

(a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both; or

(b) a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system;

16. According to the Explanatory Memorandum for the Crimes Amendment (Sexual Offences) Bill 2016, this provision allows the offence to apply "where A engages in sexual activity while communicating with B over the internet. This updates the offence to cover offending using new technologies."

Knowledge of B's presence

17. The fourth element is that the accused knew that B was, or probably was, present when he or she engaged in the activity (*Crimes Act 1958* s 49G(1)).

18. According to the Explanatory Memorandum for the Crimes Amendment (Sexual Offences) Bill 2016, this replaces the previous fault element of "wilful" in the former provision, which was a source of uncertainty.

19. In relation to the former *Crimes Act 1958* s 47, it was thought that 'wilful' meant that the accused must have intended that the child be present at the time of the relevant act and that recklessness was not sufficient (*R v Papamitrou* (2004) 7 VR 375, [43]).

20. In contrast, *Crimes Act 1958* s 49G provides that recklessness, in the form of the accused knowing that it is probable that the child is present, is sufficient for this element.

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[733] See *Interpretation of Legislation Act 1984* s 36A on the interpretation and operation of examples.

Child aged 16 or 17

21. The fifth element requires the prosecution to prove that the complainant was aged 16 or 17 at the time the relevant activity took place (*Crimes Act 1958* s 49G(1)).

Care, supervision or authority

22. The sixth element is that B was under the accused's care, supervision or authority.

23. For information about this element, see Care, supervision or authority into 7.3.14 Sexual penetration of a child aged 16 or 17 (From 1/7/17).

Engaging in activity in presence of B contrary to community standards of acceptable conduct

24. The seventh element is that engaging in the activity in the presence of the complainant is contrary to community standards of acceptable conduct (*Crimes Act 1958* s 49G(1)).

25. Section 49G(3) of the *Crimes Act 1958* provides that:

> Whether or not engaging in the activity in the presence of B is contrary to community standards of acceptable conduct depends on the circumstances

26. The Act specifies that the circumstances include the purpose of the activity and whether the accused seeks or gets sexual arousal or gratification from engaging in the activity or from the presence of B. However, the circumstances do not include whether:

    - B consents to being present when A engages in the activity;
    - B consents to A engaging in the activity;
    - A believes that B consents to being present when A engages in the activity;
    - A believes that B consents to A engaging in the activity (*Crimes Act 1958* s 49G(4)).

27. Section 49ZC(c) of the Crimes Act 1958 provides that an honest and reasonable mistaken belief that engaging in the activity in the presence of the complainant was not contrary to community standards of acceptable conduct is not a defence.

Statutory defences and exemption

Marriage or domestic partnership

28. Section 49Y of the *Crimes Act 1958* provides an exception to the offence in s 49G(1). This exception applies if, at the time of the alleged offence –

(a) A and B are married to each other and the marriage is recognised as valid under the *Marriage Act 1961* of the Commonwealth; or

(b) A–

(i) is not more than 5 years older than B; and

(ii) is B's domestic partner and the domestic partnership commenced before B came under A's care, supervision or authority.

Reasonable belief as to age

29. Section 49X of the *Crimes Act 1958* provides that it is a defence to an offence against section 49G(1) if, at the time of the conduct, the accused reasonably believed that the child was aged 18 or more (*Crimes Act 1958* s 49X(1))

30. The accused bears the burden of proving, on the balance of probabilities, that he or she reasonably believed that B was 18 years of age or more (*Crimes Act 1958* s 49X(4)).

31. The Note to section 49X states that:

> Whether or not A reasonably believed that B … was 18 years of age or more depends on the circumstances. The circumstances include any steps that A took to find out [B's] age.

Reasonable belief as to marriage or domestic partnership

32. Section 49Z of the *Crimes Act 1958* provides a defence to the offence in s 49G(1) which applies if, at the time of the alleged offence –

(a) A reasonably believed that A and B are married to each other and that the marriage is recognised as valid under the *Marriage Act 1961* of the Commonwealth; or

(b) A–

(i) was not more than 5 years older than B; and

(ii) reasonably believed that A was B's domestic partner and that the domestic partnership commenced before B came under A's care, supervision or authority.

33. The accused bears the burden of proving, on the balance of probabilities, the reasonable belief referred to in the section (*Crimes Act 1958* s 49Z(3)).

34. The Note to the section specifies that the accused has an evidential burden in relation to the relative ages of the accused and the complainant.

Reasonable belief as to care, supervision or authority

35. Section 49ZA provides a defence to a charge under s 49G(1) that applies if, at the time of the conduct constituting the offence, the accused reasonably believed that the complainant was not under his or her care, supervision or authority.

36. The accused bears the burden of proving, on the balance of probabilities, that he or she held this reasonable belief (*Crimes Act 1958* s 49ZA(3)).

Extraterritorial conduct

37. Subsections (6) and (7) of section 49G give the offence extraterritorial operation.

38. Subsection (6) provides that some or all of the conduct constituting the offence can occur outside Victoria, provided B was in Victoria at the time of the conduct.

39. Similarly, subsection (7) provides that some or all of the conduct constituting the offence can occur outside Victoria, provided A was in Victoria at the time of the conduct.

Last updated: 1 July 2017

7.3.22.1 Charge: Sexual Activity in Presence of a Child Aged 16 or 17 under Care, Supervision or Authority (From 1/7/17)

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I must now direct you about the crime of sexual activity in the presence of a child aged 16 or 17. To prove this crime, the prosecution must prove the following 7 elements beyond reasonable doubt:

One – the accused intentionally engaged in an activity.

Two – the activity was sexual.

Three – NOC was present during that activity.

Four – NOA knew that NOC was or probably was present during that activity.

Five – NOC was a child aged 16 or 17 years.

Six – NOC was under NOA's care, supervision or authority.

Seven – Engaging in the activity in the presence of NOC was contrary to community standards of acceptable conduct.

I will now explain each of these elements in more detail.

Engaging in activity

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that NOA [*identify relevant activity*].

[*If the evidence or arguments have placed the intentional or voluntary nature of the acts in issue, add the following shaded section*.[734]]

For this element to be met, the act of [*describe relevant activity*] must have been done intentionally.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves intention in the circumstance of the case, e.g.* "NOA touched the outside of NO3P's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the touching"].

In this case the prosecution alleged that NOA [*insert evidence about the relevant act*]. The defence responded [*insert relevant evidence and/or arguments*].

Sexual activity

The second element that the prosecution must prove is that [*identify relevant activity*] is a sexual activity.

---

[734] Because of how the offence is defined, the issue of intention is likely inseparable from the question of voluntariness. Where the issue is raised, the judge should direct the jury on the specific matters the jury must consider to find that the accused's conduct was voluntary and intentional (e.g. disproof of accident or proof that the accused was conscious).

The law says that an activity can be sexual because of the area of the body involved, including the genital or anal region, the buttocks or, in the case of a woman, the breasts.

Or the activity can be sexual because the person engaging in the activity seeks or gets sexual arousal or gratification from the activity.

Finally, any other aspect of the activity, including the circumstances in which it happened, can also make the activity sexual.

The question of whether or not the activity was sexual is for you to decide.

In this case, the prosecution alleged that the activity was sexual because [*insert evidence and arguments*]. [*If relevant add*: The defence responded [*insert evidence and arguments*]].

For this element to be met, you must be satisfied, beyond reasonable doubt, that [*identify relevant activity*] is a sexual activity.

Presence of complainant

The third element that the prosecution must prove is that NOC was present when NOA [*identify relevant activity*].

The law states that a person can be present during an activity by either being present in person, or by means of an electronic communication that is received in real time. In other words, a person can be present by phone or by web cam, for example.

In this case, the prosecution argues that NOC was present when NOA [*identify relevant activity*] because [*identify evidence and arguments*]. [*If relevant, add:* The defence responded [*insert evidence and arguments*].

Knowledge of Accused

The fourth element requires that you reach a conclusion about NOA's state of mind. The prosecution must prove that NOA knew that NOC was present, or knew that NOC was probably present, when s/he [*identify relevant activity*].

[*Identify relevant prosecution and defence evidence and arguments.*]

Child aged 16 or 17

The fifth element relates to the age of the complainant, NOC. The prosecution must prove that s/he was aged 16 or 17 when the activity occurred.

In this case, there is no dispute that NOC was under 16 at that time. The main issue in this case is [*insert relevant issue*].[735]

Care, supervision or authority

The sixth element that the prosecution must prove is that, at the time that the [*identify relevant activity*] took place, the complainant was under the care, supervision or authority of the accused.

[*If care, supervision or authority is not in issue, add the following shaded section*.]

In this case it was conceded by the defence that NOA was NOC's [*describe relationship*] and that the complainant was thus under the care, supervision or authority of the accused [at the relevant time]. While it is for you to determine whether this was the case, you should have no difficulty finding that this element has been proven.

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[735] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

[*If care, supervision or authority is in issue and the prosecution relies on a prescribed relationship, add the following shaded section*.]

Parliament has defined a number of relationships where a child is deemed to be under the care, supervision and authority of another person. This includes [*name relevant relationships from s 37 list*].

In this case the prosecution alleged that NOA was NOC's [*describe relationship*]. [*Insert prosecution evidence.*] The defence responded [*insert relevant evidence and/or arguments*].

If you find beyond reasonable doubt that NOA was NOC's [*identify relationship*] at the time of the alleged offence(s), then you will find this element has been proven.

[*If care, supervision or authority is in issue and the prosecution does not rely on a standing relationship, add the following shaded section*.]

The words "care, supervision or authority" all describe different types of relationships where the accused is in a position to exploit or take advantage of that relationship to influence the child to engage in a sexual act. You should take this into account when deciding whether the prosecution has proved that the complainant was under the accused's care, supervision or authority.

The relationship of care, supervision or authority does not have to be a formal one. There does not, for example, have to have been a formal agreement that the accused would take care of the complainant. An informal relationship of care, supervision or authority is sufficient.

[*If relevant, add:* You do not need to find that the alleged act of touching was actually connected with, or influenced by, the relationship of care, supervision or authority or that NOA was actually exploiting his/her position of advantage. It is sufficient if you are satisfied that an established relationship of care, supervision or authority existed between NOA and NOC that *could have* been connected with, or influenced the child to engage in, [*identify relevant activity*], and that the relationship existed on the day on which the [*identify relevant activity*] took place.]

In this case the prosecution alleged that NOC was under NOA's [care/supervision/authority]. [*Insert prosecution evidence*]. The defence responded [*insert relevant evidence and/or arguments*].

It is for you to determine, on the basis of all the evidence, whether the prosecution has proven, beyond reasonable doubt, that NOC was under NOA's care, supervision or authority at the time that the sexual touching took place.

[*If the accused may be unaware of the facts giving rise to a relationship of care, supervision or authority, add the following shaded section.*]

The law states that NOA must know and be aware of the facts that give rise to a relationship of care, supervision or authority. For example, if a teacher with a large number of students did not recognise the complainant was a member of one of his/her classes, then you could not find this element proved.

[*Insert relevant prosecution and defence evidence and arguments.*]

[*If the accused raises the defence in Crimes Act 1958 s 49ZA of a reasonable belief as to no care, supervision or authority, add the following shaded section.*]

This element requires you to look at the facts and decide whether NOC was under NOA's care, supervision or authority. The prosecution does not need to prove that NOA thought NOC was under his/her care, supervision or authority.

However, the law provides that NOA has a defence to this charge if s/he can show that s/he reasonably believed that NOC was not under his/her care, supervision or authority.

Unlike the elements of the offence, this is a matter which the accused must prove. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that NOC was not under his/her care, supervision or authority on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he believed NOC was not under his/her care, supervision or authority and that this belief was reasonable. Unlike the prosecution, s/he does not need to prove this matter beyond reasonable doubt.

[*Refer to relevant evidence and arguments.*]

Contrary to community standards of acceptable conduct

The seventh element that the prosecution must prove is that [*identify relevant activity*] in NOC's presence was contrary to community standards of acceptable conduct.

The law says that whether engaging in an activity in the presence of NOC is contrary to community standards depends on the circumstances, and that this includes the purpose of the activity and whether NOA seeks or gets sexual arousal or sexual gratification from engaging in the activity or from NOC's presence.

The law also says that whether NOC consented to NOA [*identify relevant activity*] or whether NOC consented to being present when NOA [*identify relevant activity*] are not relevant to whether [*identify relevant activity*] in NOC's presence was contrary to community standards. Similarly, whether NOA believed that NOC consented to NOA [*identify relevant activity*] or whether NOA believed that NOC consented to being present when NOA [*identify relevant activity*] are not relevant to this element.

[*Refer to relevant prosecution and defence evidence and arguments.*]

Defences

Reasonable belief as to age

[*If the accused relies on the belief in age defence in Crimes Act 1958 s 49X, add the following shaded section.*]

For this offence, the law recognises a defence which may be termed "reasonable belief in age".

This defence is available if the accused had a reasonable belief that at the time of the activity, the complainant was 18 years of age or more.

Unlike the elements of the offence, this is a matter which the accused must prove. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that NOC was aged 18 or more on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he believed that NOC was aged 18 or more and that this belief was reasonable. Unlike the prosecution, s/he does not need to prove this matter beyond reasonable doubt.

Marriage or domestic partnership

[*If the accused relies on the domestic partnership defence in Crimes Act 1958 s 49Y, add the following shaded section.*]

For this offence, the law recognises a defence which may be termed "domestic partnership".

There are three parts to the defence.

First, NOA must be no more than 5 years older than NOC. This applies here.

Second, NOA must be NOC's domestic partner. The law recognises that two people are in a domestic partnership if they are not married but are living as a couple on a genuine domestic basis.

To decide whether two people are domestic partners, you must consider all the circumstances of the relationship, including [*add the following factors from Relationships Act 2008* s 35(2), *as relevant*:

(a) the degree of mutual commitment to a shared life;

(b) the duration of the relationship;

(c) the nature and extent of common residence;

(d) whether or not a sexual relationship exists;

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(f) the ownership, use and acquisition of property;

(g) the care and support of children;

(h) the reputation and public aspects of the relationship.

[*Refer to relevant evidence and arguments.*]

Third, the domestic partnership must have started before NOC came under NOA's care, supervision or authority.

[*Refer to relevant evidence and arguments.*]

Remember, while I called this a defence, it is the prosecution's role to prove guilt. This means that the prosecution must show that this defence of domestic partnership does not apply. In other words, you cannot find NOA guilty unless the prosecution can prove beyond reasonable doubt either that NOA was not NOC's domestic partner, or that the domestic partnership started after NOC came under NOA's care, supervision or authority.

Reasonable belief as to marriage or domestic partnership

[*If the accused relies on the reasonable belief in domestic partnership defence in Crimes Act 1958 s 49Z, add the following shaded section*.]

For this offence, the law recognises a defence which may be termed "reasonable belief in domestic partnership".[736]

There are three parts to this defence.

First, NOA must be no more than 5 years older than NOC. This applies here.

Second, NOA must have reasonably believed that s/he was in a domestic partnership with NOC.

The law recognises that two people are in a domestic partnership if they are not married but are living

[736] Section 49Z also creates a reasonable belief in marriage defence. If the accused relies on this defence the directions must be modified accordingly.

as a couple on a genuine domestic basis.[737]

To decide whether two people are domestic partners, you must consider all the circumstances of the relationship, including [*add the following factors from Relationships Act 2008* s 35(2), *as relevant*:

(a) the degree of mutual commitment to a shared life;

(b) the duration of the relationship;

(c) the nature and extent of common residence;

(d) whether or not a sexual relationship exists;

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(f) the ownership, use and acquisition of property;

(g) the care and support of children;

(h) the reputation and public aspects of the relationship.

Third, NOA must have reasonably believed that this domestic partnership started before NOC came under his/her care, supervision or authority.

[*Refer to relevant evidence and arguments.*]

Unlike the elements of the offence, the accused must prove these matters. It is an exception to the general rule that the prosecution must prove all matters. However, the accused only need to prove that s/he reasonably believed that s/he was in a domestic partnership with NOC which started before NOC came under his/her care, supervision or authority on the balance of probabilities. In other words, s/he must show that it is more likely than not that s/he believed that s/he was in a domestic partnership with NOC which started before NOC came under his/her care, supervision or authority and that this belief was reasonable. Unlike the prosecution, s/he does not need to prove this matter beyond reasonable doubt.

Summary

To summarise, before you can find NOA guilty of sexual activity in the presence of a child aged 16 or 17, the prosecution must prove to you beyond reasonable doubt:

- One – the accused intentionally engaged in an activity.
- Two – the activity was sexual.
- Three – NOC was present during that activity.
- Four – NOA knew that NOC was or probably was present during that activity.
- Five – NOC was a child aged 16 or 17 years.
- Six – NOC was under NOA's care, supervision or authority.

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[737] Section 35 defines a domestic partner also as a person who is in a registered domestic relationship with the person. If the accused relies on this limb of the definition the directions must be modified accordingly.

- Seven – Engaging in the activity in the presence of NOC is contrary to community standards of acceptable conduct.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual activity in the presence of a child aged 16 or 17.

Last updated: 1 July 2017

7.3.22.2 Checklist: Sexual Activity in Presence of a Child Aged 16 or 17 under Care, Supervision or Authority (From 1/7/17)

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Seven elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally engaged in an activity; and

2. The activity was sexual; and

3. The complainant was present during that activity; and

4. The accused knew that the complainant was or probably was present during that activity; and

5. The complainant was under the age of 16; and

6. The complainant was under the accused's care, supervision or authority; and

7. Engaging in the activity in the presence of the complainant was contrary to community standards of acceptable conduct.

Intentional activity

1. Did the accused intentionally [*identify relevant activity*]?

If Yes then go to 2

If No, then the accused is not guilty of Sexual Activity in presence of a child aged 16 or 17

Sexual activity

2. Is [*identify relevant activity*] a sexual activity?

Consider – An activity may be sexual because of the area of body involved, the fact that the person doing it seeks or gets sexual arousal or gratification from the activity, or any other reason.

If Yes then go to 3

If No, then the accused is not guilty of Sexual Activity in presence of a child aged 16 or 17

Presence of complainant

3. Was NOC present when NOA [*identify relevant activity*]?

If Yes then go to 4

If No, then the accused is not guilty of Sexual Activity in presence of a child aged 16 or 17

Accused knew that complainant present

4. Did NOA know that NOC was or probably was present when s/he [*identify relevant activity*]?

If Yes then go to 5

If No, then the accused is not guilty of Sexual Activity in presence of a child aged 16 or 17

Complainant under the age of 16

5. At the time of the act, was NOC under the age of 16?

If Yes then go to 6

If No, then the accused is not guilty of Sexual Activity in presence of a child aged 16 or 17

Care, supervision or authority

6. At the time of the activity, was NOC under NOA's care, supervision or authority?

If Yes then go to 7

If No, then the accused is not guilty of Sexual Activity in presence of a child aged 16 or 17

Contrary to community standards of acceptable conduct

7. Is it contrary to community standards of acceptable conduct for NOA to [*identify relevant activity*] in the presence of NOC?

Consider – Relevant matters include the purpose of the activity and whether the accused was seeking or got sexual arousal or gratification from engaging in the activity in the presence of the complainant

Consider – Whether NOC consented to being present or the activity or whether NOA believed NOC consented to being present or the activity is not relevant to this element

If Yes then the accused is guilty of Sexual Activity in presence of a child aged 16 or 17 (as long as you also answered Yes to Questions 1, 2, 3, 4, 5 and 6)

If No, then the accused is not guilty of Sexual Activity in presence of a child aged 16 or 17

Last updated: 1 July 2017

7.3.23 Persistent Sexual Abuse of a Child (From 1/7/17)

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Commencement information

1. The offence of "persistent sexual abuse of a child under the age of 16" is currently located in *Crimes Act 1958* s 49J. This provision was introduced on 1 July 2017.
2. Prior to 1 July 2017, the offence was found in *Crimes Act 1958* s 47A.
3. *Crimes Act 1958* s 47A commenced operation on 5 August 1991. It was enacted to overcome problems that can arise when a young child, who has been the subject of repeated sexual abuse by the same person over a lengthy period, is unable to identify with any precision the occasions upon which particular sexual acts occurred (*R v Macfie* [2000] VSCA 173).

4. The provision was amended in 1997. This amendment *removed* the requirements that:
    - The child have been under the care, supervision or authority of the accused; and
    - The prosecution prove at least three sexual offences of the *same kind*.
5. The amendment also amended the requirement for particulars. Prior to the amendment, s 47A(3) specified that "it is not necessary to prove the dates or the exact circumstances of the alleged occasions". Under the 1997 amendments, this was replaced with:

    > It is not necessary to prove an act referred to in sub-section (2)(a) or (b) with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged with an offence constituted by that act instead of an offence against sub-section (1).

6. The 1997 modifications commenced operation on 1 January 1998. The removal of the requirement that the child was under the care, supervision or authority of the accused only applies to acts committed on or after that date (*Crimes Act 1958* s 587(3)). The removal of the requirement that the sexual offences were of the same kind, and the changes to s 47A(3) concerning the degree of particulars required, apply to all offences where the charge is filed on or after 1 January 1998, regardless of when the offence is alleged to have been committed (*Crimes Act 1958* s 587(5)).
7. For the purpose of s 587(3), if an offence is alleged to have been committed between dates, one date before and one date on or after 1 January 1998, the offence should be treated as having been committed before 1 January 1998 (*Crimes Act 1958* s 587(4)).
8. Section 47A was further amended on 1 December 2006. These amendments modified the description of the offence, but not its elements. Previously, the offence was called "maintaining a sexual relationship with a child under the age of 16". By the 2006 amendment, the offence was renamed to its current name of "persistent sexual abuse of a child under the age of 16". This "name–change" applies only to offences committed on or after 1 December 2006 (*Crimes Act 1958* s 606A). Unless otherwise indicated, references below to the new offence name apply also to the original offence.
9. The section was further amended on 22 October 2014, to remove the requirement that the child was not married to the accused. This applies only to offences committed on or after that date (*Crimes Amendment (Sexual Offences and Other Matters) Act 2014* s 5).
10. On 1 July 2017 the *Crimes Amendment (Sexual Offences) Act 2016* commenced operation. This Act repealed section 47A and replaced it with the offence in section 49J.
11. This topic describes the elements of both the former section 47A offence and the current section 49J offence.

The elements – Pre 1 July 2017

12. Prior to 1 July 2017, persistent sexual abuse of child under the age of 16 has the following two elements:

    i) On at least three occasions the accused committed acts which would constitute an offence under a provision of Subdivisions 8A, 8B or 8C of the Crimes Act;

    ii) These acts were committed against a child who was under the age of 16 at the time.

13. For offences alleged to have been committed prior to 22 October 2014, there is a third element:

    iii) The accused was not married to the child at the relevant time.

14. The offences specified in Subdivisions 8A, 8B or 8C are:
    - Rape (s 38);
    - Indecent Assault (s 39);

- Assault with Intent to Rape (s 40);
- Incest (s 44);
- Sexual Penetration of a Child Under 16 (s 45);
- Indecent Act with a Child Under 16 (s 47);
- Sexual Penetration of a 16 or 17 Year Old Child (s 48);
- Indecent Act with a 16 or 17 Year Old Child (s 49); and
- Facilitating Sexual Offences Against Children (s 49A).

15. Prior to 1 December 2006 s 47A(1) stated that a person who "maintains a sexual relationship" with a child is guilty of an offence. However, the *actus reus* of the offence was never the maintenance of a sexual relationship with a child. It has always been (in this respect) the commission of the acts outlined above (*KBT v R* (1997) CLR 417; *KRM v R* (2001) 206 CLR 221; *R v GJB* (2002) 4 VR 355).

16. It is therefore not necessary for the prosecution to prove that there was a "relationship" between the accused and the child; that the relationship was a sexual one; that the relationship was "maintained" over a period of time; or that the accused intended that the sexual behaviour would be ongoing. The prosecution merely needs to prove the commission of offences of the specified type on at least three occasions (*R v KRM* (1999) 105 A Crim R 437; *R v Macfie* [2000] VSCA 173; *R v Sobevski* (2004) 150 A Crim R 355).

The elements – Post 1 July 2017

17. Under section 49J(1), the offence consists of two elements:

    (a) A sexually abuses another person (B) on at least 3 occasions during a particular period; and

    (b) B is a child under the age of 16 years during the whole of that period.

18. The term "sexually abuses" is defined in s 49J(5) as conduct that would involve the commission by A of any of the following–

    (a) An offence against a provision of Subdivision (8A) (rape, sexual assault and associated sexual offences);

    (b) An offence against section 49A(1) (sexual penetration of a child under the age of 12);

    (c) An offence against section 49B(1) (sexual penetration of a child under the age of 16);

    (d) An offence against section 49D(1) (sexual assault of a child under the age of 16);

    (e) An offence against section 49F(1) (sexual activity in the presence of a child under the age of 16);

    (f) An offence against section 49H(1) (causing a child under the age of 16 to be present during sexual activity);

    (g) An offence against a provision of Subdivision (8C) (incest).

19. The effect of this revised list is to:

    - update the list to include newly defined offences such as causing a child under 16 to be present during sexual activity;
    - remove the superfluous references to sexual offences against children aged 16 or 17 from the list of notionally available offences; and
    - remove the facilitation offence (now located in s 49S) from the list of included offences.

20. The new definition of the offence also states in clearer language that the child must be under the age of 16 for the whole of the period of the offending. Otherwise, the principles established in relation to the old *Crimes Act 1958* s 47A offence continue to apply to the operation of the new s 49J.

Proof of at least three acts

21. The prosecution must prove that on at least three occasions while the complainant was under the age of 16 the accused committed acts of the relevant kind (ss 47A(2), 49J(1)).

22. It is no longer necessary that the acts committed be of a similar nature or constitute an offence under the same provision (ss 47A(2A), 49J(3)). It is therefore possible for a jury to convict an accused if, for example, they find that the accused sexually or indecently assaulted a child on one occasion, sexually penetrated them on another, and committed an indecent act with them (or engaged in sexual activity in their presence) on a third occasion.

23. It is not necessary to prove these acts "with the same degree of specificity as to date, time, place, circumstances or occasion" as would be required if the accused were charged with other offences constituted by those acts (ss 47A(3), 49J(4)).

24. While ss 47A(3) and 49J(4) reduces the specificity with which the relevant acts must be proved, they do not detract from the need to prove the actual commission of acts which constitute the specified sexual offences on at least three occasions.

25. The precise effect of the High Court's decision in *Hamra v R* [2017] HCA 38 on this requirement remains uncertain.

Pre-*Hamra* position

26. Prior to Hamra, courts held that the charge cannot be proved by a blanket assertion that on three or more occasions the accused committed one of the specified offences against the complainant (*KBT v R* (1997) CLR 417; *KRM v R* (2001) 206 CLR 221; *R v SLJ* (2010) 24 VR 372; *REE v R* [2010] VSCA 124).

27. The prosecution must therefore still prove the circumstances or occurrences surrounding each of the acts in sufficient detail to identify each "occasion" (*R v SLJ* (2010) 24 VR 372; *REE v R* [2010] VSCA 124; *R v Sobevski* (2004) 150 A Crim R 355; *KRM v R* (2001) 206 CLR 221 (McHugh and Kirby JJ, cf. Hayne J)).

28. As this issue is so fundamental, the prosecution should clearly identify the evidence to be relied upon to prove the three occasions well ahead of the trial (*REE v R* [2010] VSCA 124).

29. Reference to circumstances or occurrences happening at a particular time is the usual way of describing an "occasion" (*KRM v R* (2001) 206 CLR 221 (McHugh and Kirby JJ)*; R v SLJ* (2010) 24 VR 372).

30. The critical question is not whether acts of the kind alleged would, if proved to have occurred, have constituted three or more of the relevant types of sexual offence. The question is whether the evidence in question proves, beyond reasonable doubt, that the applicant had on three occasions – identified with "some specificity" – done an act which constituted a relevant sexual offence (*R v SLJ* (2010) 24 VR 372; *REE v R* [2010] VSCA 124).

31. Repeated references to what the accused "would always" or "would normally" do, in which the complainant is giving an account of what typically or routinely occurred, will not be sufficient. There must be something that distinguishes one occasion from another (*R v SLJ* (2010) 24 VR 372).

32. Where many occasions of sexual offending have been alleged, it is not sufficient for the prosecution to identify a first and a last occasion with specificity, and identify the third occasion as being "the next occasion after the first". All three occasions must be identified with specificity (*REE v R* [2010] VSCA 124).

33. If the prosecution cannot give particulars sufficient to identify each of the three occasions relied on to constitute the charge, in the absence of some special factor the proper course will be to stay the proceedings on this charge (*KRM v R* (2001) 206 CLR 221 (McHugh J)).

Effect of Hamra

34. *Hamra v R* [2017] HCA 38 concerned the South Australian equivalent to s 49J, which requires proof of two or more acts which constitute a specified offence, separated by at least three days. In the course of the judgment, the Court held that:

    - A jury could infer using deductive reasoning that the necessary number of acts and period of time where the complainant gave evidence of sexual exploitation every day over a two week period, or every weekend over a two month period, without identifying particular occasions (at [28], [46])
    - The Act does not always require evidence which allows acts of sexual exploitation to be delineated by reference to differentiating circumstances (at [45]).

35. The conclusion that a jury could find the offence proved if satisfied that relevant offences were committed every weekend for a period of two months without differentiating the particular occasions is difficult to reconcile with the principles outlined in *R v SLJ* (2010) 24 VR 372 and *REE v R* [2010] VSCA 124 that the occasions of each offence must be sufficiently specified.

36. Because the matter was not argued, it is not known whether s 49J is relevantly similar to s 50 of the *Criminal Law Consolidation Act 1935* (SA) such that previous Victorian decisions on ss 47A and 49J have been qualified or overruled.

37. In the South Australian Court of Criminal Appeal, Kourakis CJ had noted that the Victorian provision refers to "occasions", whereas the South Australian provision contemplates that it may not be possible to particularise an occasion sufficiently (*R v Hamra* (2016) 126 SASR 374, [35]). However, this passage was not considered or referred to by the High Court and neither was the earlier High Court decision *KRM v R* (2001) 206 CLR 221, which had considered the Victorian provision.

38. In obiter remarks made in an appeal against sentence for incest decided after Hamra, the Court of Appeal stated the Victoria offence requires proof of three distinct occasions and that a complainant cannot give evidence of what would typically or routinely occur (*McCray v R* [2017] VSCA 340, [28]).

39. Judges should therefore be circumspect about the possible relevance of *Hamra* to this offence and the prudent course is to treat *Hamra* as irrelevant to the Victorian legislation.

Extended unanimity requirement

40. Where there is evidence a relevant offence was committed on *more than three occasions*, it will be necessary to direct the jury specifically about the way in which the requirement for unanimity works in this context. In such a case, it is not sufficient for the jury simply to agree that a relevant offence was committed on at least three occasions. They must be in agreement about the three occasions on which a relevant offence was committed. This is known as the requirement for 'extended unanimity' (*KBT v R* (1997) CLR 417; *R v KRM* (1999) 105 A Crim R 437; *R v Sobevski* (2004) 150 A Crim R 355; *REE v R* [2010] VSCA 124; *Chiro v R* [2017] HCA 37).

41. Similarly, if there is evidence that *more than one relevant offence* was committed on any of the alleged occasions, the jury will need to agree about which of those offences the accused committed, rather than simply agreeing that the accused committed a relevant offence on three or more occasions (*KBT v R* (1997) CLR 417; *R v KRM* (1999) 105 A Crim R 437; *R v Sobevski* (2004) 150 A Crim R 355).

42. It is therefore necessary for a judge to make clear to the jury that:

    - They have to be agreed about the occasions on which the accused committed a relevant offence; and

- They have to be agreed about the offences committed on those occasions.

43. The judge should also make clear which alleged acts and occasions the prosecution relies on to prove the offence (*R v Sobevski* (2004) 150 A Crim R 355).

44. In relation to similar South Australian legislation, the High Court has held that in the event of a guilty verdict, the judge should usually ask the jury to specify which of the particularised offences have been proved beyond reasonable doubt. This unusual process is a consequence of the extended unanimity requirement and the fact that the actus reus of this offence is the commission of other offences (*Chiro v R* [2017] HCA 37, [37]–[45], [65]–[67]).

45. This process of asking the jury to specify the occasions which they found proved does not involve the jury returning a special verdict. A special verdict would involve the jury making pure findings of fact concerning proof of individual occasions, which the court would convert to a general verdict. In contrast, under the process discussed in *Chiro*, the jury returns a general verdict of guilty, and is only expected to specify which occasions were proved after they return that verdict (see *Chiro v R* [2017] HCA 37, [29], [32).

46. Without information from the jury on the nature of its verdict, a judge must sentence on the basis that the jury had convicted the accused of the minimum number of the least serious offences which the prosecution alleged (*Chiro v R* [2017] HCA 37, [52]–[53]).

47. A jury should therefore be informed during directions that they will be asked to identify the occasions proved (*Chiro v R* [2017] HCA 37, [47], [49]).

48. As a matter of practice, the judge should provide the jury with a list of the possible occasions in writing, and invite the jury to specify the proved occasions in writing using that list. A template for providing a list of occasions is provided at 7.3.23.9 Jury handout: Identifying occasions for persistent sexual abuse of a child under 16.

49. A jury cannot be compelled to provide this information, or continue to deliberate to identify additional proved occasions after reaching the minimum necessary to give a verdict (*Chiro v R* [2017] HCA 37, [49], [51]). However, the judge should inform the jury that the information sought will help the judge give effect to the jury's verdict.

Alternative Offences

50. Sections 47A(5) and 49J(7) specifically provide that where a jury is not satisfied of the persistent sexual abuse offence but is satisfied that the accused engaged in conduct during the qualifying period that constitutes one or more qualifying offences, then the jury must find the accused not guilty of the persistent sexual abuse offence and may find the accused guilty of one or more instances of a qualifying offence (*Crimes Act 1958* ss 47A(5), 49J(7)).

51. Where the prosecution alleges that the accused committed an offence against s 47A or s 49J, and further alleges that, during the same period, s/he committed specific qualifying offences, the specific qualifying offences averred must be treated as particulars of, and alternatives to, the offence of persistent sexual abuse. A person must not be convicted of both an offence against s 47A or s 49J and the specific offences which are relevant to proving that offence (*R v GJB* (2002) 4 VR 355; *R v Sobevski* (2004) 150 A Crim R 355).

52. This is because the offence created by ss 47A and 49J subsumes within its requirement of proof of "at least" three relevant acts all of the acts done by the accused in relation to the child during the period of the relationship which are offences of the relevant kind. Every such act committed within the specified period is capable of being relied upon by the prosecution to prove the offence, and must necessarily be an ingredient or particular of that offence (*R v GJB* (2002) 4 VR 355).

53. The s 47A or s 49J charge must therefore not be confined to some of the acts allegedly committed by the accused during the relevant period, with other acts alleged to have been committed by the accused during that period charged as substantive offences punishable independently (*R v GJB* (2002) 4 VR 355; *R v RNT* [2009] VSCA 137).

54. This does not mean that the offences that the prosecution relies upon to establish a count of persistent sexual abuse cannot be charged separately. It merely means that when charged separately, such counts must be regarded as alternatives to the more general s 47A or s 49J charge, of which they can be seen to be particulars (*R v Menta* [2004] VSCA 57. See also ss 47A(5) and 49J(7)).

Other Directions and Warnings

55. The fact that it is possible for the jury to convict on the basis of acts which have not been specified with a high degree of particularity creates the potential for unfairness to the accused, who may find it difficult to defend against the allegations. It is therefore important that the trial judge's summing-up include whatever directions are necessary to ensure that the accused's trial is fair (*KRM v R* (2001) 206 CLR 221 (Kirby J); *R v Kemp (No.2)* [1998] 2 Qd R 510).
56. This may include addressing the special risk of unfairness that arises from the generalised nature of the allegations, and the difficulties confronting an accused person in meeting such allegations (*KRM v R* (2001) 206 CLR 221 (Gummow and Callinan JJ); *R v Kemp (No.2)* [1998] 2 Qd R 510).
57. Consideration should also be given to the need to give a direction about other misconduct evidence (see, e.g. *KRM v R* (2001) 206 CLR 221; *R v J (No 2)* [1998] 3 VR 602 at 642–3. See also Tendency Evidence and Other Forms of Other Misconduct Evidence).

Director's Consent

58. A prosecution for an offence under s 47A or s 49J must not be commenced without the consent of the Director of Public Prosecutions (ss 47A(7), 49J(9)).
59. It is usual for the prosecutor to advise the court before the case begins that the Director's consent has been obtained and is available in court (in the prosecution file).

Last updated: 30 November 2017

7.3.23.1 Charge: Persistent Sexual Abuse of a Child (From 1/7/17)

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I must now direct you about the crime of persistent sexual abuse of a child under 16. To prove this crime, the prosecution must prove the following 2 elements beyond reasonable doubt:

One – the complainant, NOC, was under the age of 16 between [*insert dates alleged in the count*]. In this case, there is no dispute that NOC was under 16 during this period.[738]

Two – on at least three occasions between [*insert dates alleged in the count*] the accused committed the offence[s] of [*insert relevant offences*] in relation to the complainant.[739] I will explain the meaning of [this offence/these offences] in a moment.

[738] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

[739] The offences that can establish a count of persistent sexual abuse of a child under 16 are offences against a provision of Subdivision (8A) (rape, sexual assault and associated sexual offences), sexual penetration of a child under 12 (s 49A(1)), sexual penetration of a child under 16 (s 49B(1)), sexual assault of a child under 16 (s 49D(1)), sexual activity in the presence of a child under 16 (s 49F(1)), causing a child under 16 to be present during sexual activity (s 49H(1)), incest (Subdivision (8C)).

It is the commission of [this offence/these offences] on at least three occasions that constitutes the "persistent sexual abuse" referred to in the name of this offence. NOA will therefore be guilty of this offence if the prosecution has proved, beyond reasonable doubt, that on at least three occasions during the relevant period, [he/she] committed [this offence/these offences] in relation to a child under the age of 16.

[*If different types of offences have been alleged, add the following shaded section*.]

The offences do not have to be of the same type. That is, you do not need to find that the accused committed three acts of [*insert one relevant offence*] or three acts of [*insert another relevant offence*] for this element to be met. The element will be satisfied if, on at least three occasions, the accused committed any of the relevant offences – for example, [*insert one relevant offence*] on one occasion, and [*insert another relevant offence*] on two other occasions.

Elements of the constituting offence[s]

[*Insert elements of the relevant offence[s] and apply to the facts in issue*.]

Specificity of "occasions"

This offence is a little unusual. Ordinarily, the prosecution will need to provide specific details of the offence alleged, such as when and where it took place. However, the law says that this is not necessary in relation to the offence of persistent sexual abuse of a child under 16.

This does not mean that you can convict the accused simply because you believe that, on at least three occasions between [*insert dates*], they committed [*insert relevant offences*]. The prosecution must still prove, beyond reasonable doubt, that there were three separate occasions on which NOA committed such an offence, even if they cannot provide precise details about those occasions.

In this case, the prosecution alleged that the offences occurred on the following occasions: [*insert details of the occasions alleged to provide the basis of the offence*].

Special Directions

[*Insert any directions or warnings necessary in accordance with Jury Directions Act 2015 Part 3*.]

Need for Unanimity

The need for a specific direction[740] about the requirement for unanimity in the context of this offence, and the content of that direction, will depend on the number of occasions and the number of offences raised by the evidence in the case. Four possible situations may arise:

i) There is evidence that relevant offences were committed on only three occasions, and for each of those occasions there is evidence of only one relevant offence having been committed;

ii) There is evidence that relevant offences were committed on only three occasions, but there is evidence that on one [or more] of those occasions more than one relevant offence was committed;

[740] Note that a general direction about the requirement for unanimity will always be required. See Unanimous and Majority Verdicts.

iii) There is evidence that relevant offences were committed on more than three occasions, but on each of those occasions there is evidence of only one offence having been committed; and

iv) There is evidence that relevant offences were committed on more than three occasions, and there is evidence that on one [or more] of these occasions more than one relevant offence was committed.

There is no need for a specific unanimity direction in relation to the first situation (although a general direction about unanimity will still be required), but a direction will be necessary for each of the other circumstances. The appropriate direction should be selected from the shaded sections below.

[*If there is evidence that relevant offences were committed on only three occasions, but there is evidence that on one [or more] of those occasions more than one relevant offence was committed, add the following shaded section*.]

I have told you that for this second element to be met, you must be satisfied that, on at least three occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed a number of offences on [one of/some of/each of] those three occasions. [*Outline the alleged offences.*]

You do not need to find that the accused committed all of these offences. This element will be satisfied even if you determine that NOA committed just one offence on three separate occasions.

However, you must all be in agreement about the three offences committed by NOA. It is not, for example, sufficient for some of you to decide that on [*insert occasion*] [he/she] committed [*insert offence*], and for others to decide that on that occasion [he/she] committed [*insert different offence*].

For this second element to be met, you must all be in agreement about the offence or offences committed on each of the three alleged occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved on each occasion. To help you with this, my associate has given you a document that lists the offences alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to your verdict. I will only ask for this document if you find NOA guilty of this offence.

[*If there is evidence that relevant offences were committed on more than three occasions, but on each of those occasions there is evidence of only one offence having been committed, add the following shaded section*.]

I have told you that for this second element to be met, you must be satisfied that, on at least three occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed such an offence on more than three occasions. [*Outline the alleged occasions.*]

You do not need to find that the accused committed offences on all of these occasions. This element will be satisfied even if you determine that NOA committed [*insert relevant offences*] on only three of those occasions.

However, you must all be in agreement about the occasions on which NOA committed such an offence. It is not sufficient for some of you to decide that [he/she] committed an offence on three particular occasions, such as [*insert examples from evidence*], while others determine that [he/she] committed an offence on a different three occasions, such as [*insert examples from evidence*].

For this second element to be met, you must all be in agreement that NOA committed [*insert relevant offences*] on the same three occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved. To help you with this, my associate has given you a document that lists the occasions alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to

your verdict. I will only ask for this document if you find NOA guilty of this offence.

[*If there is evidence that relevant offences were committed on more than three occasions, and there is evidence that on one [or more] of these occasions more than one relevant offence was committed, add the following shaded section*.]

I have told you that for this second element to be met, you must be satisfied that, on at least three occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed such an offence on more than three occasions. [*Outline the alleged occasions.*]

You do not need to find that the accused committed offences on all of these occasions. This element will be satisfied even if you determine that NOA committed [*insert relevant offences*] on only three of those occasions.

However, you must all be in agreement about the occasions on which NOA committed such an offence. It is not sufficient for some of you to decide that [he/she] committed an offence on three particular occasions, such as [*insert examples from evidence*], while others determine that [he/she] committed an offence on a different three occasions, such as [*insert examples from evidence*].

The prosecution also alleged that NOA committed a number of offences on [one of/some of/each of] those occasions. [*Outline the alleged offences.*]

Again, you do not need to find that the accused committed all of these offences. This element will be satisfied even if you determine that NOA committed just one offence on three separate occasions.

However, you must also all be in agreement about the three offences committed by the NOA. It is not, for example, sufficient for some of you to decide that on [*insert occasion*] [he/she] committed [*insert offence*], and for others to decide that on that occasion [he/she] committed [*insert different offence*].

So for this second element to be met, you must all be in agreement about the three occasions on which NOA committed [*insert relevant offences*], and you must also be in agreement about the offence [he/she] committed on those occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved on each occasion. To help you with this, my associate has given you a document that lists the offences and occasions alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to your verdict. I will only ask for this document if you find NOA guilty of this offence.

Summary

To summarise, before you can find NOA guilty of persistent sexual abuse of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

- One – that NOC was under the age of 16 between [*insert dates alleged in the count*]; and
- Two – that on at least three occasions between [*insert dates alleged in the count*] NOA committed the offence[s] of [*insert relevant offences*] in relation to the complainant. This requires the prosecution to prove that [*insert summary of elements of the relevant offences*].

If you find that either of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of persistent sexual abuse of a child under the age of 16.

Last updated: 30 November 2017

7.3.23.2 Checklist: Persistent Sexual Abuse of a Child (From 1/7/17)

Click here to obtain a Word version of this document for adaptation

Two elements the prosecution must prove beyond reasonable doubt:

1. The complainant was under 16 between [*insert relevant dates*]; and

2. On at least three occasions between [*insert relevant dates*], the accused committed the crime[s] of [*identify relevant sexual offences*] against the complainant.

Age of complainant

1. Was the complainant aged under 16 at [*insert relevant dates*]?

If yes, then go to 2

If no, then the accused is not guilty of persistent sexual abuse of a child

Commission of offence on at least three occasions

2. Did the accused commit the offence[s] of [*identify relevant sexual offence(s)*] against the complainant on at least three occasions between [*insert relevant dates*]?

Consider – See separate document for the elements of [*identify relevant sexual offence(s)*]

If yes, then the accused is guilty of persistent sexual abuse of a child (as long as you also answered yes to question 1

If no, then the accused is not guilty of persistent sexual abuse of a child

Last updated: 1 July 2017

7.3.23.3 Charge: Persistent Sexual Abuse of Child under 16 (22/10/14–30/6/17)

Click here to obtain a Word version of this document for adaptation

This charge should only be used for offences alleged to have been committed between 22 October 2014 and 30 June 2017

I must now direct you about the crime of persistent sexual abuse of a child under 16. To prove this crime, the prosecution must prove the following 2 elements beyond reasonable doubt:

One – the complainant, NOC, was under the age of 16 between [*insert dates alleged in the count*]. In this case, there is no dispute that NOC was under 16 during this period.[741]

Two – on at least three occasions between [*insert dates alleged in the count*] the accused committed the offence[s] of [*insert relevant offences*] in relation to the complainant.[742] I will explain the meaning of [this offence/these offences] in a moment.

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[741] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

[742] The offences that can establish a count of persistent sexual abuse of a child under 16 are rape (s 38); indecent assault (s 39); assault with intent to rape (s 40); incest (s 44); sexual penetration of a child under the age of 16 (s 45); indecent act with a child under the age of 16 (s 47); sexual penetration of a 16 or 17 year old child (s 48); indecent act with a 16 or 17 year old child (s 49); and facilitating sexual offences against children (s 49A).

It is the commission of [this offence/these offences] on at least three occasions that constitutes the "persistent sexual abuse" referred to in the name of this offence. NOA will therefore be guilty of this offence if the prosecution has proved, beyond reasonable doubt, that on at least three occasions during the relevant period, [he/she] committed [this offence/these offences] in relation to a child under the age of 16.

[*If different types of offences have been alleged, add the following shaded section*.]

The offences do not have to be of the same type. That is, you do not need to find that the accused committed three acts of [*insert one relevant offence*] or three acts of [*insert another relevant offence*] for this element to be met. The element will be satisfied if, on at least three occasions, the accused committed any of the relevant offences – for example, [*insert one relevant offence*] on one occasion, and [*insert another relevant offence*] on two other occasions.

Elements of the constituting offence[s]

[*Insert elements of the relevant offence[s] and apply to the facts in issue*.]

Specificity of "occasions"

This offence is a little unusual. Ordinarily, the prosecution will need to provide specific details of the offence alleged, such as when and where it took place. However, the law says that this is not necessary in relation to the offence of persistent sexual abuse of a child under 16.

This does not mean that you can convict the accused simply because you believe that, on at least three occasions between [*insert dates*], they committed [*insert relevant offences*]. The prosecution must still prove, beyond reasonable doubt, that there were three separate occasions on which NOA committed such an offence, even if they cannot provide precise details about those occasions.

In this case, the prosecution alleged that the offences occurred on the following occasions: [*insert details of the occasions alleged to provide the basis of the offence*].

Special Directions

[*Insert any directions or warnings necessary in accordance with Jury Directions Act 2015 Part 3.*]

Need for Unanimity

[The need for a specific direction[743] about the requirement for unanimity in the context of this offence, and the content of that direction, will depend on the number of occasions and the number of offences raised by the evidence in the case. Four possible situations may arise:

i) There is evidence that relevant offences were committed on only three occasions, and for each of those occasions there is evidence of only one relevant offence having been committed;

ii) There is evidence that relevant offences were committed on only three occasions, but there is evidence that on one [or more] of those occasions more than one relevant offence was committed;

[743] Note that a general direction about the requirement for unanimity will always be required. See Unanimous and Majority Verdicts.

iii) There is evidence that relevant offences were committed on more than three occasions, but on each of those occasions there is evidence of only one offence having been committed; and

iv) There is evidence that relevant offences were committed on more than three occasions, and there is evidence that on one [or more] of these occasions more than one relevant offence was committed.

There is no need for a specific unanimity direction in relation to the first situation (although a general direction about unanimity will still be required), but a direction will be necessary for each of the other circumstances. The appropriate direction should be selected from the shaded sections below.]

[*If there is evidence that relevant offences were committed on only three occasions, but there is evidence that on one [or more] of those occasions more than one relevant offence was committed, add the following shaded section*.]

I have told you that for this second element to be met, you must be satisfied that, on at least three occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed a number of offences on [one of/some of/each of] those three occasions. [*Outline the alleged offences.*]

You do not need to find that the accused committed all of these offences. This element will be satisfied even if you determine that NOA committed just one offence on three separate occasions.

However, you must all be in agreement about the three offences committed by the NOA. It is not, for example, sufficient for some of you to decide that on [*insert occasion*] [he/she] committed [*insert offence*], and for others to decide that on that occasion [he/she] committed [*insert different offence*].

For this third element to be met, you must all be in agreement about the offence or offences committed on each of the three alleged occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved on each occasion. To help you with this, my associate has given you a document that lists the offences alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to your verdict. I will only ask for this document if you find NOA guilty of this offence.

[*If there is evidence that relevant offences were committed on more than three occasions, but on each of those occasions there is evidence of only one offence having been committed, add the following shaded section*.]

I have told you that for this third element to be met, you must be satisfied that, on at least three occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed such an offence on more than three occasions. [*Outline the alleged occasions*.]

You do not need to find that the accused committed offences on all of these occasions. This element will be satisfied even if you determine that NOA committed [*insert relevant offences*] on only three of those occasions.

However, you must all be in agreement about the occasions on which NOA committed such an offence. It is not sufficient for some of you to decide that [he/she] committed an offence on three particular occasions, such as [*insert examples from evidence*], while others determine that [he/she] committed an offence on a different three occasions, such as [*insert examples from evidence*].

For this third element to be met, you must all be in agreement that NOA committed [*insert relevant offences*] on the same three occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved. To help you with this, my associate has given you a document that lists the occasions alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to

your verdict. I will only ask for this document if you find NOA guilty of this offence.

[*If there is evidence that relevant offences were committed on more than three occasions, and there is evidence that on one [or more] of these occasions more than one relevant offence was committed, add the following shaded section*.]

I have told you that for this third element to be met, you must be satisfied that, on at least three occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed such an offence on more than three occasions. [*Outline the alleged occasions.*]

You do not need to find that the accused committed offences on all of these occasions. This element will be satisfied even if you determine that NOA committed [*insert relevant offences*] on only three of those occasions.

However, you must all be in agreement about the occasions on which NOA committed such an offence. It is not sufficient for some of you to decide that [he/she] committed an offence on three particular occasions, such as [*insert examples from evidence*], while others determine that [he/she] committed an offence on a different three occasions, such as [*insert examples from evidence*].

The prosecution also alleged that NOA committed a number of offences on [one of/some of/each of] those occasions. [*Outline the alleged offences*.]

Again, you do not need to find that the accused committed all of these offences. This element will be satisfied even if you determine that NOA committed just one offence on three separate occasions.

However, you must also all be in agreement about the three offences committed by the NOA. It is not, for example, sufficient for some of you to decide that on [*insert occasion*] [he/she] committed [*insert offence*], and for others to decide that on that occasion [he/she] committed [*insert different offence*].

So for this third element to be met, you must all be in agreement about the three occasions on which NOA committed [*insert relevant offences*], and you must also be in agreement about the offence [he/she] committed on those occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved on each occasion. To help you with this, my associate has given you a document that lists the offences and occasions alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to your verdict. I will only ask for this document if you find NOA guilty of this offence.

Summary

To summarise, before you can find NOA guilty of persistent sexual abuse of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

- One – that NOC was under the age of 16 between [*insert dates alleged in the count*]*;* and
- Two – that on at least three occasions between [*insert dates alleged in the count*] NOA committed the offence[s] of [*insert relevant offences*] in relation to the complainant. This requires the prosecution to prove that [*insert summary of elements of the relevant offences*].

If you find that either of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of persistent sexual abuse of a child under the age of 16.

Last updated: 30 November 2017

7.3.23.4 Checklist: Persistent Sexual Abuse of a Child under 16 (22/10/14–30/6/17)

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Two elements the prosecution must prove beyond reasonable doubt:

1. The complainant was under 16 between [*insert relevant dates*]; and

2. On at least three occasions between [*insert relevant dates*], the accused committed the crime[s] of [*identify relevant sexual offences*] against the complainant.

Age of complainant

1. Was the complainant aged under 16 at [*insert relevant dates*]?

If yes, then go to 2

If no, then the accused is not guilty of persistent sexual abuse of a child

Commission of offence on at least three occasions

2. Did the accused commit the offence[s] of [*identify relevant sexual offence(s)*] against the complainant on at least three occasions between [*insert relevant dates*]?

Consider – See separate document for the elements of [identify relevant sexual offence(s)]

If yes, then the accused is guilty of persistent sexual abuse of a child (as long as you also answered yes to question 1

If no, then the accused is not guilty of persistent sexual abuse of a child

Last updated: 22 January 2016

7.3.23.5 Charge: Persistent Sexual Abuse of Child under 16 (1/12/06–21/10/14)

Click here to obtain a Word version of this document for adaptation

This charge should only be used for offences alleged to have been committed between 1 December 2006 and 21 October 2014

I must now direct you about the crime of persistent sexual abuse of a child under 16. To prove this crime, the prosecution must prove the following three elements beyond reasonable doubt:

One – the complainant, NOC, was under the age of 16 between [*insert dates alleged in the count*]. In this case, there is no dispute that NOC was under 16 during this period.[744]

Two – the accused and the complainant were not married during this period. Again, there is no dispute that this was the case here.[745]

[744] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

[745] If it is alleged that the accused and the complainant were married, this section of the charge will need to be modified accordingly.

Three – on at least three occasions between [*insert dates alleged in the count*] the accused committed the offence[s] of [*insert relevant offences*] in relation to the complainant.[746] I will explain the meaning of [this offence/these offences] in a moment.

It is the commission of [this offence/these offences] on at least three occasions that constitutes the "persistent sexual abuse" referred to in the name of this offence. NOA will therefore be guilty of this offence if the prosecution has proved, beyond reasonable doubt, that on at least three occasions during the relevant period, [he/she] committed [this offence/these offences] in relation to a child under the age of 16 to whom [he/she] was not married.

[*If different types of offences have been alleged, add the following shaded section*.]

The offences do not have to be of the same type. That is, you do not need to find that the accused committed three acts of [*insert one relevant offence*] or three acts of [*insert another relevant offence*] for this element to be met. The element will be satisfied if, on at least three occasions, the accused committed any of the relevant offences – for example, [*insert one relevant offence*] on one occasion, and [*insert another relevant offence*] on two other occasions.

Elements of the constituting offence[s]

[*Insert elements of the relevant offence[s] and apply to the facts in issue.*]

Specificity of "occasions"

This offence is a little unusual. Ordinarily, the prosecution will need to provide specific details of the offence alleged, such as when and where it took place. However, the law says that this is not necessary in relation to the offence of persistent sexual abuse of a child under 16.

This does not mean that you can convict the accused simply because you believe that, on at least three occasions between [*insert dates*], they committed [*insert relevant offences*]. The prosecution must still prove, beyond reasonable doubt, that there were three separate occasions on which NOA committed such an offence, even if they cannot provide precise details about those occasions.

In this case, the prosecution alleged that the offences occurred on the following occasions: [*insert details of the occasions alleged to provide the basis of the offence*].

Special Directions

[*Insert any directions or warnings necessary to ensure a fair trial, e.g. a warning about tendency reasoning or another misconduct evidence direction*.]

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[746] The offences that can establish a count of persistent sexual abuse of a child under 16 are: rape (s 38); indecent assault (s 39); assault with intent to rape (s 40); incest (s 44); sexual penetration of a child under the age of 16 (s 45); indecent act with a child under the age of 16 (s 47); sexual penetration of a 16 or 17 year old child (s 48); indecent act with a 16 or 17 year old child (s 49); and facilitating sexual offences against children (s 49A).

Need for Unanimity

[The need for a specific direction[747] about the requirement for unanimity in the context of this offence, and the content of that direction, will depend on the number of occasions and the number of offences raised by the evidence in the case. Four possible situations may arise:

i) There is evidence that relevant offences were committed on only three occasions, and for each of those occasions there is evidence of only one relevant offence having been committed;

ii) There is evidence that relevant offences were committed on only three occasions, but there is evidence that on one [or more] of those occasions more than one relevant offence was committed;

iii) There is evidence that relevant offences were committed on more than three occasions, but on each of those occasions there is evidence of only one offence having been committed; and

iv) There is evidence that relevant offences were committed on more than three occasions, and there is evidence that on one [or more] of these occasions more than one relevant offence was committed.

There is no need for a specific unanimity direction in relation to the first situation (although a general direction about unanimity will still be required), but a direction will be necessary for each of the other circumstances. The appropriate direction should be selected from the shaded sections below.]

[*If there is evidence that relevant offences were committed on only three occasions, but there is evidence that on one [or more] of those occasions more than one relevant offence was committed, add the following shaded section*.]

I have told you that for this third element to be met, you must be satisfied that, on at least three occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed a number of offences on [one of/some of/each of] those three occasions. [*Outline the alleged offences.*]

You do not need to find that the accused committed all of these offences. This element will be satisfied even if you determine that NOA committed just one offence on three separate occasions.

However, you must all be in agreement about the three offences committed by the NOA. It is not, for example, sufficient for some of you to decide that on [*insert occasion*] [he/she] committed [*insert offence*], and for others to decide that on that occasion [he/she] committed [*insert different offence*].

For this third element to be met, you must all be in agreement about the offence or offences committed on each of the three alleged occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved on each occasion. To help you with this, my associate has given you a document that lists the offences alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to your verdict. I will only ask for this document if you find NOA guilty of this offence.

[*If there is evidence that relevant offences were committed on more than three occasions, but on each of those occasions there is evidence of only one offence having been committed, add the following shaded section*.]

I have told you that for this third element to be met, you must be satisfied that, on at least three

[747] Note that a general direction about the requirement for unanimity will always be required. See Unanimous and Majority Verdicts.

occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed such an offence on more than three occasions. [*Outline the alleged occasions.*]

You do not need to find that the accused committed offences on all of these occasions. This element will be satisfied even if you determine that NOA committed [*insert relevant offences*] on only three of those occasions.

However, you must all be in agreement about the occasions on which NOA committed such an offence. It is not sufficient for some of you to decide that [he/she] committed an offence on three particular occasions, such as [*insert examples from evidence*], while others determine that [he/she] committed an offence on a different three occasions, such as [*insert examples from evidence*].

For this third element to be met, you must all be in agreement that NOA committed [*insert relevant offences*] on the same three occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved. To help you with this, my associate has given you a document that lists the occasions alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to your verdict. I will only ask for this document if you find NOA guilty of this offence.

[*If there is evidence that relevant offences were committed on more than three occasions, and there is evidence that on one [or more] of these occasions more than one relevant offence was committed, add the following shaded section.*]

I have told you that for this third element to be met, you must be satisfied that, on at least three occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed such an offence on more than three occasions. [*Outline the alleged occasions.*]

You do not need to find that the accused committed offences on all of these occasions. This element will be satisfied even if you determine that NOA committed [*insert relevant offences*] on only three of those occasions.

However, you must all be in agreement about the occasions on which NOA committed such an offence. It is not sufficient for some of you to decide that [he/she] committed an offence on three particular occasions, such as [*insert examples from evidence*], while others determine that [he/she] committed an offence on a different three occasions, such as [*insert examples from evidence*].

The prosecution also alleged that NOA committed a number of offences on [one of/some of/each of] those occasions. [*Outline the alleged offences.*]

Again, you do not need to find that the accused committed all of these offences. This element will be satisfied even if you determine that NOA committed just one offence on three separate occasions.

However, you must also all be in agreement about the three offences committed by the NOA. It is not, for example, sufficient for some of you to decide that on [*insert occasion*] [he/she] committed [*insert offence*], and for others to decide that on that occasion [he/she] committed [*insert different offence*].

So for this third element to be met, you must all be in agreement about the three occasions on which NOA committed [*insert relevant offences*], and you must also be in agreement about the offence [he/she] committed on those occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved on each occasion. To help you with this, my associate has given you a document that lists the offences and occasions alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to your verdict. I will only ask for this document if you find NOA guilty of

this offence.

Summary

To summarise, before you can find NOA guilty of persistent sexual abuse of a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

One – that NOC was under the age of 16 between [*insert dates alleged in the count*]; and

Two – that NOA and NOC were not married during this period; and

Three – that on at least three occasions between [*insert dates alleged in the count*] NOA committed the offence[s] of [*insert relevant offences*] in relation to the complainant. This requires the prosecution to prove that [*insert summary of elements of the relevant offences*].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of persistent sexual abuse of a child under the age of 16.

Last updated: 30 November 2017

7.3.23.6 Checklist: Persistent Sexual Abuse of a Child under 16 (1/12/06–21/10/14)

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Three elements the prosecution must prove beyond reasonable doubt:

1. The complainant was under 16 between [*insert relevant dates*]; and

2. The accused and the complainant were not married during this period; and

3. On at least three occasions between [*insert relevant dates*], the accused committed the crime[s] of [*identify relevant sexual offences*] against the complainant.

Age of complainant

1. Was the complainant aged under 16 at [*insert relevant dates*]?

If yes, then go to 2

If no, then the accused is not guilty of persistent sexual abuse of a child

Complainant and Accused not married

2. Has the prosecution proved that the accused was not married to the complainant during this period?

If yes, then go to 3

If no, then the accused is not guilty of persistent sexual abuse of a child

Commission of offence on at least three occasions

3. Did the accused commit the offence[s] of [*identify relevant sexual offence(s)*] against the complainant on at least three occasions between [*insert relevant dates*]?

Consider – See separate document for the elements of [identify relevant sexual offence(s)]

If yes, then the accused is guilty of persistent sexual abuse of a child (as long as you also answered yes to questions 1 and 2)

If no, then the accused is not guilty of persistent sexual abuse of a child

Last updated: 22 January 2016

7.3.23.7 Charge: Maintaining a Sexual Relationship with a Child under 16 (5/8/91–30/11/06)

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This charge should only be used for offences alleged to have been committed before 1 December 2006

I must now direct you about the crime of maintaining a sexual relationship with a child under the age of 16. To prove this crime, the prosecution must prove the following three elements beyond reasonable doubt:

One – the complainant, NOC, was under the age of 16 between [*insert dates alleged in the count*]. In this case, there is no dispute that NOC was under 16 during this period.[748]

Two – the accused and the complainant were not married during this period. Again, there is no dispute that this was the case here.[749]

Three – on at least three occasions between [*insert dates alleged in the count*] the accused committed the offence[s] of [*insert relevant offences*] in relation to the complainant.[750] I will explain the meaning of [this offence/these offences] in a moment.

It is the commission of [this offence/these offences] on at least three occasions that constitutes the "sexual relationship" referred to in the name of this offence. NOA will therefore be guilty of this offence if the prosecution has proved, beyond reasonable doubt, that on at least three occasions during the relevant period, [he/she] committed [this offence/these offences] in relation to a child under the age of 16 to whom [he/she] was not married.

[*If different types of offences have been alleged, add the following shaded section*.]

The offences do not have to be of the same type. That is, you do not need to find that the accused committed three acts of [*insert one relevant offence*] or three acts of [*insert another relevant offence*] for this element to be met. The element will be satisfied if, on at least three occasions, the accused committed any of the relevant offences – for example, [*insert one relevant offence*] on one occasion, and [*insert another relevant offence*] on two other occasions.

Elements of the constituting offence[s]

[*Insert elements of the relevant offence[s] and apply to the facts in issue*.]

---

[748] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

[749] If it is alleged that the accused and the complainant were married, this section of the charge will need to be modified accordingly.

[750] The offences that can establish a count of maintaining a sexual relationship are: rape (s 38); indecent assault (s 39); assault with intent to rape (s 40); incest (s 44); sexual penetration of a child under the age of 16 (s 45); indecent act with a child under the age of 16 (s 47); sexual penetration of a 16 or 17 year old child (s 48); indecent act with a 16 year old child (s 49); and facilitating sexual offences against children (s 49A).

Specificity of "occasions"

This offence is a little unusual. Ordinarily, the prosecution will need to provide specific details of the offence alleged, such as when and where it took place. However, the law says that this is not necessary in relation to the offence of maintaining a sexual relationship with a child under 16.

This does not mean that you can convict the accused simply because you believe that, on at least three occasions between [*insert dates*], they committed [*insert relevant offences*]. The prosecution must still prove, beyond reasonable doubt, that there were three separate occasions on which NOA committed such an offence, even if they cannot provide precise details about those occasions.

In this case, the prosecution alleged that the offences occurred on the following occasions: [*insert details of the occasions alleged to provide the basis of the offence*].

Special Directions

[*Insert any directions or warnings necessary to ensure a fair trial, e.g. a warning about tendency reasoning or a relationship or context direction*.]

Need for Unanimity

[The need for a specific direction[751] about the requirement for unanimity in the context of this offence, and the content of that direction, will depend on the number of occasions and the number of offences raised by the evidence in the case. Four possible situations may arise:

i) There is evidence that relevant offences were committed on only three occasions, and for each of those occasions there is evidence of only one relevant offence having been committed;

ii) There is evidence that relevant offences were committed on only three occasions, but there is evidence that on one [or more] of those occasions more than one relevant offence was committed;

iii) There is evidence that relevant offences were committed on more than three occasions, but on each of those occasions there is evidence of only one offence having been committed; and

iv) There is evidence that relevant offences were committed on more than three occasions, and there is evidence that on one [or more] of these occasions more than one relevant offence was committed.

There is no need for a specific unanimity direction in relation to the first situation (although a general direction about unanimity will still be required), but a direction will be necessary for each of the other circumstances. The appropriate direction should be selected from the shaded sections below.]

[*If there is evidence that relevant offences were committed on only three occasions, but there is evidence that on one [or more] of those occasions more than one relevant offence was committed, add the following shaded section*.]

I have told you that for this third element to be met, you must be satisfied that, on at least three occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed a number of offences on [one of/some of/each of] those three occasions. [*Outline the alleged offences.*]

You do not need to find that the accused committed all of these offences. This element will be

[751] Note that a general direction about the requirement for unanimity will always be required. See Unanimous and Majority Verdicts.

satisfied even if you determine that NOA committed just one offence on three separate occasions.

However, you must all be in agreement about the three offences committed by the NOA. It is not, for example, sufficient for some of you to decide that on [*insert occasion*] [he/she] committed [*insert offence*], and for others to decide that on that occasion [he/she] committed [*insert different offence*].

For this third element to be met, you must all be in agreement about the offence or offences committed on each of the three alleged occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved on each occasion. To help you with this, my associate has given you a document that lists the offences alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to your verdict. I will only ask for this document if you find NOA guilty of this offence.

[*If there is evidence that relevant offences were committed on more than three occasions, but on each of those occasions there is evidence of only one offence having been committed, add the following shaded section*.]

I have told you that for this third element to be met, you must be satisfied that, on at least three occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed such an offence on more than three occasions. [*Outline the alleged occasions.*]

You do not need to find that the accused committed offences on all of these occasions. This element will be satisfied even if you determine that NOA committed [*insert relevant offences*] on only three of those occasions.

However, you must all be in agreement about the occasions on which NOA committed such an offence. It is not sufficient for some of you to decide that [he/she] committed an offence on three particular occasions, such as [*insert examples from evidence*], while others determine that [he/she] committed an offence on a different three occasions, such as [*insert examples from evidence*].

For this third element to be met, you must all be in agreement that NOA committed [*insert relevant offences*] on the same three occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved. To help you with this, my associate has given you a document that lists the occasions alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to your verdict. I will only ask for this document if you find NOA guilty of this offence.

[*If there is evidence that relevant offences were committed on more than three occasions, and there is evidence that on one [or more] of these occasions more than one relevant offence was committed, add the following shaded section*.]

I have told you that for this third element to be met, you must be satisfied that, on at least three occasions, the accused committed [*insert relevant offences*]. In this case, the prosecution alleged that NOA committed such an offence on more than three occasions. [*Outline the alleged occasions.*]

You do not need to find that the accused committed offences on all of these occasions. This element will be satisfied even if you determine that NOA committed [*insert relevant offences*] on only three of those occasions.

However, you must all be in agreement about the occasions on which NOA committed such an offence. It is not sufficient for some of you to decide that [he/she] committed an offence on three particular occasions, such as [*insert examples from evidence*], while others determine that [he/she] committed an offence on a different three occasions, such as [*insert examples from evidence*].

The prosecution also alleged that NOA committed a number of offences on [one of/some of/each of]

those occasions. [*Outline the alleged offences.*]

Again, you do not need to find that the accused committed all of these offences. This element will be satisfied even if you determine that NOA committed just one offence on three separate occasions.

However, you must also all be in agreement about the three offences committed by the NOA. It is not, for example, sufficient for some of you to decide that on [*insert occasion*] [he/she] committed [*insert offence*], and for others to decide that on that occasion [he/she] committed [*insert different offence*].

So for this third element to be met, you must all be in agreement about the three occasions on which NOA committed [*insert relevant offences*], and you must also be in agreement about the offence [he/she] committed on those occasions.

If you find NOA guilty of this offence, I will ask you, after you deliver your verdict, to tell the court which offences you found proved on each occasion. To help you with this, my associate has given you a document that lists the offences and occasions alleged. For each offence, please select "proved" or "not proved", depending on what you all agree has been proved beyond reasonable doubt. This will help the court to give effect to your verdict. I will only ask for this document if you find NOA guilty of this offence.

Summary

To summarise, before you can find NOA guilty of maintaining a sexual relationship with a child under the age of 16, the prosecution must prove to you beyond reasonable doubt:

One – that NOC was under the age of 16 between [*insert dates alleged in the count*]; and

Two – that NOA and NOC were not married during this period; and

Three – that on at least three occasions between [*insert dates alleged in the count*] NOA committed the offence[s] of [*insert relevant offences*] in relation to the complainant. This requires the prosecution to prove that [*insert summary of elements of the relevant offences*].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of maintaining a sexual relationship with a child under the age of 16.

Last updated: 30 November 2017

7.3.23.8 Checklist: Maintaining a Sexual Relationship with a Child under 16 (5/8/91–30/11/06)

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Three elements the prosecution must prove beyond reasonable doubt:

1. The complainant was under 16 between [*insert relevant dates*]; and

2. The complainant and the accused were not married during this period; and

3. On at least three occasions between [*insert relevant dates*], the accused committed the crime[s] of [*identify relevant sexual offences*] against the complaint.

Age of complainant

1. Was the complainant aged under 16 between [*insert relevant dates*]?

    If Yes, then go to 2

    If No, then the accused is not guilty of maintaining a sexual relationship with a child under 16

Marital status

2. Has the prosecution proved that the accused was not married to the complainant during this period?

If Yes, then go to 3

If No, then the accused is not guilty of maintaining a sexual relationship with a child under 16

Commission of offence on at least three occasions

3. Did the accused commit the offence[s] of [*identify relevant sexual offence(s)*] against the complainant on at least three occasions between [*insert relevant dates*]?

Consider – See separate document for the elements of [identify relevant sexual offence(s)]

If Yes, then the accused is guilty of maintaining a sexual relationship with a child under 16 (as long as you answered yes to questions 1 and 2)

If No, then the accused is not guilty of maintaining a sexual relationship with a child under 16

Last updated: 12 September 2019

7.3.23.9 Jury Handout: Identifying Occasions for Persistent Sexual Abuse of a Child under 16

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Explanation

This chapter contains three document templates for use in cases involving persistent sexual abuse of a child contrary to Crimes Act 1958 s 49J (offences alleged on or after 1 July 2017) or s 47A (offences alleged before 1 July 2017). Judges should select the relevant template based on the number of offences and occasions alleged. The document should be provided to the jury during final directions and explained as a means by which the jury can identify the offences and occasions proved, to help the judge to give effect to the jury's verdict in accordance with the principles in *Chiro v R* [2017] HCA 37.

In each template, the words in the heading contained in [square brackets] should be removed before the document is given to the jury.

Judges will also need to provide details to identify the occasions and the offences involved, consistent with how the occasions and offences have been identified during the trial.

When giving a majority verdict direction, the judge must make clear that references in the document to unanimity must be replaced with references to a statutory majority of jurors. This can be done either by instructing the jury to amend the document, or by giving the jury a fresh copy of the document that explains what a majority verdict is in the case.

Persistent sexual abuse – Identifying occasions proved [Template One – Three occasions, more than three offences]

Note: You can only find the accused guilty of this offence if you unanimously agree that an offence has been proved under each occasion.

First occasion

[Describe the circumstances of the first occasion]

(a) [Insert details of first offence on first occasion]

O Proved

O Not proved

(b) [Insert details of second offence on first occasion]

O Proved

O Not proved

Second occasion

[*Describe the circumstances of the second occasion*]

(a) [Insert details of first offence on second occasion]

O Proved

O Not proved

(b) [Insert details of second offence on second occasion]

O Proved

O Not proved

Third occasion

[*Describe the circumstances of the third occasion*]

(a) [Insert details of first offence on third occasion]

O Proved

O Not proved

(b) [Insert details of second offence on third occasion]

O Proved

O Not proved

Persistent sexual abuse – Identifying occasions proved [Template Two – More than three occasions, one offence per occasion]

Note: You can only find the accused guilty of this offence if you unanimously agree that an offence has been proved on at least three occasions.

First occasion

[*Describe the offence alleged on the first occasion*]

O Proved

O Not proved

Second occasion

[*Describe the offence alleged on the second occasion*]

O Proved

O Not proved

Third occasion

[*Describe the offence alleged on the third occasion*]

O Proved

O Not proved

Fourth occasion

[*Describe the offence alleged on the fourth occasion*]

O Proved

O Not proved

Fifth occasion

[*Describe the offence alleged on the fifth occasion*]

O Proved

O Not proved

Persistent sexual abuse – Identifying occasions proved [Template Three – More than three occasions, more than one offence per occasion]

Note: You can only find the accused guilty of this offence if you unanimously agree that at least one offence has been proved on at least three occasions.

First occasion

[*Describe the circumstances of the first occasion*]

(a) [Insert details of first offence on first occasion]

O Proved

O Not proved

(b) [Insert details of second offence on first occasion]

O Proved

O Not proved

Second occasion

[*Describe the circumstances of the second occasion*]

(a) [Insert details of first offence on second occasion]

O Proved

O Not proved

(b) [Insert details of second offence on second occasion]

O Proved

O Not proved

Third occasion

[*Describe the circumstances of the third occasion*]

(a) [Insert details of first offence on third occasion]

O Proved

O Not proved

(b) [Insert details of second offence on third occasion]

O Proved

O Not proved

Fourth occasion

[*Describe the circumstances of the fourth occasion*]

(a) [Insert details of first offence on fourth occasion]

O Proved

O Not proved

(b) [Insert details of second offence on fourth occasion]

O Proved

O Not proved

Fifth occasion

[*Describe the circumstances of the fifth occasion*]

(a) [Insert details of first offence on fifth occasion]

O Proved

O Not proved

(b) [Insert details of second offence on fifth occasion]

O Proved

O Not proved

7.3.24 Abduction or Detention of a Child under the Age of 16 for a Sexual Purpose

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1. *Crimes Act 1958* s 49P creates the offence of 'Abduction or detention of a child under the age of 16 for a sexual purpose'.
2. The offence consists of seven elements:

   i) The accused:

   - Takes away or detains the complainant; or

- Causes the complainant to be taken away or detained by a third party

ii) The complainant is a child under the age of 16

iii) The accused knows that the complainant is, or probably is, a child under the age of 16

iv) The person who has lawful charge of the complainant (P) does not consent to the complainant being taken away or detained

v) The accused knows that P does not consent, or probably does not consent, to the complainant being taken away or detained

vi) The accused intends the complainant will take part in a sexual act with the accused, a third party or both

vii) The complainant taking part in the sexual act would involve the commission by the accused, the third party or both of an offence against sections 38(1), 39(1), 40(1), 41(1) or a provision of Subdivision (8B) of Division 1 of Part 1 of the Crimes Act 1958 other than s 49P.[752]

3. As explained in *R v Nguyen and Tran* [1998] 4 VR 394, 409 and *Davis v R* [2006] NSWCCA 392, [34]–[38], 'abduction' offences have long existed as a particular form of kidnapping.

Commencement information and previous forms of offence

4. Section 49P was introduced through the *Crimes Amendment (Sexual Offences) Act 2016*, and replaced the previous abduction or detention offence in *Crimes Act 1958* s 56. The s 49P form of the offence applies to conduct committed on or after 1 July 2017.

5. There are several differences between the current s 49P form of the offence and the former s 55 form of the offence. These are:

   - Section 49P covers detention of a child (like the general abduction and detention offence in s 55), whereas s 56 only covered taking away
   - Section 49P introduces a fault element concerning the accused's knowledge of the age of the child and that the person with lawful charge does not consent, whereas the previous offence did not require proof of these matters (compare *R v Kennedy* [1981] VR 565, 567-570)
   - Section 49P applies where the intended conduct is that the complainant 'take part in a sexual act', whereas s 56 was limited to an intention that the child take part in an act of sexual penetration
   - Section 55 required that the act of sexual penetration be outside marriage, whereas s 49P identifies particular offences that the intended sexual act would contravene.

Takes away or detains

6. The accused 'takes away' the complainant when their acts are the effective cause of the complainant accompanying the accused to another place (*R v Fetherston* [2006] VSCA 278, [55]. See also *R v Wellard* [1978] 1 WLR 921).

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[752] *Crimes Act 1958* s 49P presents these elements in a different order, by swapping the consent and knowledge of age elements. This Charge Book presents the elements in this order so that the jury considers the accused's state of mind about each fact immediately after considering that fact.

7. The offence is designed to protect vulnerable children, including where they have left home without money or accommodation. A wide scope to 'taking away' is confined by the requirement that the accused held the intention identified in the sixth element at the time of the taking away (*R v Fetherston* [2006] VSCA 278, [56]).

8. While there must be some movement, there is no strict rule regarding how far the accused must take the complainant from the complainant's previous location. The sufficiency of the distance travelled is a jury question to be decided on the facts of the case (*R v Wellard* [1978] 1 WLR 921; *Davis v The Queen* [2006] NSWCCA 392, [33]. See, for a further example, *R v Mathe* [2003] VSCA 165, where dragging the complainant into a ditch beside a footpath was sufficient for an abduction).

9. The offence is complete at the point when the accused takes away or detains the complainant, provided the other elements existed at that time (see *R v Manwaring & Ors* [1983] 2 NSWLR 82, 84; *R v Pollitt* (2007) 97 SASR 332, [107]).

Age of the complainant

10. The prosecution must prove that the complainant was under the age of 16 at the time of the taking away or detaining.

Accused's knowledge of age of complainant

11. The third element is that the accused knew the complainant was, or probably was, a child under the age of 16.

12. As explained above, this was not an element of the previous form of the offence in *Crimes Act 1958* s 56.

Absence of consent

13. The fourth element is that the person who had lawful charge of the complainant did not consent to the complainant being taken away or detained.

14. The *Crimes Act 1958* does not define who has lawful charge of the complainant. In earlier versions of the offence, the equivalent provisions spoke of the child being taken "out of the possession and against the will of his father, mother or other person having the lawful charge of him" (*Crimes Act 1958* s 57, as amended by the *Crimes (Sexual Offences) Act 1980*). The specific reference to the child's father or mother was removed as part of the overhaul of sexual offences by the *Crimes (Sexual Offences) Act 1991*.

15. "Lawful charge" can arise where the child is subject to a child protection order, such as a Care by Secretary Order (see, e.g. *R v Macfie* [2000] VSCA 173, [3]).

16. If the element is in issue, the prosecution will need to establish who had lawful charge of the child, and then show that person did not consent to the child being taken away.

17. For this element, it is not necessary to show that the child was in the custody or possession of the person who had lawful charge of the complainant at the time of the taking away. The offence is therefore capable of applying where the accused takes further steps in relation to a child who has already 'run away from home' (see *R v Fetherston* [2006] VSCA 278, [50]).

18. As this element is concerned with the consent of the person who had lawful charge of the complainant, the consent of the child is not relevant (see *R v Fetherston* [2006] VSCA 278, [47]–[54]).

19. As an offence in Subdivision (8B) of Division 1 of Part 1 of the *Crimes Act 1958*, the definition of consent in *Crimes Act 1958* s 36 and the deemed non-consent circumstances in *Crimes Act 1958* s 36AA may apply to this element (see *Crimes Act 1958* s 35). While several of the provisions in ss 36 and 36AA are limited to consent to sexual acts, some of provisions are capable on their face of applying to non-sexual consent. In such cases, it will be a question of statutory interpretation for the trial judge to determine whether the general language used in s 35 must be read down so that consent, for the purpose of s 49P, carries its ordinary meaning, or whether it carries the ss 36 and 36AA meaning. In undertaking this exercise, it is worth noting that the Explanatory Memorandum to the Crimes Amendment (Sexual Offences) Bill 2016, which introduced a new s 36, explicitly mentions s 49P as a provision where consent "continues to be mentioned … in other aspects of offences" (at 9).

20. In *R v Kennedy* [1981] VR 565 at 569, the Court left open the question whether consent which is given without fraud, but in ignorance of the accused's intended sexual acts, is vitiated. The terms of s 49P(1)(c) refer to proof that the person who has lawful charge of the complainant 'does not consent to [the complainant] being taken away or detained'. There is no reference in the statute to the person with lawful charge of the child knowing about the accused's intention that the complainant take part in a sexual act. It is suggested that under s 49P, consent cannot be vitiated by reference to the accused's ultimate act, as that would be to improperly rewrite the section by adding the words 'so that B can take part in a sexual act with A or another person or both' to s 49P(1)(c).

Accused's knowledge of absence of consent

21. The fifth element is that the accused knew that the person with lawful charge of the complainant did not consent, or probably did not consent, to the complainant being taken away or detained (*Crimes Act 1958* s 49P(1)(d)).

22. As explained above, this was not an element of the previous form of the offence in *Crimes Act 1958* s 56.

Purpose of accused

23. The sixth element is that the accused intended that the complainant would take part in a sexual act with the accused, a third party, or both.

24. Section 35C identifies that a person 'takes part in a sexual act' when the person is sexually penetrated or sexually touched. See 7.3.2 Rape (From 1/1/92) for information on the meaning of sexual penetration and 7.3.5 Sexual Assault for information on the meaning of sexual touching.

Criminality of intended act

25. The seventh element is that the complainant taking part in the intended sexual act would involve the commission by the accused, the third party or both of an offence against sections 38(1), 39(1), 40(1), 41(1) or a provision of Subdivision (8B) of Division 1 of Part 1 of the *Crimes Act 1958* other than s 49P.

26. This element will require the prosecution to identify the intended sexual act, and establish that the intended act, if committed, would constitute one of the specified offences.

27. The judge will then need to direct the jury about the elements of the specified offence, and the jury will need to consider, on a hypothetical basis, whether the accused's intended conduct would have involved the commission of that specified offence.

28. The Explanatory Memorandum to the Crimes Amendment (Sexual Offences) Bill 2016, which introduced s 49P, observes at 37 that:

> It will often be difficult (and artificial) to distinguish the precise sexual intention of the accused (i.e. it may not be possible to identify whether the accused intended that

the sexual act involve penetration or not). Accordingly, new section 49P applies to both penetrative and non-penetrative sexual acts.

29. It is not clear, however, whether imprecision in the identification of the intended offence raises issues of duplicity or uncertainty. It is hoped that prosecutors will not identify a spread of possible offences which the jury must be directed upon.

Last updated: 4 March 2024

7.3.24.1 Charge: Abduction of a Child under 16 for a Sexual Purpose

Click here to download a Word version of this charge

Note: The offence in s 49P can be committed in several ways which are not reflected in the following charge. The charge will need to be modified if:

1. The prosecution relies on proof that the accused detained (rather than took away) the complainant;

2. The prosecution relies on proof that the accused caused the complainant to be taken away or detained (rather than having taken away or detained the complainant personally)

3. The accused intended that the complainant take part in a sexual act with a third person (rather than with the accused)

I must now direct you about the crime of abduction of a child under 16 for a sexual purpose. To prove this crime, the prosecution must prove the following 7 elements beyond reasonable doubt:

One – The accused took the complainant away.

Two – The complainant was a child under the age of 16.

Three – The accused knew the complainant was, or probably was, a child under the age of 16.

Four – The person who had lawful charge of the complainant did not consent to the complainant being taken away.

Five – The accused knew that the person with lawful charge of the complainant did not, or probably did not, consent to the complainant being taken away.

Six – The accused intended that the complainant would take part in a sexual act with the accused.

Seven – The intended sexual act would involve the crime of [*identify relevant crime*].

I will now explain each element in more detail.[753]

Abduction

The first element that the prosecution must prove is that the accused took another person away.

This requires the prosecution to prove that NOA took NOC away from where he was/she was/they were to some other place.

[*If NOA only took NOC a short distance, add the following shaded section.*]

The law does not set a minimum distance that must be travelled before this element may be met. It is a matter for you to decide whether NOA took NOC far enough from where NOC wished to be that you

[753] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

can say the accused took NOC away.

[*Summarise evidence and/or arguments*.]

Age of complainant

The second element is that the complainant was a child under the age of 16.

[*Refer to relevant evidence and/or arguments*.]

Knowledge of age of complainant

The third element is that the accused knew the complainant was, or probably was, a child under the age of 16.

This requires you to draw a conclusion about NOA's state of mind at the time he/she/they allegedly took NOC away.

You may take into account what they heard and what they saw.

[*Refer to relevant evidence and/or arguments*.]

Absence of consent of guardian

The fourth element the prosecution must prove is that the person with lawful charge of the complainant did not consent the complainant being taken away.

In this case, the prosecution says that NOP[754] was the person with lawful charge of the complainant. [*Refer to evidence on why NOP had lawful charge of the complainant*.]

Consent is a state of mind. The law says that consent means free agreement. So the prosecution must prove that NOP did not freely agree to being NOA taking NOC away at the time.

[*Where a party requests a direction about the meaning of consent, add one or more of the following shaded paragraphs*.]

The law says that a person can consent to something only if they are capable of consenting, and free to choose whether or not to engage in or to allow that act.

The law says that where a person has given their consent to something, they may withdraw that consent before that act happens, or while it is happening.

[*Where a party requests a direction about the circumstances in which a person is taken not to have consented, add the following shaded section.*]

In some circumstances the law says that a person did not freely agree, or consent, to being taken away. These circumstances include [*insert relevant section(s) from the following and apply to the evidence*:

> (a) the person does not say or do anything to indicate consent to NOC being taken away;
>
> (b) the person submits to NOA taking NOC away because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal, regardless of—

[754] Name of Person.

(i) when the force, harm or conduct giving rise to the fear occurs; and

(ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

(c) the person submits to NOA taking NOC away because of coercion or intimidation—

(i) regardless of when the coercion or intimidation occurs; and

(ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

(d) the person submits to NOA taking NOC away because the person is unlawfully detained;

(e) the person submits to NOA taking NOC away because the person is overborne by the abuse of a relationship of authority or trust;

(f) the person is asleep or unconscious;

(g) the person is so affected by alcohol or another drug as to be incapable of consenting to NOA taking NOC away;

(h) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to NOA taking NOC away;

...

(k) the person is mistaken about the identity of any other person involved in the act;

(l) the person mistakenly believes that NOA is taking NOC away for medical or hygienic purposes;

...

(p) having given consent to NOA taking NOC away, the person later withdraws consent, and the accused does not stop taking NOC away.]

If you are satisfied beyond reasonable doubt that one of these circumstances existed in relation to NOP, you must find that he was/she was/they were not consenting.

However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting to being detained, then this element will be proven.

[*Summarise evidence and/or arguments*.]

Knowledge of non-consent of guardian

The fifth element that the prosecution must prove is that the accused knew that NOP did not consent, or probably did not consent, to NOC being taken away.

This requires you to draw a conclusion about NOA's state of mind. You can look at the circumstances of the alleged acts, and what NOA, NOC and NOP said and did at the time.

As with the 4th element, this element is about NOP's consent. It does not matter whether NOA thought that NOC was consenting to being taken away.

[*Summarise evidence and/or arguments*.]

Intention to take part in a sexual act

The sixth element that the prosecution must prove is that the accused intended that the complainant would take part in a sexual act with the accused.

This requires the prosecution to prove that the accused intended that NOC would be sexually penetrated or be sexually touched by the accused, or would sexually penetrate or sexually touch the accused.

In this case, the prosecution argues that NOA intended that NOC would [*identify relevant act*].

I direct you as a matter of law that this is a sexual act for the purpose of the law. If you are satisfied that NOA intended that NOC would [*identify relevant act*], then you may find this element proved.

[*Summarise evidence and/or arguments*.]

Intended sexual act a crime

The seventh element is that the intended sexual act with the complainant would involve NOA committing the crime of [*identify relevant offence*].

[*Insert relevant directions on the intended crime. Note that it may not be necessary to direct the jury in detail on all elements of the intended crime, as some may overlap with earlier elements of this offence, especially the 'taking part in a sexual act' and the 'age of complainant' elements. Where that occurs, the judge should explain that the intended offence contains certain elements, but that those elements have already been proved if the jury is satisfied of the relevant equivalent elements for the s 49P offence*.]

Summary

To summarise, before you can find NOA guilty of abduction of a child under 16 for a sexual purpose the prosecution must prove to you beyond reasonable doubt:

One – NOA took the complainant away.

Two – NOC was a child under the age of 16.

Three – NOA knew that NOC was, or probably was, a child under the age of 16.

Four – NOP did not consent to the complainant being taken away.

Five – NOA knew that NOP did not, or probably did not, consent to NOC being taken away.

Six – NOA intended that NOC would take part in a sexual act with the accused.

Seven – The intended sexual act would involve the crime of [*identify relevant crime*].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of abduction of a child under 16 for a sexual purpose.

Last updated: 4 March 2024

7.3.25 Sexual Offences against Children (Pre-1/1/92)

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Overview

1. The scope of the various sexual offences against children under the *Crimes Act 1958* has changed over time. These can be divided into four discrete periods:
    - Offences committed between 1 April 1959 and 28 February 1981;

- Offences committed between 1 March 1981 and 4 August 1991;
- Offences committed between 5 August 1991 and 31 December 1991; and
- Offences committed on or after 1 January 1992.

2. This topic examines the directions a judge must give when:
    - A person is charged with a sexual offence against a child on or after 1 January 2010; and
    - The offence is alleged to have been committed before 1 January 1992.
3. This topic is divided into three broad areas:
    - Sexual offences against a child under 10;
    - Sexual offences against a child aged between 10 and 16;
    - Sexual offences against a child aged between 16 and 18.

Sexual Offences Against a Child Under 10

Elements

4. There are three elements to the statutory offences concerning children under 10. The prosecution must prove that:

    i) The accused took part in a proscribed sexual act with the complainant;

    ii) The accused intended to take part in a proscribed sexual act; and

    iii) The complainant was under the age of 10 at the time the proscribed sexual act took place (*Crimes Act 1958* s 46 (pre 1/3/1981), s 47 (1/3/1981 – 4/8/1991), s 45 (5/8/1991 – 31/12/1991)).

5. Consent has never been a defence to this offence (*Crimes Act 1958* s 49 (pre 1/3/1981), s 47 (1/3/1981 – 4/8/1991), s 45 (5/8/1991 – 31/12/1991)).

Taking Part in a Proscribed Act of Sexual Penetration

6. Over time, the nature of the proscribed sexual act has changed:
    - Prior to 1 March 1981, the offence prohibited "unlawful carnal knowledge and abuse" of girls (*Crimes Act 1958* s 46);
    - From 1 March 1981 to 4 August 1991, the offence prohibited "taking part in an act of sexual penetration", and that phrase was defined by statute (the first statutory definition);
    - From 5 August 1991 to 31 December 1991, a new statutory definition of "sexual penetration" applied to the offence (the second statutory definition).

Unlawful Carnal Knowledge and Abuse

7. At common law, carnal knowledge only consisted of penetration of a vagina by a penis. Other forms of sexual penetration were dealt with under the offence of indecent assault (see, on similar though not identical legislation, *R v McCormack* [1969] 2 QB 442).
8. This element was met when there was any penetration of the complainant's labia by the penis (*R v Lines* (1844) 1 Car & K 393; *Randall v R* (1991) 53 A Crim R 380; *R v DD* (2007) 19 VR 143).
9. From 5 August 1991, the *Crimes Act 1958* defined vagina to include a surgically constructed vagina. It is unclear whether the common law recognised penetration of an artificially constructed sexual organ as sexual penetration (see *R v Cogley* [1989] VR 799; *R v Harris & McGuiness* (1988) 17 NSWLR 158).
10. This element was met by penetration "to any extent". Consequently:

- The penetration only needed to be slight or fleeing; and
- It was not necessary for the prosecution to prove that semen was emitted (see *Randall v R* (1991) 53 A Crim R 380; *Anderson v R* [2010] VSCA 108; *R v Pryor* [2001] QCA 341).

11. The meaning of the terms "unlawful" and "abuse" in the phrase "unlawful carnal knowledge and abuse" are not clear.

12. While the term "unlawful" may mean "outside the bounds of marriage", there is also authority indicating that the term is surplusage (compare *R v R* [1992] 1 AC 599 and *R v Champan* [1959] 1 QB 100, though neither case concerned the specific Victorian provisions).

13. As a matter of prudence, the charge assumes that the prosecution must prove that the accused and complainant were not married in order to prove "unlawful carnal knowledge and abuse".

14. It is not necessary to use the phrase "carnal knowledge" when directing the jury about this element. The judge may instead use the term "sexual penetration", as long as he or she limits the meaning of that phrase to its common law meaning (*R v DD* (2007) 19 VR 143).

"Sexual Penetration": The First Definition (1/3/81–4/8/91)

15. From 1 March 1981 to 4 August 1991, the *Crimes Act* stated that "sexual penetration" was:
    - The introduction (to any extent) of a person's penis into the vagina, anus or mouth of another person of either sex; or
    - The introduction (to any extent) of an object that is not part of the body, and which was manipulated by a person of either sex, into the vagina or anus of another person of either sex, other than as part of some generally accepted medical treatment (*Crimes Act 1958* s 2A).

16. This definition removed the gendered nature of the offence, which previously could only be committed by a male against a female. Under this definition:
    - Both males and females can be the victim of the offence; and
    - Both males and females can commit the offence, by using an object that is not part of the body.

17. It is unclear whether this definition uses the medical meaning of "vagina" (being the membranous passage or channel leading from the uterus to the vulva), or whether it should be interpreted in a manner consistent with the common law understanding of "sexual penetration" (which includes penetration of the external genitalia) (compare *R v Lines* (1844) 1 Car & K 393 and *Holland v R* (1993) 117 ALR 193. See also *Randall v R* (1991) 53 A Crim R 380 and *R v AG* (1997) 129 ACTR 1).[755] In cases where this is relevant, judges will need to engage in a process of statutory construction and will need to consider principles concerning the interpretation of ambiguous penal statutes and the interference with fundamental rights (see *Coco v R* (1994) 179 CLR 427; *Bropho v State of Western Australia* (1990) 171 CLR 1; *Beckwith v R* (1976) 135 CLR 569).

18. As was the case at common law, under this definition:
    - The penetration only needed to be slight or fleeting (penetration "to any extent") (*Randall v R* (1991) 53 A Crim R 380; *Anderson v R* [2010] VSCA 108); and
    - The prosecution did not need to prove the emission of semen (*Crimes Act 1958* s 2A).

19. It is not sufficient for the relevant body part to have simply been touched. It must have been penetrated to some extent (*Anderson v R* [2010] VSCA 108).

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[755] If the legislation uses the medical definition, cases in which only the external genitalia have been penetrated will need to be charged as indecent assault instead.

20. Subject to the statutory exception regarding penetration by an object as part of accepted medical treatment, the purpose of the penetration is irrelevant. It need not have been committed for the purposes of sexual gratification (*R v Dunn* 15/4/1992 CA NSW).

"Sexual Penetration": The Second Definition (5/8–31/12/91)

21. From 5 August 1991 to 31 December 1991, the *Crimes Act* stated that "sexual penetration" was:

    - The introduction of a person's penis into the vagina, anus or mouth of another person, whether or not there was emission of semen; or
    - The introduction of a part of a person's body other than the penis into the vagina or anus of another person, other than in the course of an appropriate and generally accepted medical or hygienic procedure; or
    - The introduction of an object into the vagina or anus of another person, other than in the course of an appropriate and generally accepted medical or hygienic procedure (*Crimes Act 1958* s 37).

"Taking Part" in an Act of Sexual Penetration

22. For offences committed from 1 March 1981 to 31 December 1991, the prosecution must prove that the accused "took part" in an act of sexual penetration (*Crimes Act 1958* s 47 (1/3/1981 – 4/8/1991), s 45 (5/8/1991 – 31/12/1991)).

23. Both parties to an act of sexual penetration are deemed to have "taken part" in that act (*Crimes Act 1958* s 2A (1/3/1981 – 4/8/1991), s 37 (5/8/1991 – 31/12/1991)).

24. This means that an accused may be found guilty of the offence whether he or she was sexually *penetrating* the complainant or was being sexually *penetrated by* the complainant (see *R v JC* [2000] ACTSC 72 and *Randall v R* (1991) 53 A Crim R 380).

Directing the Jury About the Meaning of "Vagina"

25. The common law definition of vagina (and possibly the statutory definitions: see above) includes "the external genitalia". It has been held that this phrase is not within ordinary usage and needs more explanation (*R v AJS* (2005) 12 VR 563; *Anderson v R* [2010] VSCA 108; *R v MG* (2010) 29 VR 305).

26. Consequently, where penetration is in issue, the judge should explain to the jury in precise and simple terms, what would constitute penetration of the vagina, and summarise the evidence that relates to that issue (*R v AJS* (2005) 12 VR 563; [2005] VSCA 288. See also *Randall v R* (1991) 53 A Crim R 380; *Anderson v R* [2010] VSCA 108; *R v MG* (2010) 29 VR 305).

Identifying the Penetrative Act

27. While in most cases the prosecution will be able to particularise the method of penetration (e.g. the complainant was penetrated by a penis), in some cases this will not be possible. In such cases, it will be sufficient for the prosecution to particularise the method of penetration by reference to the relevant possibilities (e.g. the complainant was penetrated by a penis, a bodily part *or* some other object) (*R v Castles (Ruling No.1)* (2007) 17 VR 329).

28. Where alternative possible methods of penetration are left to the jury, they do not need to unanimously agree about which of those methods was used. They only need to unanimously agree that penetration took place (*R v Castles (Ruling No.1)* (2007) 17 VR 329).

Intention to Take Part in the Proscribed Sexual Act

29. The second element requires the accused to have intended to take part in the proscribed sexual act (*Crimes Act 1958* s 45(1)).

30. The intention must have been to sexually penetrate or be penetrated. An intent to commit an indecent assault is not sufficient (*Anderson v R* [2010] VSCA 108).

31. There will often be no issue about whether the act was intentional. For example, if there is evidence that the penetration took place over an extended period of time, there will ordinarily be no doubt about the accused's mental state (*Anderson v R* [2010] VSCA 108).

32. However, in some cases intent will be in issue. Where this is so, it is of paramount importance that the jury be directed about the prosecution's obligation to establish intent beyond reasonable doubt (*R v AJS* (2005) 12 VR 563; [2005] VSCA 288; *MG v R* (2010) 29 VR 305; *Anderson v R* [2010] VSCA 108).

33. For example, a clear direction about intention will be necessary where it is possible that any penetration that occurred was accidental. Such a possibility must be excluded for this element to be proven (*Anderson v R* [2010] VSCA 108; *R v AJS* (2005) 12 VR 563; [2005] VSCA 288).

Child Under 10

34. The third element requires the prosecution to prove that the complainant was under the age of 10 at the time the relevant act took place (*Crimes Act 1958* s 45(1)).

35. As this is an element of the offence, the jury must find the accused not guilty if it cannot be satisfied beyond reasonable doubt that the complainant was under 10 at the time of the offence (compare *Crimes Act 1958* s 45 as amended by *Crimes (Amendment) Act 2000*).

Sexual Offences Against Children Aged 10 to 16

36. While the name of the offence for unlawful sexual acts with children aged 10 to 16 has changed over time, the basic elements of the offence have remained the same. The prosecution must prove that:

    i) The accused took part in a proscribed sexual act with the complainant;

    ii) The accused intended to take part in that proscribed sexual act;

    iii) The complainant was under the age of 16 at the time the proscribed sexual act took place; and

    iv) The accused was not married to the complainant.

Taking Part in a Proscribed Sexual Act

37. Over time, the nature of the proscribed sexual act has changed:

    - Prior to 1 March 1981, the offence prohibited "unlawful carnal knowledge and abuse" of girls (*Crimes Act 1958* s 46);
    - From 1 March 1981 to 4 August 1991, the offence prohibited "taking part in an act of sexual penetration", and that phrase was defined by statute (the first statutory definition);
    - From 5 August 1991 to 31 December 1991, a new statutory definition of "sexual penetration" applied (the second statutory definition).

38. These changes are described above in relation to the first element of "Sexual Offences Against a Child Under 10".

Intention to Take Part in the Proscribed Sexual Act

39. The second element requires the accused to have intended to take part in the proscribed sexual act (*Crimes Act 1958* s 48(1)).

40. This is identical to the second element of sexual penetration of a child aged under 10 (see above).

Child Aged between 10 and 16

41. The third element requires the prosecution to prove that the complainant was between the age of 10 and 16 at the time the proscribed sexual act took place (*Crimes Act 1958* s 48(1)).

42. As this is an element of the offence, the jury must find the accused not guilty if it cannot be satisfied beyond reasonable doubt that the complainant was aged between 10 and 16 at the time of the offence (compare *Crimes Act 1958* s 45 as amended by *Crimes (Amendment) Act 2000*).

Child and Accused Not Married

43. For offences committed between 1 March 1981 and 1 January 1992, there is a fourth element. The prosecution must prove that the accused and the complainant were not married to one another (*Crimes Act 1958* s 48).

44. It is unclear whether this is also a requirement for offences committed before 1 March 1981. This will depend on whether the word "unlawful" in the phrase "unlawful carnal knowledge" means "outside marriage", or is mere surplusage (see "Unlawful Carnal Knowledge and Abuse" above).

Date of Offence

45. Prior to 5 August 1991, a statutory limitation period of 12 months applied to this offence if the complainant was aged 12 or above.

46. On 22 October 2014, section 74 of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* commenced. This provision introduced *Criminal Procedure Act 2009* section 7A and abolished "any immunity from prosecution arising because of the time limit" which previously applied in relation to these offences. The result is that for trials conducted after 22 October 2014, the prosecution does not need to prove that the complainant was under the age of 12 at the date of the offence. The prosecution will only need to prove that the child was aged between 10 and 16 at the date of the offence.

Aggravating Circumstances

47. The *Crimes Act 1958* has always included an aggravated form of the offence of sexual penetration of a child aged 10 to 16, for cases in which the accused was in a position of trust or authority over the complainant.

48. The precise form of this aggravating circumstance has changed over time:

    - Prior to 1 March 1981, the aggravating circumstance was that the accused was a schoolmaster or teacher and the complainant was his pupil;
    - From 1 March 1981 to 31 December 1991, the aggravating circumstance was that the complainant was, either generally or at the time of the offence, under the care, supervision or authority of the accused.

49. In the absence of a clarifying statutory provision,[756] it is likely that the imposition of an increased maximum penalty for offences committed in these circumstances means that the aggravated form of the offence is a separate offence from the basic offence of sexual penetration of a child aged between 10 and 16. If that is correct, then the prosecution must specifically charge the aggravated offence in the indictment, and the judge must direct the jury on the aggravating circumstance as an element of that offence (see *R v Satalich* (2001) 3 VR 231; *R v Courtie* [1984] AC 463; *R v Hassett* (1994) 76 A Crim R 19).

Care, Supervision or Authority

50. The words "care, supervision or authority" are to be given their ordinary grammatical meaning (*R v Howes* (2000) 2 VR 141). For further information on this point, see 7.3.13 Sexual Penetration of a Child Under 16 (1/1/92–30/6/17).

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[756] Compare *Crimes Act 1958* s 45(5) in the current version of the Act.

Defences

51. The available statutory defences to the various sexual offences against children aged between 10 and 16 have changed over time.

52. Many of these defences concern the existence of consent or the accused's belief in the complainant's consent. Where consent is in issue, the judge must direct the jury in accordance with the current statutory provisions on consent. The transitional provisions on the legislation that introduced changes to the law on consent state that the legislative changes apply to all proceedings commenced after the amending legislation, regardless of when the alleged offence was committed (see *Crimes (Rape) Act 1991* s 9 and *Crimes Act 1958* s 609). For information on the current meaning of consent, see 7.3.1.3 Consent and Awareness of Non-Consent (Pre-1/7/15).

Offences Committed Before 1 March 1981

53. Prior to 1 March 1981, consent was not a defence unless the girl was older than or of the same age as the defendant (*Crimes Act 1958* s 49).

Offences Committed 1 March 1981 to 4 August 1991

54. From 1 March 1981 to 4 August 1991, consent was only a defence if:

    - The accused believed on reasonable grounds that the complainant was of or above the age of 16 years; or
    - The accused was not more than 2 years older than the complainant (*Crimes Act 1958* s 48(4)).

55. The accused also had a discrete defence if he or she believed, on reasonable grounds, that he or she was married to the complainant at the time of the alleged offence (*Crimes Act 1958* s 48(5)).

Offences Committed 5 August 1991 to 31 December 1991

56. From 5 August 1991 to 31 December 1991, consent was a defence only if:

    - The accused believed on reasonable grounds that the complainant was of or above the age of 16 years;
    - The accused was not more than 2 years older than the complainant; or
    - The accused believed on reasonable grounds that he or she was married to the child (*Crimes Act 1958* s 46(2)).

57. During this period, having a belief in marriage was no longer a discrete defence. Instead, such a belief was merely a precondition for the availability of a defence of consent.

Age Difference

58. For offences committed between 1 March 1981 and 31 December 1991, consent is available as a defence if the accused is not more than two years older than the complainant.

59. This defence is not available where the accused's *actual age* exceeds the complainant's by anything more than 24 months. The availability of the defence is not determined by a measure limited to whole–years (*Stannard v DPP* (2010) 28 VR 84).

60. It is unclear whether a similar limitation applies to offences committed before 1 March 1981, where the defence of consent was available if the complainant was older than or the same age as the accused. In particular, it is not clear whether "the same age" means having the same date of birth, or includes the situation where the accused and complainant are, at the time of the alleged offence, the same age as measured in whole–years.

Reasonable Grounds

61. For there to be "reasonable grounds" for a state of mind (such as a belief), there must exist facts which are sufficient to induce that state of mind in a reasonable person (*George v Rockett* (1990) 170 CLR 104).

Burden of Proof

62. Where there is an evidentiary basis for the defence of consent, the prosecution must disprove the existence of consent, or the grounds for a consent defence being available, beyond reasonable doubt (*R v Mark & Elmazovski* [2006] VSCA 251; *R v Deblasis* (2007) 19 VR 128; *R v Fagone* [2008] VSCA 175. Cf *R v Douglas* [1985] VR 721).

63. Judges should carefully explain the burden of proof to the jury in a way they can understand (*R v Fagone* [2008] VSCA 175).

Intoxication

64. The fact that the accused had used drugs or alcohol may be relevant to his or her belief that the child was 16 or older (see, e.g. *R v Fagone* [2008] VSCA 175).

65. However, this issue only needs to be addressed if there is a factual foundation for finding that the accused's drug or alcohol use affected his or her belief that the child was 16 or older. The mere fact that he or she had used drugs or alcohol at the relevant time is not sufficient (*R v Fagone* [2008] VSCA 175).

66. For further information on the relevance of drug or alcohol use generally, see 8.7 Common Law Intoxication.

Accused's Awareness of the Absence of Consent

67. The provisions regulating when consent is a defence to a sexual offence against a child were drafted in similar terms to the provision restricting when consent is a defence for indecent assault if the complainant is under 16 (compare *Crimes Act 1958* s 44 (as implemented by the *Crimes (Sexual Offences) Act 1980*)).

68. In relation to consent for indecent assault, it has been held that where consent is a defence, the prosecution must prove both that the complainant did not consent and that the accused was aware that the complainant was not consenting or might not be consenting (see *Frank v The King* [2024] VSCA 37, [33]-[34]; *R v Whelan* [1973] VR 268; *R v Trotter*, Unreported, Supreme Court of Victoria Court of Criminal Appeal, 5 December 1985).

69. It is likely that the same approach must be taken for the offences discussed in this chapter.

Last updated: 17 April 2024

7.3.25.1 Charge: Carnal Knowledge of a Girl under 10 (Pre-1/3/81)

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This charge can be used for trials involving offences alleged to have been committed before 1/3/1981.

I must now direct you about the crime of carnal knowledge of a girl under the age of 10. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt.

One – the accused took part in an act of sexual penetration with a girl.

Two – the accused did this intentionally.

Three – the girl was under the age of 10 at the time that the sexual penetration took place.

Four – The complainant was not married to the accused.

I will now explain each of these elements in more detail.[757]

Unlawful Carnal Knowledge

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused sexually penetrated a girl, NOC. [*If the conscious, voluntary or deliberate nature of the act is in issue*,[758] *add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.]

The law defines sexual penetration as the introduction of a person's penis into another person's vagina.

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced his penis to any extent between the outer lips of NOC's vagina.

[*If relevant add:*

- NOA's penis does not need to have gone all the way into NOC's vagina. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the penis to the outer surface of the external lips of the vagina is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the conscious, voluntary or deliberate nature of the acts in issue, add the following shaded section.*]

For this element to be met, the act of putting NOA's penis in NOC's vagina must have been done consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA was conscious and not asleep and dreaming at the time of the penetration"].

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to sexually penetrate the complainant.[759]

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[757] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[758] Described hereafter as the "voluntariness" requirement.

[759] Because sexual penetration of a child under 10 is an offence of basic intent (the intent to take part in the act of penetration), proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Mental state issues related to the intention to penetrate (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions.

[*If intention is not in issue, add the following shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.* "if you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally".]

Child Under the Age of 10

The third element relates to the complainant. The prosecution must prove that she was under the age of 10 when the alleged act of sexual penetration took place.

In this case, [*describe competing evidence and arguments*].

Accused Not Married to the Complainant

The fourth element that the prosecution must prove is that the complainant and accused were not married at the time the act of sexual penetration took place.

In this case, there is no dispute that NOC and NOA were not married at that time. The main issue in this case is [*insert relevant issue*].

Summary

To summarise, before you can find NOA guilty of unlawful carnal knowledge of a girl under the age of 10, the prosecution must prove to you beyond reasonable doubt:

One – that NOA sexually penetrated a girl, NOC; and

Two – that NOA intended to sexually penetrate NOC; and

Three – that NOC was under the age of 10 at the time that the act of sexual penetration took place; and

Four – that NOC was not married to NOA at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a girl under the age of 10.

Last updated: 3 December 2012

7.3.25.2 Checklist: Carnal Knowledge of a Girl under 10 (Pre-1/3/81)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with a girl; and

2. The accused sexually penetrated the complainant intentionally; and

3. The complainant was under the age of 10 at the time of the sexual penetration; and

4. The complainant was not married to the accused.

Sexual Penetration

1. Did the accused sexually penetrate the complainant?

If yes, then go to 2

If no, then the accused is not guilty of carnal knowledge of a girl under 10

Intention

2. Did the accused intend to sexually penetrate the complainant?

If yes, then go to 3

If no, then the accused is not guilty of carnal knowledge of a girl under 10

Age of complainant

3. Was the complainant under the age of 10 at the time of the sexual penetration?

If yes, then go to 4

If no, then the accused is not guilty of carnal knowledge of a girl under 10

Absence of marriage

4. Has the prosecution proved that at the time of the sexual penetration the complainant was not married to the accused?

If yes, then the accused is guilty of carnal knowledge of a girl under 10 (as long as you also answered yes to questions 1, 2 and 3)

If no, then the accused is not guilty of carnal knowledge of a girl under 10

Last updated: 30 May 2014

7.3.25.3 Charge: Sexual Penetration of a Child under 10 (1/3/81–4/8/91)

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This charge can be used for trials involving offences alleged to have been committed between 1/3/1981 and 4/8/1991.

I must now direct you about the crime of sexual penetration of a child under the age of 10. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused took part in an act of sexual penetration with the complainant.

Two – the accused did this intentionally.

Three – the complainant was under the age of 10 at the time that the act of sexual penetration took place.

I will now explain each of these elements in more detail.[760]

[760] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

Taking Part in an Act of Sexual Penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant. [*If the conscious, voluntary or deliberate nature of the act is in issue,*[761] *add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.]

The law defines sexual penetration as the introduction of a person's penis or object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "when he took NOC's penis in his mouth"].

[*If relevant add*:

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the conscious, voluntary or deliberate nature of the acts in issue, add the following shaded section.*]

For this element to be met, the act of [*describe relevant act of participation, e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been done consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

[*In cases involving alleged penetration in the context of a medical procedure or hygienic purposes add the following shaded section.*]

However, according to the law, the introduction of an object into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done as part of some generally accepted medical treatment. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done as part of a generally accepted medical treatment.

In this case [*insert evidence and arguments relevant to proof of this element*].

---

[761] Described hereafter as the "voluntariness" requirement.

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[762]

[*If intention is not in issue, add the shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.* if you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally.]

Child Under the Age of 10

The third element relates to the complainant. The prosecution must prove that s/he was under the age of 10 when the alleged act of sexual penetration took place.

In this case, [*describe competing evidence and arguments*].

Summary

To summarise, before you can find NOA guilty of sexual penetration of a child under the age of 10, the prosecution must prove to you beyond reasonable doubt:

- One – that NOA took part in an act of sexual penetration with NOC; and
- Two – that NOA intended to take part in that act of sexual penetration; and
- Three – that NOC was under the age of 10 at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child under the age of 10.

Last updated: 3 December 2012

7.3.25.4 Checklist: Sexual Penetration of a Child under 10 (1/3/81–4/8/91)

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with a child; and

2. The accused sexually penetrated the complainant intentionally; and

3. The complainant was under the age of 10 at the time of the sexual penetration.

Sexual Penetration

[762] Because sexual penetration of a child under 10 is an offence of basic intent (the intent to take part in the act of penetration), the issue of intention is only likely to arise in cases involving *penetration of the accused by the complainant*. In cases where the accused is alleged to have *penetrated the complainant*, proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Mental state issues related to the intention to penetrate (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions.

1. Did the accused sexually penetrate the complainant?

If yes, then go to 2

If no, then the accused is not guilty of sexual penetration of a child under 10

Intention

2. Did the accused intend to sexually penetrate the complainant?

If yes, then go to 3

If no, then the accused is not guilty of sexual penetration of a child under 10

Age of complainant

3. Was the complainant a child under the age of 10 at the time of the sexual penetration?

If yes, then the accused is guilty of sexual penetration of a child under 10 (as long as you also answered yes to questions 1 and 2)

If no, then the accused is not guilty of sexual penetration of a child under 10

Last updated: 30 May 2014

7.3.25.5 Charge: Carnal Knowledge of a Girl Aged between 10 and 16 (Pre-1/3/81)

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This charge can be used for trials involving offences alleged to have been committed before 1/3/1981 where consent is not in issue.

If consent is in issue, it will need to be modified accordingly. See 7.3.25 Sexual Offences Against Children (Pre–1/1/92) for guidance.

I must now direct you about the crime of carnal knowledge of a girl aged between 10 and 16. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt.

One – the accused sexually penetrated the complainant, a girl, on the dates specified in the indictment.

Two – the accused did this intentionally.

Three – the complainant was aged between 10 and 16 at the time that the sexual penetration took place.

Four – The complainant was not married to the accused.

I will now explain each of these elements in more detail.[763]

[763] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

Unlawful Carnal Knowledge

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused sexually penetrated a girl, NOC [on/between] [*identify dates specified in the indictment*]. To find this element proven, you must be satisfied that the sexual penetration took place at that time, rather than at some other time.

[*If the conscious, voluntary or deliberate nature of the act is in issue,*[764] *add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.]

The law defines sexual penetration as the introduction of a person's penis into another person's vagina.

The law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced his penis to any extent between the outer lips of NOC's vagina.

[*If relevant add:*

- NOA's penis does not need to have gone all the way into NOC's vagina. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the penis to the outer surface of the external lips of the vagina is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the conscious, voluntary or deliberate nature of the acts in issue, add the following shaded section.*]

For this element to be met, the act of putting NOA's penis in NOC's vagina must have been done consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g* "NOA was conscious and not asleep and dreaming at the time of the penetration"].

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to engage in sexual penetration of the complainant.[765]

[*If intention is not in issue, add the following shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.* if you are satisfied that the accused [consciously, voluntarily and deliberately] engaged in carnal knowledge of the complainant, you

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[764] Described hereafter as the "voluntariness" requirement.

[765] Because sexual penetration of a child aged between 10 and 16 is an offence of basic intent (the intent to take part in the act of penetration), the issue of intention will rarely be an independent issue. Mental state issues related to the intention to penetrate (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions.

should have no trouble finding that s/he did so intentionally.]

Girl Aged Between 10 and 16

The third element relates to the complainant. The prosecution must prove that she was aged between 10 and 16 when the alleged act of carnal knowledge took place.

In this case, there is no dispute that NOC was aged between 10 and 16 at that time. The main issue in this case is [*insert relevant issue*].[766]

Accused Not Married to the Complainant

The fourth element that the prosecution must prove is that the complainant and accused were not married at the time the act of sexual penetration took place.

In this case, there is no dispute that NOC and NOA were not married at that time. The main issue in this case is [*insert relevant issue*].[767]

Summary

To summarise, before you can find NOA guilty of unlawful carnal knowledge a girl aged between 10 and 16, the prosecution must prove to you beyond reasonable doubt:

One – that NOA engaged in sexual penetration of a girl, NOC, on the date specified in the indictment; and

Two – that NOA intended to engage in that act of sexual penetration; and

Three – that NOC was aged between 10 and 16 at the time that the act of sexual penetration took place; and

Four – that NOC was not married to NOA at the time that the act of sexual penetration took place.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of carnal knowledge of a girl aged between 10 and 16.

Last updated: 19 March 2015

7.3.25.6 Checklist: Carnal Knowledge of a Girl between 10 and 16 (Pre-1/3/81)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with a girl on the dates specified; and

2. The accused sexually penetrated the complainant intentionally; and

3. The complainant was between the age of 10 and 16 at the time of the sexual penetration; and

4. The complainant was not married to the accused.

Sexual Penetration

[766] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

[767] If this element is in issue, this section of the charge will need to be modified accordingly.

1. Did the accused sexually penetrate the complainant between the dates specified in the indictment?

Consider – You must be satisfied beyond reasonable doubt that the sexual penetration took place between the dates alleged

If yes, then go to 2

If no, then the accused is not guilty of carnal knowledge of a girl between 10 and 16

Intention

2. Did the accused intend to sexually penetrate the complainant?

If yes, then go to 3

If no, then the accused is not guilty of carnal knowledge of a girl between 10 and 16

Age of complainant

3. Was the complainant a girl between the age of 10 and 16 at the time of the sexual penetration?

If yes, then go to 4

If no, then the accused is not guilty of carnal knowledge of a girl between 10 and 16

Absence of marriage

4. Has the prosecution proved that at the time of the sexual penetration the complainant was not married to the accused?

If yes, then the accused is guilty of carnal knowledge of a girl between 10 and 16 (as long as you also answered yes to questions 1, 2 and 3)

If no, then the accused is not guilty of carnal knowledge of a girl between 10 and 16

Last updated: 30 May 2014

7.3.25.7 Charge: Sexual Penetration of a Child Aged between 10 and 16 (1/3/81–4/8/91)

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This charge can be used for trials involving offences alleged to have been committed between 1/3/1981 and 4/8/1991 where consent is not in issue. If consent is in issue, it will need to be modified accordingly. See 7.3.13.9 Charge: Sexual penetration of a Child Under 16 (Pre-1/12/06) – Consent in Issue for guidance.

I must now direct you about the crime of sexual penetration of a child aged between 10 and 16. To prove this crime, the prosecution must prove the following four elements beyond reasonable doubt.

One – the accused took part in an act of sexual penetration with the complainant in the manner alleged.

Two – the accused did this intentionally.

Three – the complainant was between the age of 10 and 16 at the time that the act of sexual penetration took place.

Four – the complainant and accused were not married at the time of the sexual penetration

I will now explain each of these elements in more detail.[768]

Taking Part in an Act of Sexual Penetration

The first element relates to what the accused is alleged to have done. The prosecution must prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the complainant in the manner alleged.

[*If the conscious, voluntary or deliberate nature of the act is in issue,*[769] *add*: The prosecution must also prove that the relevant acts of the accused were performed consciously, voluntarily and deliberately.]

The law defines sexual penetration as the introduction of a person's penis, or an object into another person's vagina or anus. It also includes putting a penis into someone's mouth.

For this first element to be satisfied, the prosecution must prove that NOA took part in one of these acts. The law says that both the person who sexually penetrates and the person who is penetrated are regarded as "taking part" in sexual penetration. [*If relevant add*: This means that if you find that NOA was sexually penetrated by NOC, you will be satisfied that the accused "took part" in that act of sexual penetration.]

In this case the prosecution seeks to prove that NOA took part in an act of sexual penetration with NOC [*describe relevant form of penetration, e.g.* "when he took NOC's penis in his mouth"].

[If relevant add:

- [*Identify item or body part and actor*] does not need to have gone all the way into [NOC/NOA's] [vagina/anus/mouth]. The prosecution can succeed by proving penetration to any extent. Even slight penetration is enough.
- There must have been actual penetration. Mere touching of the [*identify item or body part*] to the [*describe relevant external surface, e.g.* "buttocks near the anus/outer surface of the external lips of the vagina/outer surface of the lips"] is not enough.
- This element is concerned with penetration, not ejaculation. The prosecution is not required to prove that there was any ejaculation].

[*If the evidence or arguments have placed the conscious, voluntary or deliberate nature of the acts in issue, add the following shaded section*.]

For this element to be met, the act of [*describe relevant act of participation, e.g.* "introducing his finger into NOC's anus"/"receiving NOC's penis into his mouth"] must have been done consciously, voluntarily and deliberately.

This means that you must find NOA not guilty unless the prosecution can satisfy you that [*describe the finding that proves voluntariness in the circumstance of the case, e.g.* "NOA introduced his finger into NOC's vagina deliberately, and not accidentally" or "NOA was conscious and not asleep and dreaming at the time of the penetration"].

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[768] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[769] Described hereafter as the "voluntariness" requirement.

[*In cases involving alleged penetration in the context of a medical or hygienic procedure add the following shaded section.*]

However, according to the law, the introduction of an object into a person's [vagina/anus] does not always amount to sexual penetration. It is not sexual penetration if it is done as part of some generally accepted and appropriate medical or hygienic procedure. In this case, the accused submits [*refer to relevant evidence*]. It is for the prosecution to prove to you, beyond reasonable doubt, that the insertion of [*insert name of object*] by NOA into NOC's [anus/vagina], was not done as part of a generally accepted medical or hygienic procedure.

In this case [*insert evidence and arguments relevant to proof of this element*].

Intention

The second element that the prosecution must prove beyond reasonable doubt is that the accused intended to take part in the act of sexual penetration with the complainant.[770]

[*If intention is not in issue, add the shaded section.*]

This element is not in issue here. [*If appropriate, explain further, e.g.* "if you are satisfied that the accused [consciously, voluntarily and deliberately] sexually penetrated the complainant, you should have no trouble finding that s/he did so intentionally".]

Child Under the Age of 16

The third element relates to the complainant. The prosecution must prove that s/he was between the age of 10 and 16 when the alleged act of sexual penetration took place.

In this case, there is no dispute that NOC was aged between 10 and 16 at that time. The main issue in this case is [*insert relevant issue*].[771]

Accused Not Married to the Complainant

The fourth element that the prosecution must prove is that the complainant and accused were not married at the time the act of sexual penetration took place.

In this case, there is no dispute that NOC and NOA were not married at that time. The main issue in this case is [*insert relevant issue*].[772]

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[770] Because sexual penetration of a child aged between 10 and 16 is an offence of basic intent (the intent to take part in the act of penetration), the issue of intention is only likely to arise in cases involving *penetration of the accused by the complainant*. In cases where the accused is alleged to have *penetrated the complainant*, proof of intent will rarely be separated from proof of the act, and "intention" will rarely be an independent issue. Mental state issues related to the intention to penetrate (e.g. the negation of intent by involuntariness, unconsciousness or accident) should generally be addressed by voluntariness directions.

[771] If the complainant's age is disputed, this section of the charge will need to be modified accordingly.

[772] If the existence of a marriage is disputed, this section of the charge will need to be modified accordingly.

Summary

To summarise, before you can find NOA guilty of sexual penetration of a child aged between 10 and 16, the prosecution must prove to you beyond reasonable doubt:

One – that NOA took part in an act of sexual penetration with NOC in the manner alleged; and

Two – that NOA intended to take part in that act of sexual penetration; and

Three – that NOC was between the age of 10 and 16 at the time that the act of sexual penetration took place; and

Four – that NOA and NOC were not married at the time of the sexual penetration.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of sexual penetration of a child aged between 10 and 16.

Last updated: 7 August 2015

7.3.25.8 Checklist: Sexual Penetration of a Child between 10 and 16 (1/3/81–4/8/91)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused took part in an act of sexual penetration with a child in the manner alleged; and

2. The accused sexually penetrated the complainant intentionally; and

3. The complainant was between the age of 10 and 16 at the time of the sexual penetration; and

4. The complainant was not married to the accused.

Sexual Penetration

1. Did the accused sexually penetrate the complainant in the manner alleged?

If yes, then go to 2

If no, then the accused is not guilty of sexual penetration of a child aged between 10 and 16

Intention

2. Did the accused intend to sexually penetrate the complainant?

If yes, then go to 3

If no, then the accused is not guilty of sexual penetration of a child aged between 10 and 16

Age of complainant

3. Was the complainant a child between the age of 10 and 16 at the time of the sexual penetration?

If yes, then go to 4

If no, then the accused is not guilty of sexual penetration of a child aged between 10 and 16

Absence of marriage

4. Has the prosecution proved that at the time of the sexual penetration the complainant was not married to the accused?

If yes, then the accused is guilty of sexual penetration of a child aged between 10 and 16 (as long as you also answered yes to questions 1, 2 and 3)

If no, then the accused is not guilty of sexual penetration of a child aged between 10 and 16

Last updated: 7 August 2015

7.3.26 Production of Child Abuse Material

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Commencement information

1. Section 51C of the *Crimes Act 1958* establishes that it is an offence to produce child abuse material. The section came into effect on 1 July 2017 (*Crimes Amendment (Sexual Offences) Act 2016* s 2).
2. The section replaced the former *Crimes Act 1958* s 68 and no longer uses the terminology "child pornography". The Act now uses the term "child abuse material", which incorporates material depicting non-sexual child abuse (*Crimes Act 1958* s 51A(1)).

Overview of elements

3. The offence requires that the prosecution prove three elements beyond reasonable doubt:
    - The accused intentionally produced material;
    - The material was child abuse material; and
    - The accused knew that the material was, or probably was, child abuse material (*Crimes Act 1958* s 51C(1)).

Intentionally produced material

4. The prosecution must prove the accused intentionally produced the material in question (*Crimes Act 1958* s 51C(1)(a)).
5. Material is defined in *Crimes Act 1958* s 51A(1) to include film, audio, photographs, printed matter, computer games, text, electronic material or any other thing of any kind.
6. Images can be still, moving, recorded or unrecorded (*Crimes Act 1958* s 51A(2)).
7. Electronic material is defined as including data from which text, images or sound may be generated (*Crimes Act 1958* s 51A(2)).
8. Material may extend to tactile items, such as sex dolls (*CD v Hamence* [2017] VSC 753, [28]).
9. The definition of material may be wider than the definitions that applied to the former child pornography offences, which covered film, photograph, publication or computer game, and where publication was defined as any written or pictorial matter, but did not include a film, computer game or an advertisement for a publication, film or computer game (*Crimes Act 1958* s 67A (as in force before 1 July 2017); *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5). In particular, the new definition may cover text or printed matter which is not intended for distribution, whereas under the previous legislation such material was not child pornography as it was not a 'publication' (compare *R v Quick* (2004) 148 A Crim R 51).
10. Producing material includes filming, printing, photographing, recording, writing, drawing or otherwise generating material (*Crimes Act 1958* s 51C(3)(a)).
11. Producing material also includes copying, reproducing, altering or collating material (*Crimes Act 1958* ss 51C(3)(b), (c)).

12. The Department of Justice's report, 'Crimes Amendment Sexual Offences Act 2016: An Introduction', notes that this means the same image can be "produced" multiple times. If an image is intentionally downloaded on to a new device or added to a collage, the subsequent action will also amount to producing material.

13. When a computer user views an image on the Internet, that image will automatically be copied to a "temporary Internet cache", where it will remain until the user deletes it, or until the computer overwrites the image after a certain period of time. If a particular user is unaware of the existence and operation of this cache, they cannot be said to have intentionally copied that image to their computer (*R v Smith* [2003] 1 Cr App R 13; *DPP v Kear* [2006] NSWSC 1145). In that situation, the offence of accessing child abuse material under *Crimes Act 1958* s 51H may be relevant.

Child abuse material

14. The prosecution must prove that the material is child abuse material.

15. Child abuse material is defined as material that:

> (a) depicts or describes-
>
> (i) a person who is, or who appears or is implied to be, a child-
>
> (A) as a victim of torture, cruelty or physical abuse (whether or not the torture, cruelty or abuse is sexual); or
>
> (B) as a victim of sexual abuse; or
>
> (C) engaged in, or apparently engaging in, a sexual pose or sexual activity (whether or not in the presence of another person); or
>
> (D) in the presence of another person who is engaged in, or apparently engaged in, a sexual pose or sexual activity; or
>
> (ii) the genital or anal region of a person who is, or who appears or is implied to be, a child; or
>
> (iii) the breast area of a person who is, or who appears or is implied to be, a female child; and
>
> (b) reasonable persons would regard as being, in the circumstances, offensive;

16. For the purposes of the offence, a child is a person under the age of 18 years (*Crimes Act 1958* s 51A(1)).

17. This definition of child abuse material mirrors the use of the terminology in some other Australian jurisdictions (see, e.g. *Criminal Code Act 1995* (Cth) s 473.1; *Crimes Act 1900* (NSW) s 91FB).

18. The use of the term "breast" connotates a 'visible degree of sexual development' which does not include the chest region of prepubescent girls (*Turner v R* (2017) 271 A Crim R 54, [59]).

19. Material is not child abuse material if the only reason it would fall within the definition is because it includes descriptions or depictions of prescribed body regions and the body regions are covered up by clothing (*Turner v R* (2017) 271 A Crim R 54, [51]).

20. Under the definition, the person depicted may be, appear to be, or be implied to be, a child. This reduces the need to prove the chronological age of the child, which can often be difficult to establish beyond reasonable doubt, as it is sufficient to prove that the person appears to be or is implied to be a child (see, on similar legislation, *R v Morcom* (2015) 122 SASR 154, [76]–[77]).This extends the definition to material produced by artistic means or material that describes fictitious persons. For example, a fictional story that contains explicit descriptions of children being sexually abused will be child abuse material (*Martin v R* [2014] NSWCCA 124).

21. This element is determined objectively. The court is not required to decide whether the accused intended for the material to be child abuse material. For example, photographs of children fully clothed in non-sexual situations would not constitute child abuse material even if the accused took the photographs for their own sexual gratification (*Turner v R* (2017) 271 A Crim R 54, [29]–[35]. See also *R v Morcom* (2015) 122 SASR 154, [22]–[63]).

Offensive to reasonable persons

22. Material will only be child abuse material if reasonable persons would regard the material as being, in the circumstances, offensive (*Crimes Act 1958* s 51A(1)).

23. The Department of Justice's report, 'Crimes Amendment Sexual Offences Act 2016: An Introduction', notes that this is a common standard in criminal law and directs attention to the discussion of the matter in *Monis v The Queen* (2013) 249 CLR 92.

24. The reasonable person standard requires that the circumstances of the allegedly offensive conduct be examined through objective eyes (*Monis v The Queen* (2013) 249 CLR 92, [44]).

25. Offensive material is material which is likely to 'arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances' (*Monis v The Queen* (2013) 249 CLR 92, [57]).

26. In relation to similar legislation in the Queensland Criminal Code, it has been held that, on appeal, the onus is on the appellant to demonstrate that there was a need for the trial judge to elaborate on the meaning of offensive (*R v SDI* [2019] QCA 135, [49]–[50]).

Knowledge that the material is child abuse material

27. The accused must have known the material was, or probably was, child abuse material (*Crimes Act 1958* s 51C(1)(c)).

28. As noted above, the definition of child abuse material has a content limb, such as depicting or describing the genital or anal region of a person who is or appears to be a child, and an offensiveness limb, that reasonable persons would regard the material as being, in the circumstances, offensive.

29. Crimes Act 1958 s 51U states:

> It is not a defence to a charge for a child abuse material offence that, at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that reasonable persons would not regard the child abuse material as being, in the circumstances, offensive.

30. It has not been determined how this interacts with the definition of child abuse material. In a case where it arises, the judge should take submissions on how it applies. As a matter of prudence, the model charge assumes that s 51U does not affect the scope of this element. The prosecution must therefore prove the accused knew the material meets both the content limb and the offensiveness limb of the definition.

Exceptions and defences

31. The Crimes Act 1958 provides three exceptions and six defences to the offence of producing child abuse material (see *Crimes Act 1958* ss 51J, 51K, 51L, 51M, 51N, 51O, 51P, 51Q, 51R).

32. Four of the defences are only available if the accused has not distributed the child abuse material to a person other than the child depicted (*Crimes Act 1958* s 51P, 51Q, 51R), or at all (*Crimes Act 1958* s 51O). Distribution for the purposes of these defences includes publishing, exhibiting, communicating, sending, supplying or transmitting the material or making it available to another person (*Crimes Act 1958* s 51A(2)(b)).

Administration of law

33. Section 51J of the *Crimes Act 1958* provides that a person has not committed a child abuse material offence if the production of child abuse material occurred in connection with the administration of the criminal justice system.

34. The section replaces ss 68(2) and (3), 70(4) and (5) and 70AAAB(6)(a)(i) of the *Crimes Act 1958*. The new exception operates in a similar fashion as its predecessors, though it condenses the previously extensive list of exempt persons into two broad categories.

35. Actions undertaken in connection with the administration of the criminal justice system includes the investigation or prosecution of offences (*Crimes Act 1958* s 51J(a)).

36. The exception extends to employees of the Department of Justice and Regulation who are authorised to engage in the relevant conduct by the Secretary of the Department (*Crimes Act 1958* s 51J(b)).

37. Exempt individuals must have undertaken the relevant conduct in good faith (*Crimes Act 1958* s 51J).

Classification

38. Section 51K of the *Crimes Act 1958* provides that the accused has not committed a child abuse material offence if the relevant material was classified, or would if classified be, anything other than RC.

39. The section replaces ss 68(1A), 69(2) and 70(2)(a) of the *Crimes Act 1958*. The updated section recategorizes the classification defence as an exception and extends the range of exempt material to include material rated X 18+.

40. Section 51A(1) of the *Crimes Act 1958* provides that the relevant classification is one made under the *Classification (Publications, Films and Computer Games) Act 1995*.

41. The classification of RC means Refused Classification (Classification (Publications, Films and Computer Games) Act 1995 s 7).

Artistic merit or public benefit

42. Section 51L of the *Crimes Act 1958* provides that the accused will have a defence when the child abuse material has public benefit or artistic merit.

43. The section replaces s 70(2)(b) of the *Crimes Act 1958*. The new section has added a requirement to the artistic merit defence that requires that the child abuse material was produced without the involvement of persons aged under the age of 18 years (*Crimes Act 1958* s 51L(1)(a)(ii)).

44. Materials that possess public benefit include materials that are for a genuine medical, legal, scientific or educational purpose (*Crimes Act 1958* s 51L(2)).

45. In *Nugent v Western Australia*, the Court of Appeal in Western Australia considered a differently worded exception that applied where the material had recognised scientific merit. The court held that there was a difference between material that may be studied for the purpose of science (including social sciences), and material that is a product of scientific study, and that only the latter type of material fell within the exception (*Nugent v Western Australia* (2014) 246 A Crim R 165, [66]).

46. The accused bears the burden of proving, on the balance of probabilities, that the material possesses artistic merit or public benefit (*Crimes Act 1958* s 51L(3)).[773]

Depictions of the accused

47. Section 51M of the *Crimes Act 1958* provides the accused has not committed a child abuse material offence if the accused is a child and:

    - the image depicts the accused alone (*Crimes Act 1958* s 51M(1)(c)); or
    - the image depicts the accused as a victim of a criminal offence punishable by imprisonment (*Crimes Act 1958* s 51M(2)(c)).

Accused is a minor and of similar age to those depicted

48. Section 51N of the *Crimes Act 1958* provides a defence where the accused is a child and the child abuse material depicts those of a similar age.

49. The section replaces elements of ss 70AAA(2) and 70AAA(4) of the *Crimes Act 1958*. The defence now requires that the accused is no more than 2 years older than the youngest child depicted in the image, regardless of whether that child makes the image child abuse material.

50. The defence is available if:

    - the accused is under the age of 18 years (*Crimes Act 1958* s 51N(1)(a));
    - the child abuse material is an image (*Crimes Act 1958* s 51N(1)(b));
    - the image depicts one or more persons (*Crimes Act 1958* s 51N(1)(c));
    - the image does not depict a criminal act punishable by imprisonment or, in the event that it does, the accused must have reasonably believed it did not (*Crimes Act 1958* s 51N(1)(d)); and
    - the accused is or reasonably believed they were no more than two years older than the youngest child depicted in the image (*Crimes Act 1958* s 51N(1)(e)).

51. It is immaterial for this defence whether the accused is depicted in the image (*Crimes Act 1958* s 51N(1)(c)).

52. The accused carries the burden of proving, on the balance of probabilities that they reasonably believed that they were no more than two years older than the youngest child and that the image did not depict a criminal act punishable by imprisonment (*Crimes Act 1958* s 51N(3)).[774]

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[773] An evidential burden applies to the requirement that material possessing artistic merit was produced without the involvement of persons under the age of 18 years.

[774] An evidentiary burden applies to all other requirements of the defence.

Material depicts accused as a child

53. Section 51O of the *Crimes Act 1958* provides a defence where the child abuse material depicts the accused as a child.

54. This section replaces s 70(2)(e) of the *Crimes Act 1958* and introduces new safeguards regarding the distribution of the material and the subject matter depicted.

55. Unlike s 51M of the *Crimes Act 1958*, this defence is available to an accused over the age of 18 years. This broader application is circumscribed by tighter restrictions on the distribution of the material and depictions of criminal activity.

56. The defence is available if:

- the child abuse material is an image (*Crimes Act 1958* s 51O(1)(a));
- the image depicts the accused as a child (*Crimes Act 1958* s 51O(1)(b));
- the accused has not distributed the image to any other persons (*Crimes Act 1958* s 51O(1)(d)); and
- the image does not depict the accused committing an act that is a criminal offence punishable by imprisonment (*Crimes Act 1958* s 51O(1)(c)).

57. The accused bears the burden of proving, on the balance of probabilities, that the image depicts them as a child (*Crimes Act 1958* s 51O(3)).[775]

Accused is of similar age to child and had child's consent

58. Section 51P of the *Crimes Act 1958* provides a defence where the depicted child is close in age to the accused and the accused reasonably believed that the depicted child had consented to the accused producing the material.

59. This section replaces s 70(2)(d) of the *Crimes Act 1958* and adds new requirements concerning consent and depictions of criminal conduct.

60. The defence is available if:

- the child abuse material is an image (*Crimes Act 1958* s 51P(1)(a));
- the image depicts a child aged 16 or 17 years at the time when the original image was first made (*Crimes Act 1958* s 51P(1)(b)(i));
- the accused is no more than two years older than the child (*Crimes Act 1958* s 51P(1)(e));
- the accused reasonably believes that they had the consent of the child to produce the image (*Crimes Act 1958* s 51P(1)(f));
- the child was not under the care, supervision or authority of the accused when the image was first made or any time prior (*Crimes Act 1958* s 51P(1)(b)(ii));
- the accused has not distributed the image to persons other than the child depicted (*Crimes Act 1958* s 51P(1)(d)); and
- the image does not depict an act that is a criminal offence punishable by imprisonment (*Crimes Act 1958* s 51P(1)(c)).

[775] An evidentiary burden applies to all other requirements of the defence.

61. The accused bears the burden of proving, on the balance of probabilities, that the accused is no more than two years older than the depicted child and he or she reasonably believed the depicted child had consented (*Crimes Act 1958* s 51P(4)).[776]

Accused is married to or in domestic partnership with child

62. Section 51Q of the Crimes Act 1958 provides a defence where the child depicted in the child abuse material was married or in a domestic partnership with the accused.

63. The defence is available if:

- the child abuse material is an image (*Crimes Act 1958* s 51Q(1)(a));
- the image is child abuse material because it depicts a person other than the accused (*Crimes Act 1958* s 51Q(1)(b));
- the accused has not distributed the image to any persons other than the person depicted (*Crimes Act 1958* s 51Q(1)(d));
- the image does not depict a criminal offence punishable by imprisonment (*Crimes Act 1958* s 51Q(1)(c));
- that other person was aged 16 or 17 years when the original image was first created (*Crimes Act 1958* s 51Q(1)(c));
- the accused was validly married to or in a domestic partnership with that other person when the accused produced the material and at the time when the original image was first created (*Crimes Act 1958* ss 51Q(1)(e)(ii) and 51Q(f)(i)); and
- the accused reasonably believed, at the time of the offence, the other person consented to the accused producing the image (*Crimes Act 1958* s 51Q(1)(f)(ii)).

64. If the accused was in a domestic partnership with the other person, the defence also requires that:

- the accused is no more than two years older than the other person (*Crimes Act 1958* s 51Q(1)(e)(ii)); and
- if the child was under the care, supervision or authority of the accused, the domestic partnership commenced prior to relationship of care, supervision or authority (*Crimes Act 1958* s 51Q(1)(e)(iii)).

65. The accused bears the burden of proving, on the balance of probabilities, that they reasonably believed the depicted child had consented (*Crimes Act 1958* s 51Q(4)).[777]

Reasonable belief in marriage or domestic partnership

66. Section 51R of the *Crimes Act 1958* provides a defence where the accused believed that they were married to or in a domestic partnership with the child depicted in the child abuse material.

67. The defence is available if:

- the child abuse material is an image (*Crimes Act 1958* s 51R(1)(a));
- the image is child abuse material because it depicts a person other than the accused (*Crimes Act 1958* s 51R(1)(b));

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[776] An evidentiary burden applies to all other requirements of the defence.

[777] An evidentiary burden applies to all other requirements of the defence.

- the image does not depict a criminal offence punishable by imprisonment (*Crimes Act 1958* s 51R(1)(c));[778]
- the accused has not distributed the image to any persons other the person depicted in the image (*Crimes Act 1958* s 51R(1)(d));
- When the image was first made, the accused reasonably believed that:

i) the child was aged 16 or 17 (Crimes Act 1958 s 51R(1)(e)(i));

ii) the accused and the child were married and the marriage was recognised as valid, or the accused was the child's domestic partner (Crimes Act 1958 s 51R(1)(e)(ii));

- At the time of the offence, the accused reasonably believed that:

i) the accused and the child were married and the marriage was recognised as valid, or the accused was the child's domestic partner (Crimes Act 1958 s 51R(1)(f)(i));

ii) the child consented to the conduct constituting the offence (Crimes Act 1958 s 51R(1)(f)(ii)).

68. If the accused reasonably believed that they were in a domestic partnership with the other person, they must also prove, on the balance of probabilities, that they reasonably believed that:
    - the child was no more than two years younger than the accused (*Crimes Act 1958* ss 51R(1)(f)(i) and 51R(4)); and
    - if the child was under the care, supervision or authority of the accused, the domestic partnership commenced prior to relationship of care, supervision or authority (*Crimes Act 1958* ss 51R(1)(e)(iii) and 51R(4)).

Last updated: 17 March 2020

7.3.26.1 Charge: Production of Child Abuse Material

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This direction is designed for cases where the child abuse material depicts the child engaged in, or apparently engaging in, a sexual pose or sexual activity. If the prosecution relies on other limbs of the definition of child abuse material, then the direction must be modified.

I must now direct you about the crime of producing child abuse material. To prove this crime, the prosecution must prove the following three elements beyond reasonable doubt:

One – The accused intentionally produced material.

Two – The material is child abuse material.

Three – The accused knew that the material was, or probably was, child abuse material.

I will now explain these each of these elements in more detail.

Produced material

The first element the prosecution must prove is that the accused intentionally produced material.

[778] An evidentiary burden applies to these elements.

This requires the prosecution to show that the accused intentionally created[779] the photos[780] in question.

In other words, the prosecution must show that it was the accused who created the photos and that s/he did so deliberately and not accidentally.

[*Refer to relevant evidence and arguments.*]

Child abuse material

The second element that the prosecution must prove is that the material is child abuse material.

The law provides that child abuse material comes in many forms. You must consider three questions:

- One – Does the material depict a person who is child or who appears to be a child?
- Two – Does the material depict the person engaged in a sexual pose or activity?[781]
- Three – Would a reasonable person regard the material as offensive, given all the circumstances?

If you answer yes to each question, then the material is child abuse material.

Depicts or describes a child or someone who is or who appears to be a child

The first question requires the prosecution to show that the person depicted is a child or appears to be a child. For the purpose of this offence, a child is a person under the age of 18.

To prove this first part of the element, the prosecution says [*identify relevant evidence and arguments*]. In response, the defence says [*identify relevant evidence and arguments*].

As part of this element, you can take into account your own life experience about how young the relevant person appears to be. You can also take into account how that person is depicted. If the person is depicted as a child, then this part of the element would be proved, even if the person was actually an adult.

Subject matter of the material

The second question looks at what the material shows. It must show the person in a sexual pose or sexual activity.[782]

To prove this second part of the element, the prosecution says [*identify relevant evidence and arguments*]. In response, the defence says [*identify relevant evidence and arguments*].

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[779] If the prosecution relies on a different form of production, this should be modified accordingly.

[780] If the prosecution relies on a different form of material, this should be modified accordingly. In cases where the jury must determine whether the alleged child abuse material is "material" within the meaning of the Crimes Act 1958, the direction should be modified to instruct the jury about the definition of material and how it can apply that definition in the case.

[781] If the prosecution relies on a different limb of the definition of child abuse material, this question should be modified accordingly, such as by asking whether the material depicts the genital or anal region of a person, or the breast area of a person who is or who appears to be female.

[782] If the prosecution relies on a different limb of the definition of child abuse material, this question should be modified accordingly, such as by asking whether the material depicts the genital or anal region of a person, or the breast area of a person who is or who appears to be female.

Offensive to reasonable persons

The third question requires you to decide whether reasonable people would regard the material as being offensive in the circumstances.

For this question you must consider current community standards and values. You must decide whether it offensive when measured against the standards of morality, decency and propriety generally accepted by reasonable adults.

To prove this third part of the element, the prosecution says [*identify relevant evidence and arguments*]. In response, the defence says [*identify relevant evidence and arguments*].

Knowledge

The third element the prosecution must prove is that the accused knew that the material was, or probably was, child abuse material.

This requires the prosecution to prove the accused knew that the material contained, or probably contained, the three features that make something child abuse material.

That is, first, the accused knew that the material depicted, or probably depicted, a person who was or appeared to be under the age of 18 years; secondly, that the accused knew that the material depicted, or probably depicted, the person engaging in a sexual pose or sexual activity; and, thirdly, that the accused knew that reasonable persons would, or probably would, regard the material as being offensive in the circumstances.

[*Identify relevant evidence and arguments.*]

Defences

[*If the defence has raised any relevant defence or exception, insert appropriate directions on that defence or exception here.*]

Summary

To summarise, before you can find the accused guilty, you must be satisfied that the prosecution has proved the following three elements beyond reasonable doubt:

One – NOA intentionally produced material

Two – The material is child abuse material.

Three – NOA knew that the material was, or probably was, child abuse material.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of producing child abuse material.

Last updated: 17 March 2020

7.3.26.2 Checklist: Production of Child Abuse Material

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This checklist is drafted on the assumption that the prosecution relies on clause (i)(C) of the definition of child abuse material. The checklist must be modified if the prosecution relies on a different limb of the definition.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally produced material; and

2. The material was child abuse material; and

3. The accused knew that the material was, or probably was, child abuse material.

Intentional Production of Material

1. Did the accused intentionally produce material?

1.1. Is the item in question material?

If Yes, then go to 1.2

If No, then the accused is not guilty of Production of Child Abuse Material

1.2. Did the accused produce that material?

If Yes, then go to 1.3

If No, then the accused is not guilty of Production of Child Abuse Material

1.3. Did the accused intend to produce that material?

If Yes, then go to 2

If No, then the accused is not guilty of Production of Child Abuse Material

Child Abuse Material

2. Is the material child abuse material?

2.1. Did it describe or depict someone who was, or appears to be, under the age of 18 years?

Consider – The person described or depicted does not need to be a real person

If Yes, then go to 2.2

If No, then the accused is not guilty of Production of Child Abuse Material

2.2. Did the material describe or depict that person engaged in, or apparently engaging in, a sexual pose or sexual activity?

If Yes, then go to 2.3

If No, then the accused is not guilty of Production of Child Abuse Material

2.3. In the circumstances, would reasonable persons regard the material as being

offensive?

If Yes, then go to 3

If No, then the accused is not guilty of Production of Child Abuse Material

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Knowledge of the Accused

3. Did the accused know that the material was, or probably was, child abuse material?

3.1. Did the accused know the material described or depicted, or probably described or depicted, someone who was, or appeared to be, under the age of 18 years?

If Yes, then go to 3.2

If No, then the accused is not guilty of Production of Child Abuse Material

3.2. Did the accused know the material described or depicted, or probably described or depicted, that person engaged in, or apparently engaging in, a sexual pose or sexual activity?

If Yes, then go to 3.3

If No, then the accused is not guilty of Production of Child Abuse Material

3.3. Did the accused know that reasonable persons would, or probably would, regard the material as being offensive?

If Yes, then the accused is guilty of Producing Child Abuse Material (as long as you have answered Yes to all previous questions)

If No, then the accused is not guilty of Production of Child Abuse Material

7.3.27 Distributing Child Abuse Material

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Commencement information

1. Section 51D of the *Crimes Act 1958* establishes that it is an offence to distribute child abuse material. The section came into effect on 1 July 2017 (*Crimes Amendment (Sexual Offences) Act 2016* s 2).

Overview of elements

2. The offence requires that the prosecution prove three elements beyond reasonable doubt:
    - The accused intentionally distributed material;
    - The material was child abuse material; and
    - The accused knew that the material was, or probably was, child abuse material (*Crimes Act 1958* s 51D(1)).

Intentionally distributed material

1. The prosecution must prove the accused intentionally distributed the material in question (*Crimes Act 1958* s 51D(1)(a)).
2. For information on the meaning of 'material', see 7.3.26 Production of child abuse material.
3. The *Crimes Act 1958* contains an inclusive list of ways in which material may be distributed, including:

> Publishing, exhibiting communicating, sending, supplying or transmitting the material to any other person; or
> Making the material available for access by any other person (*Crimes Act 1958* s 51A(2)(b)).

Child abuse material

4. The second element the prosecution must prove is that the material is child abuse material (*Crimes Act 1958* s 51D(1)(b)).
5. For information on the meaning of 'child abuse material', see 7.3.26 Production of child abuse material.

Knowledge that the material is child abuse material

6. The third element the prosecution must prove is that the accused knew the material was, or probably was, child abuse material (*Crimes Act 1958* s 51D(1)(c)).
7. As discussed in 7.3.26 Production of child abuse material, the model charge assumes that, despite *Crimes Act 1958* s 51U, the prosecution must prove that the accused knew the material meets both the content limb and the offensiveness limb of the definition of child abuse material.

Matters that do not affect the offence

8. Section 51D provides that it is not necessary to prove the identity of any person to whom the material was distributed, or that another person accessed the material (*Crimes Act 1958* s 51D(3)).

Territorial operation

9. It does not matter that some of the material was distributed outside Victoria, provided the accused was in Victoria for some or all of the time when the material was distributed (*Crimes Act 1958* s 51D).
10. Further, it does not matter that the accused was outside Victoria for some or all of the time when the material was distributed, as long as some or all of the material was distributed in Victoria (*Crimes Act 1958* s 51D).

Exceptions and defences

11. The *Crimes Act 1958* provides three exceptions and five defences to the offence of producing child abuse material (see *Crimes Act 1958* ss 51J, 51K, 51L, 51M, 51N, 51P, 51Q, 51R).
12. Three of the defences are only available if the accused has not distributed the child abuse material to a person other than the child depicted (*Crimes Act 1958* ss 51P, 51Q, 51R).
13. For information on the defences and exceptions, see 7.3.26 Production of child abuse material, noting that the defence in *Crimes Act 1958* s 51O (image of oneself) does not apply to this offence.

Last updated: 17 March 2020

7.3.27.1 Charge: Distributing Child Abuse Material

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This direction is designed for cases where the child abuse material depicts the child engaged in, or apparently engaging in, a sexual pose or sexual activity. If the prosecution relies on other limbs of the definition of child abuse material, then the direction must be modified.

I must now direct you about the crime of distributing child abuse material. To prove this crime, the prosecution must prove the following three elements beyond reasonable doubt:

One – The accused intentionally distributed material.

Two – The material is child abuse material.

Three – The accused knew that the material was, or probably was, child abuse material.

I will now explain these each of these elements in more detail.

Distributing material

The first element the prosecution must prove is that the accused intentionally distributed material.

This requires the prosecution to show that the accused intentionally published, exhibited, communicated, sent, supplied or transmitted the photos to another person.[783] The prosecution can also prove this element by showing that the accused intentionally made the photos available for another person to access.

[*If there is uncertainty about who the material was distributed to, add the following direction.*]

The law states that it is not necessary to prove who received the photos, or that another person in fact accessed the photos. You must focus on the accused's actions, and whether the accused published, exhibited, communicated, sent supplied or transmitted the photos, rather than whether another person obtained the photos.

[*Refer to relevant evidence and arguments.*]

Child abuse material

The second element that the prosecution must prove is that the material is child abuse material.

The law provides that child abuse material comes in many forms. You must consider three questions:

- One – Does the material depict a person who is child or who appears to be a child?
- Two – Does the material depict the person engaged in a sexual pose or activity?[784]
- Three – Would a reasonable person regard the material as offensive, given all the circumstances?

If you answer yes to each question, then the material is child abuse material.

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[783] If the prosecution relies on a different form of material, this should be modified accordingly. In cases where the jury must determine whether the alleged child abuse material is "material" within the meaning of the *Crimes Act 1958*, the direction should be modified to instruct the jury about the definition of material and how it can apply that definition in the case.

[784] If the prosecution relies on a different limb of the definition of child abuse material, this question should be modified accordingly, such as by asking whether the material depicts the genital or anal region of a person, or the breast area of a person who is or who appears to be female.

Depicts or describes a child or someone who is or who appears to be a child

The first question requires the prosecution to show that the person depicted is a child or appears to be a child. For the purpose of this offence, a child is a person under the age of 18.

To prove this first part of the element, the prosecution says [*identify relevant evidence and arguments*]. In response, the defence says [*identify relevant evidence and arguments*].

As part of this element, you can take into account your own life experience about how young the relevant person appears to be. You can also take into account how that person is depicted. If the person is depicted as a child, then this part of the element would be proved, even if the person was actually an adult.

Subject matter of the material

The second question looks at what the material shows. It must show the person in a sexual pose or sexual activity.[785]

To prove this second part of the element, the prosecution says [*identify relevant evidence and arguments*]. In response, the defence says [*identify relevant evidence and arguments*].

Offensive to reasonable persons

The third question requires you to decide whether reasonable people would regard the material as being offensive in the circumstances.

For this question you must consider current community standards and values. You must decide whether it offensive when measured against the standards of morality, decency and propriety generally accepted by reasonable adults.

To prove this third part of the element, the prosecution says [*identify relevant evidence and arguments*]. In response, the defence says [*identify relevant evidence and arguments*].

Knowledge

The third element the prosecution must prove is that the accused knew that the material was, or probably was, child abuse material.

This requires the prosecution to prove the accused knew that the material contained, or probably contained, the three features that make something child abuse material.

That is, first, the accused knew that the material depicted, or probably depicted, a person who was or appeared to be under the age of 18 years; secondly, that the accused knew that the material depicted, or probably depicted, the person engaging in a sexual pose or sexual activity; and, thirdly, that the accused knew that reasonable persons would, or probably would, regard the material as being offensive in the circumstances.

[*Identify relevant evidence and arguments.*]

Defences

[*If the defence has raised any relevant defence or exception, insert appropriate directions on that defence or exception here.*]

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[785] If the prosecution relies on a different limb of the definition of child abuse material, this question should be modified accordingly, such as by asking whether the material depicts the genital or anal region of a person, or the breast area of a person who is or who appears to be female.

Summary

To summarise, before you can find the accused guilty, you must be satisfied that the prosecution has proved the following three elements beyond reasonable doubt:

One – NOA intentionally distributed material;

Two – The material is child abuse material;

Three – NOA knew that the material was, or probably was, child abuse material.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of distributing child abuse material.

Last updated: 17 March 2020

7.3.27.2 Checklist: Distributing Child Abuse Material

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This checklist is drafted on the assumption that the prosecution relies on clause (i)(C) of the definition of child abuse material. The checklist must be modified if the prosecution relies on a different limb of the definition.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally distributed material; and

2. The material was child abuse material; and

3. The accused knew that the material was, or probably was, child abuse material.

Intentional Distribution of Material

1. Did the accused intentionally distribute material?

1.1. Is the item in question material?

If Yes, then go to 1.2

If No, then the accused is not guilty of Distributing Child Abuse Material

1.2. Did the accused distribute that material?

Consider – A person can distribute material by publishing, exhibiting, communicating, sending, supplying or transmitting the material to another person. A person can also distribute material by making the material available to access.

If Yes, then go to 1.3

If No, then the accused is not guilty of Distributing Child Abuse Material

1.3. Did the accused intend to distribute that material?

If Yes, then go to 2

If No, then the accused is not guilty of Distributing Child Abuse Material

Child Abuse Material

2. Is the material child abuse material?

2.1. Did it describe or depict someone who was, or appears to be, under the age of 18 years?

Consider – The person described or depicted does not need to be a real person

If Yes, then go to 2.2

If No, then the accused is not guilty of Distributing Child Abuse Material

2.2. Did the material describe or depict that person engaged in, or apparently engaging in, a sexual pose or sexual activity?

If Yes, then go to 2.3

If No, then the accused is not guilty of Distributing Child Abuse Material

2.3. In the circumstances, would reasonable persons regard the material as being offensive?

If Yes, then go to 3

If No, then the accused is not guilty of Distributing Child Abuse Material

Knowledge of the Accused

3. Did the accused know that the material was, or probably was, child abuse material?

3.1. Did the accused know the material described or depicted, or probably described or depicted, someone who was, or appeared to be, under the age of 18 years?

If Yes, then go to 3.2

If No, then the accused is not guilty of Distributing Child Abuse Material

3.2. Did the accused know the material described or depicted, or probably described or depicted, that person engaged in, or apparently engaging in, a sexual pose or sexual activity?

If Yes, then go to 3.3

If No, then the accused is not guilty of Distributing Child Abuse Material

3.3. Did the accused know that reasonable persons would, or probably would, regard the material as being offensive?

If Yes, then the accused is guilty of Distributing Child Abuse Material (as long as you have answered Yes to all previous questions)

If No, then the accused is not guilty of Distributing Child Abuse Material

Last updated: 17 March 2020

7.3.28 Production of Child Pornography

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Commencement Information

1. The offence of Production of Child Pornography (*Crimes Act 1958* s 68) commenced operation on 1 January 1996 (*Classification (Publication, Films and Computer Games) (Enforcement) Act 1995* s 2).
2. This offence was amended by the *Justice Legislation (Sexual Offences and Bail) Act 2004*, to increase the relevant age of a child from "under 16" to "under 18". The revised age limit applies to offences alleged to have been committed on or after 18 May 2004.

Overview of Elements

3. Production of Child Pornography has the following five elements, each of which must be proven beyond reasonable doubt:

   i) The accused printed or otherwise made or produced a film, photograph, publication or computer game;

   ii) The accused intended to print, make or produce that film, photograph, publication or computer game;

   iii) That film, photograph, publication or computer game describes or depicts a person:

   (a) engaging in sexual activity; or

   (b) depicted in an indecent sexual manner or context;

   iv) The person described or depicted in that way is, or appears to be, a minor; and

   v) The accused knew the nature of the film, photograph, publication or computer game, or was aware of its likely nature.

Production of a Film, Photograph, Publication or Game

4. There are two aspects to the first element:

   i) The accused must have printed or otherwise made or produced certain material; and

   ii) The material printed, made or produced must have been a film, photograph, publication or computer game.

5. The terms "printed", "made" or "produced" are ordinary English terms (*R v Bowden* [2000] 2 All ER 418; *R v Atkins* [2000] 2 Cr App R 248).
6. It has been held in England that a person who intentionally downloads a copy of a file from the Internet onto his or her computer produces or makes that copied file, because s/he causes it to exist (*R v Bowden* [2000] 2 All ER 418; *R v Atkins* [2000] 2 Cr App R 248; *R v Smith* [2003] 1 Cr App R 13. See also *DPP v Kear* [2006] NSWSC 1145).[786]
7. The definition of a "photograph" includes a photocopy or other reproduction of a photograph (*Crimes Act 1958* s 67A).
8. *Crimes Act* s 67A specifies that the terms "film", "publication" and "computer game" are to be given the same meaning as in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).
9. A "film" is defined to include any form of recording from which a visual image may be reproduced. This includes cinematographic films, slides, video tapes or video disks (*Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5).
10. A series of separate images downloaded to a computer by a user may also be considered to be a "film" (*DPP v Kear* [2006] NSWSC 1145).
11. A "computer game" is defined as a computer program capable of generating a display that allows for the playing of an interactive game[787] (*Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5A).
12. Although a "publication" is defined as any written or pictorial material which is not a film, computer game or advertisement for a publication, film or computer game (*Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5), private expressions of thought intended exclusively for private use, and which are not intended or likely to be distributed or disseminated, are not publications (*R v Quick* [2004] VSC 270).
13. Advertisements for publications, films or computer games are excluded from the definitions of those terms (*Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5). It therefore seems that a person who makes or produces an advertisement containing child pornography will only be guilty of this offence if the advertisement is photographic.

Intention to Print, Make or Produce

14. The second element of this offence requires the accused to have intended to print, make or produce the film, photograph, publication or computer game (*R v Bowden* [2000] 2 All ER 418; *R v Atkins* [2000] 2 Cr App R 248; *R v Smith* [2003] 1 Cr App R 13).
15. A person will therefore not be guilty of this offence if he or she *unintentionally* downloads a copy of a file from the Internet onto his or her computer (*R v Bowden* [2000] 2 All ER 418; *R v Atkins* [2000] 2 Cr App R 248; *R v Smith* [2003] 1 Cr App R 13. See also *DPP v Kear* [2006] NSWSC 1145).

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[786] In Victoria, people who download images of child pornography are usually charged with Possession of Child Pornograpy (*Crimes Act 1958* s 70) rather than Production of Child Pornography.

[787] An "interactive game" is one where the way in which the game proceeds, and the result achieved at various stages of the game, is determined in response to the decisions, inputs and direct involvement of the player (*Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5).

16. This may occur due to the way in which the Internet works. When a computer user views an image on the Internet, that image will automatically be copied to a "temporary Internet cache", where it will remain until the user deletes it, or until the computer overwrites the image after a certain period of time. If a particular user is unaware of the existence and operation of this cache, he or she cannot be said to have *intentionally* copied that image to his or her computer (*R v Smith* [2003] 1 Cr App R 13; *DPP v Kear* [2006] NSWSC 1145).[788]

Sexual Activity or Indecent Sexual Context

17. The third element of this offence requires the film, photograph, publication or computer game to depict or describe a person "engaging in sexual activity or depicted in an indecent sexual manner or context" (*Crimes Act 1958* s 67A).

18. It is not necessary that the person be engaging in sexual conduct or adopting a sexual pose. It is sufficient if the depiction is of a sexual character, nature or context (*Walls v R* Vic CC 14/07/2003).

19. It is not necessary that the depiction be of an event that has actually taken place. A fictitious account may depict or describe conduct constituting child pornography (*R v Quick* [2004] VSC 270).

20. The people depicted in the material do not need to be real people. An account involving fictitious people described as minors will be sufficient for this element to be met (*Holland v The Queen* (2005) 30 WAR 231).

21. In determining whether material is "indecent", it is necessary to apply contemporary standards and values. This must be assessed using community standards rather than the standards of any particular member of the jury (*Walls v R* Vic CC 14/07/2003; *Phillips v SA Police* (1994) 75 A Crim R 480; *Crowe v Graham* (1969) 121 CLR 375).

22. The context and purpose of the act will also be relevant in determining whether it is indecent. An act done for a legitimate medical purpose may not be indecent even if the same act would be indecent if done for a prurient purpose (*R v EG* [2002] ACTSC 85; *R v Court* [1989] AC 28).

Age of the Victim

23. The fourth element of this offence requires a person depicted or described in the way outlined above to be, or appear to be, a minor (*Crimes Act 1958* s 67A).

24. The age requirement for this section varies, depending on when the offence is alleged to have been committed:

    - For offences alleged to have been committed on or after 18 May 2004, the person depicted or described in the relevant way must be under the age of 18 (*Crimes Act 1958* s 67A).
    - For offences alleged to have been committed prior to 18 May 2004, the person depicted or described in the relevant way must be under the age of 16 (*Justice Legislation (Sexual Offences and Bail) Act 2004* s 4).

25. This element will be satisfied if the person depicted or described is under the relevant age limit, even if he or she does not appear to be so (*Police v Kennedy* (1998) 71 SASR 175).

26. In determining whether the victim "appears to be" a minor, the jury is required to make its own assessment of his or her apparent age (*Police v Kennedy* (1998) 71 SASR 175).

27. The jury must be satisfied that this element has been proven beyond reasonable doubt. Where the prosecution relies on the victim's "apparent age", this means that the jury must be satisfied, beyond reasonable doubt, that the accused appears to be a minor (*R v Wescott* Vic CC 26/5/2005).

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[788] While this approach has not been expressly adopted in Victoria, it was referred to in *R v Quick* [2004] VSC 270 without disapproval.

Knowledge

28. The fifth element of this offence requires the accused to know the nature of the film, photograph, publication or computer game (*Police v Kennedy* (1998) 71 SASR 175).

29. The precise scope of this element has not yet been determined in Victoria. Following the principles in *He Kaw Teh v R* (1985) 157 CLR 523, it appears likely that the accused will have to have known, or been aware that it was likely, that s/he was printing, making or producing pornographic images of a minor.

Exceptions

30. Section 70AAA of the *Crimes Act 1958* sets out exceptions to the offences of production of child pornography, procurement of minor for child pornography and possession of child pornography.

31. Section 70AAA commenced on 3 November 2014, and applies to all proceedings, regardless of when the offence is alleged to have been committed (*Crimes Act 1958*, s 626(5)).

32. Whenever one of the four exceptions requires a belief by the accused on reasonable grounds, the accused has the burden of proving this matter on a balance of probabilities (s 70AAA(7)). For other matters, the prosecution bears the burden of disproving the exception.

Elements of the exceptions

33. There are four exceptions in s 70AAA, one in each of subsections (1)–(4), and each exception applies only where:

    - the accused is a minor, and
    - the child pornography is an image.

34. For the purpose of this Charge Book, it is assumed that the relevant time for ascertaining whether the accused is a minor is at the date of the commission of the alleged offence although this is not explicit in s 70AAA, which states only that each exception applies 'to a minor'.

Section 70AAA(1)

35. The first exception applies to child pornography of the accused him or herself. It is particularly relevant where a minor produces an intimate 'selfie'. The exception applies where:

    - the accused is a minor,
    - the child pornography is an image,
    - the image depicts the accused alone or with an adult, and
    - the image is child pornography because of its depiction of the accused.

Section 70AAA(2)

36. The second exception applies to pornographic depictions of non-criminal acts between minors. Like all the exceptions, it is directed at behaviour that is not exploitative on the part of the accused.

37. For example, the exception would apply to an image depicting the accused in an act of sexual penetration with another minor up to two years younger, where both are consenting to the act.

38. The exception applies where:

    - the accused is a minor,

- the child pornography is an image,
- the image depicts the accused with another minor,
- the image does not depict a criminal act punishable by imprisonment, and
- the image is child pornography either because of:

(a) the depiction of the accused, or

(b) the depiction of the other minor if, at the time the offence was alleged to be committed, the accused-

- is not more than two years older, or
- believes on reasonable grounds that he or she is not more than two years older than

the youngest minor whose depiction makes the image child pornography.

39. This exception does not apply if the image depicts a criminal offence punishable by imprisonment. However, the exception in subsection (3) may be applicable in such circumstances (see below).

Section 70AAA(3)

40. The third exception applies where the child pornography depicts a criminal offence and the accused is the victim of that offence.

41. For example, the exception would apply to an image depicting the accused being raped.

- It requires that:
- the accused is a minor,
- the child pornography is an image,
- the image depicts the accused alone or with another person,
- the image depicts an act that is a criminal offence, and
- the accused is a victim of that offence.

Section 70AAA(4)

42. The fourth exception applies to a pornographic depiction of a person other than the accused, and requires that the image does not depict a criminal offence punishable by imprisonment and the accused is not more than two years older than that person. This exception is most likely to apply where an accused produces an intimate image of another person and covers many instances of 'sexting'.

43. For example, the exception will apply to an image depicting a minor engaging in sexual activity if the accused believes on reasonable grounds that the minor depicted is younger than him or her by up to two years.

44. The exception requires that:

- the accused is a minor,
- the child pornography is an image,
- the image does not depict the accused,
- the image does not depict a criminal act punishable by imprisonment, or the accused believes on reasonable grounds that it does not, and
- the accused-

- Is not more than two years older, or
- Believes on reasonable grounds that he or she is not more than two years older

than the youngest minor whose depiction makes the image child pornography.

Age of the youngest minor

45. Section 70AAA(5)(a) specifies that the reference in s 70AAA(4) to 'the youngest minor whose depiction in the image makes it child pornography' is to the age of that minor when the image was made or produced.

46. Section 70AAA(5)(a) only applies for purposes of sub-s (4) and makes no mention of the identical phrase in sub-s (2). It is not clear why the clarification in sub-s (5)(a) would not apply equally to subs(2). For example, s 70AAA(5)(a) is substantially replicated as s 57A(7) of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995*. But, in that version, both exceptions that use the phrase 'the youngest minor whose depiction in the image makes it child pornography' are included.

Defences and Exemptions

Classification by the OFLC

47. The accused will have a defence if s/he printed, made or produced a film, a photograph contained in a publication, or a computer game which, at the time of the alleged offence:
    - Was classified by the Office of Film and Literature Classification (OFLC) as being other than RC,[789] X or X 18+; or
    - Would, if classified by the OFLC, be classified as being other than RC, X or X 18+ (*Crimes Act 1958* s 68(1A)).

48. This defence does not cover non-photographic aspects of publications, or photographs which are not contained in publications (*Crimes Act 1958* s 68(1A). See also *R v Quick* [2004] VSC 270).

49. It seems likely that the accused bears the onus of establishing this defence on the balance of probabilities. This was the position agreed to by the parties, and taken by the judge, in *Walls v R* Vic CC 14/07/2003, in relation to a similarly drafted defence to Possession of Child Pornography (*Crimes Act 1958* s 70).

Law Enforcement

50. The Act exempts the conduct of the following people who print, make or produce child pornography in the exercise of functions conferred under the *Crimes Act 1958*, any other Act, or the common law:

[789] RC means "Refused Classification" (*Classification (Publications, Films and Computer Games) Act 1995* s 7).

(a) A member or officer of a law enforcement agency;

(b) A person authorised in writing by the Chief Commissioner of Police who is assisting a member or officer;

(c) A person belonging to a class of persons who have been authorised in writing by the Chief Commissioner of Police assisting a member or officer (*Crimes Act 1958* s 68(2)).

Last updated: 8 December 2014

7.3.28.1 Charge: Production of Child Pornography

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I must now direct you about the crime of production of child pornography. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – NOA printed, made or otherwise produced[790] a [film/photograph/publication/computer game].

Two – NOA intended to print, make or produce that [film/photograph/publication/computer game].

Three – that the [film/photograph/publication/computer game] describes or depicts a person engaging in sexual activity, or depicts a person in an indecent sexual manner or context.

Four – the person depicted or described in that way is, or appears to be, under the age of [16/18].[791]

Five – at the time the accused printed, made or otherwise produced the [film/photograph/publication/computer game], s/he knew that it contained child pornography, or was aware that this was likely.

I will now explain each of these elements in more detail.

Film, photograph, publication or computer game

The first element that the prosecution must prove is that the accused printed, made or otherwise produced a [film/photograph/publication/computer game].

There are two parts to this element, both of which must be proven beyond reasonable doubt:

- First, the item in question – in this case the [*describe relevant item*] – must be a [film/photograph/publication/computer game].
- Second, the accused must have printed, made or otherwise produced that [film/photograph/publication/computer game].

Film, photograph, publication or computer game

[*If it is not disputed that the relevant item is a film, photograph, publication or computer game, add the following shaded section.*]

In this case, it is not disputed that the [*describe relevant item*] is a [film/photograph/publication/computer game], so you should have no difficulty finding this to be the

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[790] If one or more of the terms "printed, made or otherwise produced" are not relevant in the context of a particular case, they should be removed throughout this charge.

[791] The relevant age is 16 for offences alleged to have been committed before 18 May 2004, and 18 for offences alleged to have committed on or after that date.

case.

[*If it is disputed that the relevant item is a film, photograph, publication or computer game, add the following shaded section*.]

[*For cases involving films, add the following darker shaded section*.]

The law says that a "film" is any form of recording from which a visual image may be reproduced. This includes [*insert any relevant examples, such as slides, video tapes, cinematographic films*].[792]

[*For cases involving photographs, add the following darker shaded section*.]

"Photograph" is an ordinary English word and does not have any special legal meaning. [*If it is alleged that the photograph is a photocopy or reproduction, add*: For the purposes of this offence, it includes photocopies or other reproductions of a photograph.]

[*For cases involving publications, add the following darker shaded section*.]

The law says that a "publication" is any published picture or piece of writing that is not a film, computer game or an advertisement. Because the writing or pictures must be "published", this definition does not include private expressions of thought which are not intended to be circulated or distributed to others – such as those contained in a personal diary or journal.

[*For cases involving computer games, add the following darker shaded section*.]

The law says that a "computer game" is a computer program that is capable of generating a display that allows for the playing of an interactive game. That is, it is a visual computer program that a person is directly involved in playing. He or she makes various decisions, which are input into the computer. The way in which the game proceeds, and the results achieved at the different stages of the game, will be determined in response to the player's input.

According to the prosecution, the [*describe relevant item*] is a [film/photograph/publication/computer game], because [*insert relevant prosecution evidence and/or arguments*]. The defence denies this, claiming that [*insert relevant defence evidence and/or arguments*].

It is for you to determine whether the [*describe relevant item*] is a [film/photograph/publication/computer game]. If you are not satisfied, beyond reasonable doubt, that it is, then you must find NOA not guilty of this offence.

Printed, made or otherwise produced

If you are satisfied that the [*describe relevant item*] is a [film/photograph/publication/computer game], you must then determine whether NOA printed, made or otherwise produced that [film/photograph/publication/computer game].

These are ordinary English words, which do not have a specific legal definition. It is for you to determine, based on all of the evidence, whether what NOA did was to print, make or otherwise produce the [*describe relevant item*].

[*Insert relevant evidence and/or arguments*.]

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[792] The definition of a "film" excludes advertisements. If it is contended that the relevant item was an advertisement rather than a film, this issue will need to be addressed.

It is only if you are satisfied that the prosecution has proven, beyond reasonable doubt, that NOA printed, made or otherwise produced the [*describe relevant item*], and that the [*describe relevant item*] is a [film/photograph/publication/computer game] that this first element will be met.

Intention

The second element that the prosecution must prove is that the accused intended to print, make or otherwise produce the [film/photograph/publication/computer game]. That is, you must be satisfied that NOA deliberately and not accidentally printed, made or produced the [*insert relevant item*].

[*If it is alleged that the accused unintentionally downloaded a copy of a file from the Internet onto his or her computer, add the following shaded section.*[793]]

In this case, the defence has argued that the relevant file was unintentionally downloaded onto his/her computer, and that s/he therefore did not intend to make or produce that file. [*Explain relevant evidence.*]

If a person is not aware that s/he is downloading a file to his/her computer, s/he cannot be said to have intended to make or produce a copy of that file. This element will therefore only be satisfied if the prosecution can prove, beyond reasonable doubt, that NOA was aware that the file was being downloaded, and intended to make or produce a copy of it.

Sexual Activity or Indecent Sexual Context

The third element that the prosecution must prove is that the [film/photograph/publication/computer game] describes or depicts a person engaging in sexual activity, or depicts a person in an indecent sexual manner or context.

[*If this element is not in issue, add the following shaded section.*]

In this case, it has not been disputed that the [*describe relevant item*] [describes or depicts a person engaging in sexual activity/depicts a person in an indecent sexual manner or context]. You should therefore have no difficulty finding that this element has been established.

[*If this element is in issue, add the following shaded section.*]

[*If the relevant material does not show people engaging in sexual conduct, add the following darker shaded section.*]

For this element to be satisfied, it is not necessary that the people involved actually be engaging in sexual conduct, or adopting an explicitly sexual pose. It is sufficient if the depiction in the material is of a sexual character, nature or context.

[*If the relevant material does not depict real people, add the following darker shaded section.*]

The people described or depicted in this way do not need to be real people. This element will be satisfied even if the people described as engaging in sexual activity, or depicted in an indecent sexual manner or context, are fictitious.

[*If it is alleged that the material depicts a person in an indecent sexual context, add the following darker shaded section.*]

In this case, it is alleged that the [film/photograph/publication/computer game] depicts a person in an

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[793] It is unclear whether downloading a file from the Internet constitutes production. See 7.3.28 Production of Child Pornography for further information.

"indecent" sexual manner or context. It is for you to decide whether this is so.

To determine whether something is indecent, you must consider contemporary community standards and values. That is, you must decide whether an ordinary member of the community would consider the depiction to be indecent, in light of our current standards of decency.

In making your determination, you must consider the context in which the [film/photograph/publication/computer game] was produced, and the purpose of its production. For example, a photograph of a naked child in a medical journal may not be indecent, even though the same photograph may be considered indecent if it was in a pornographic magazine.

In this case, the prosecution contends that the [*describe relevant item*] [describes or depicts a person engaging in sexual activity/depicts a person in an indecent sexual manner or context] because [*describe relevant prosecution evidence and/or arguments*]. The defence denies this, arguing that [*describe relevant defence evidence and/or arguments*].

It is only if you are satisfied, beyond reasonable doubt, that the [film/photograph/publication/computer game] does describe or depict a person engaging in sexual activity, or does depict a person in an indecent sexual manner or context, that this third element will be met.

Age

The fourth element that the prosecution must prove relates to the age of the [person/people] described or depicted in the way I have just outlined. For this element to be met, [he/she/one of them] must either be under the age of [16/18], or must appear to be under that age.[794]

These are alternatives. It is not necessary for the prosecution to prove that a person in the material is both under [16/18] and appears to be that young. It will be sufficient if they can prove one or other of these facts beyond reasonable doubt.

[*If this element is not in issue, add the following shaded section*.]

In this case, it is not contested that a person in the [*describe relevant material*] is, or appears to be, under the age of [16/18]. You should therefore have no difficulty finding that this element has been satisfied.

[*If this element is in issue, and the prosecution has provided evidence of actual age, add the following shaded section*.]

In this case, you have heard evidence that NOV was under [16/18] when the [film/photograph/publication/computer game] was produced. [*Summarise relevant prosecution evidence.*] The defence denies this, contending [*summarise relevant defence evidence and/or arguments*].

It is for you to determine if NOV was under [16/18] when the [*describe relevant item*] was made. If you find that s/he was, then this element will be met.

However, if you find that this has not been proven, you must then consider NOV's apparent age in the [film/photograph/publication/computer game].

Determining a person's apparent age is something you probably do every day. For example, you may look at a person who you don't know, and based on their physical characteristics you may estimate that they are over 50, or that they are under 20.

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[794] The relevant age is 16 for offences alleged to have been committed before 18 May 2004, and 18 for offences alleged to have been committed on or after that date.

That is the same process that you need to apply here. You must carefully consider NOV's appearance, and determine whether s/he seems to be under [16/18]. If you find, beyond reasonable doubt, that s/he does appear to be under that age, then this fourth element will be established.

[*If this element is in issue, and the prosecution is relying on apparent age, add the following shaded section*.]

In this case, the prosecution has not provided any evidence that a person depicted in the material was actually under [16/18]. Instead, they have contended that this element has been met because [a person/people] in the [film/photograph/publication/computer game] appear[s] to be under that age. You must therefore consider the apparent age of the [person/people] in the [film/photograph/publication/computer game].

Determining a person's apparent age is something you probably do every day. For example, you may look at a person who you don't know, and based on their physical characteristics you may estimate that they are over 50, or that they are under 20.

That is the same process that you need to apply here. You must carefully consider the relevant material, and determine whether [the person/any of the people] depicted in it appear[s] to be under [16/18]. If you find, beyond reasonable doubt, that [he/she/at least one of them] does appear to be under that age, then this fourth element will be established.

Knowledge

The fifth element that the prosecution must prove is that, at the time the accused printed, made or otherwise produced the [film/photograph/publication/computer game], s/he knew that it contained child pornography, or was aware that this was likely.

This requires the accused to have known, or to have been aware that it was likely that, the [film/photograph/publication/computer game] described or depicted a person engaging in sexual activity, or in an indecent sexual manner or context.

It also requires the accused to have known, or to have been aware that it was likely, that [the person/at least one of the people] depicted in that way was under the age of [16/18], or appeared to be under that age.

In this case, the prosecution alleged that the accused had the relevant state of knowledge, because [*insert prosecution evidence and/or arguments*]. The defence denied this, arguing that [*insert relevant defence evidence and/or arguments*].

It is only if you are satisfied, beyond reasonable doubt, that the accused knew that the [film/photograph/publication/computer game] contained child pornography, or was aware that this was likely, that this fifth element will be met.

Defences

[*If any of the exceptions in s 70AAA are relevant, insert appropriate directions on that exception/those exceptions here. See* 7.3.28 Production of Child Pornography *for guidance.*]

[*If the defence of classification is raised in respect of a film, a photograph contained in a publication or a computer game, include the following shaded section*.]

It is a defence to a charge of production of child pornography that the [film/photograph contained in a publication/computer game] would, at the time it was made, have been classified by the Office of Film

and Literature Classification as being other than RC or X 18+.[795]

A [film/photograph in a publication/computer game] may be classified RC or refused classification if it depicts, expresses or deals with matters of sex in a way that offends against the standards of morality and decency generally accepted by the community. This is the highest classification available and will only be given if the material is so offensive that it should not be classified.

A [film/computer game] may also be classified RC if it depicts or describes a person who is, or who appears to be, under the age of 18 in a way that is likely to cause offence to a reasonable adult.

A film will be classified X18+ if it is unsuitable for a minor to see and it contains real depictions of actual sexual activity between consenting adults which contain no violence, coercion or demeaning material that is likely to cause offence to a reasonable adult.

In applying these standards, you must consider community standards and values as they existed when the [film/photograph in the publication/computer game] was made or produced. You must decide whether an ordinary member of the community at that time would consider the material to be offensive.

The defence says that [*describe relevant defence arguments*]. The prosecution disputes this, saying that [*describe relevant prosecution arguments*].

This is one of those rare situations in which a matter must be proved by the accused. The prosecution must still prove all of the elements of the offence before you need to consider this defence. However, if you are satisfied that those elements have all been proven, it is defence counsel who must prove the requirements of this defence before you can find the accused not guilty.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – the defence only needs to prove these requirements on what is called the "balance of probabilities". This is a much lower standard than that required of the prosecution when proving an offence. It only requires the defence to prove that it is more probable than not that the [film/photograph contained in a publication/computer game] would be classified as something other than RC or X18+.

[*Insert any other defences that are open on the evidence here.*]

Summary

To summarise, before you can find NOA guilty of production of child pornography, the prosecution must prove, beyond reasonable doubt:

One – That NOA printed, made or otherwise produced a [film/photograph/publication/computer game]; and

Two – That NOA intended to print, make or produce that [film/photograph/publication/computer game]; and

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[795] This charge assumes that the Office of Film and Literature Classification had not classified the item. If they have, then the charge will need to be modified accordingly.

This charge is based on the *National Classification Code 2005* as on 30 July 2007, which contains X18+ classification rather than X classification. If the Code was different at the date of publication, the charge will need to be modified accordingly.

Three – That the [film/photograph/publication/computer game] describes or depicts a person engaging in sexual activity, or depicts a person in an indecent sexual manner or context; and

Four – That the person described or depicted in that way is, or appears to be, under the age of [16/18]; and

Five – That, at the time NOA printed, made or published the [film/photograph/publication/computer game], s/he knew that it contained child pornography, or was aware that this was likely.[796]

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of production of child pornography.

Last updated: 8 December 2014

7.3.28.2 Checklist: Production of Child Pornography

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused printed, made or otherwise produced a [film/photograph/publication/computer game]; and
2. The accused intended to print, make or otherwise produce that [film/photograph/publication/computer game]; and
3. The [film/photograph/publication/computer game] describes or depicts a person engaging in sexual activity, or depicts a person in an indecent sexual manner or context; and
4. A person depicted or described in that way, is or appears to be, under the age of [16/18];[797] and
5. The accused knew that the [film/photograph/publication/computer game] contained child pornography, or was aware that that was likely.

Production of a [Film/Photograph/Publication/Computer Game]

1. Did the accused print, make or otherwise produce a [film/photograph/publication/computer game]?

1.1 Is the item in question a [film/photograph/publication/computer game]?

If Yes, then go to 1.2

If No, then the accused is not guilty of Production of Child Pornography

1.2 Did the accused print, make or otherwise produce that [film/photograph/publication/computer game]?

If Yes, then go to 2

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[796] The judge should also summarise any defences or exceptions that are in issue.

[797] The relevant age is 16 for offences alleged to have been committed before 18 May 2004, and 18 for offences alleged to have committed on or after that date.

If No, then the accused is not guilty of Production of Child Pornography

Intention

2. Did the accused intend to print, make or otherwise produce that [film/photograph/publication/computer game]?

If Yes, then go to 3.1

If No, then the accused is not guilty of Production of Child Pornography

Child Pornography

3.1 Does the [film/photograph/publication/computer game] describe or depict a person engaging in sexual activity?

If Yes, then go to 4.1

If No, then go to 3.2

3.2 Does the [film/photograph/publication/computer game] depict a person in an indecent sexual manner or context?

Consider – Would an ordinary member of the community consider the depiction to be indecent, in light of our current standards of decency?

If Yes, then go to 4.1

If No, then the accused is not guilty of Production of Child Pornography

Age

4.1 Is a person described or depicted engaging in sexual activity, or in an indecent sexual manner or context, under the age of [16/18]?

If Yes, then go to 5.1

If No, then go to 4.2

4.2 Does a person described or depicted engaging in sexual activity, or in an indecent sexual manner or context, appear to be under the age of [16/18]?

If Yes, then go to 5.1

If No, then the accused is not guilty of Production of Child Pornography

Accused's Knowledge or Awareness

5. Did the accused know that the [film/photograph/publication/computer game] contained child pornography, or was the accused aware that that was likely?

5.1 Did the accused know that the [film/photograph/publication/computer game] described or depicted someone who was under [16/18], or who appeared to be under [16/18],

engaging in sexual activity?

If Yes, then the accused is guilty of Production of Child Pornography (as long as you have also answered Yes to questions 1.1, 1.2 and 2, Yes to either question 3.1 or 3.2, and Yes to either question 4.1 or 4.2)

If No, then go to 5.2

5.2 Was the accused aware that it was likely that the [film/photograph/publication/computer game] described or depicted someone who was under [16/18], or who appeared to be under [16/18], engaging in sexual activity?

If Yes, then the accused is guilty of Production of Child Pornography (as long as you have also answered Yes to questions 1.1, 1.2 and 2, Yes to either question 3.1 or 3.2, and Yes to either question 4.1 or 4.2)

If No, then go to 5.3

5.3 Did the accused know that the [film/photograph/publication/computer game] depicted someone who was under [16/18], or who appeared to be under [16/18], in an indecent sexual manner or context?

If Yes, then the accused is guilty of Production of Child Pornography (as long as you have also answered Yes to questions 1.1, 1.2 and 2, Yes to either question 3.1 or 3.2, and Yes to either question 4.1 or 4.2)

If No, then go to 5.4

5.4 Was the accused aware that it was likely that the [film/photograph/publication/computer game] depicted someone who was under [16/18], or who appeared to be under [16/18], in an indecent sexual manner or context?

If Yes, then the accused is guilty of Production of Child Pornography (as long as you have also answered Yes to questions 1.1, 1.2 and 2, Yes to either question 3.1 or 3.2, and Yes to either question 4.1 or 4.2)

If No, then the accused is not guilty of Production of Child Pornography

Last updated: 28 February 2008

7.3.29 Possessing Child Abuse Material

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Commencement information

1. Section 51G of the *Crimes Act 1958* establishes that it is an offence to knowingly possess child abuse material. The section came into effect on 1 July 2017 (*Crimes Amendment (Sexual Offences) Act 2016* s 2).

Overview of elements

2. The offence requires that the prosecution prove three elements beyond reasonable doubt:
    - The accused possessed material;
    - The material was child abuse material
    - The accused knowingly possessed child abuse material (*Crimes Act 1958* s 51G(1)).

Possessed material

3. The prosecution must prove the accused possessed the material in question (*Crimes Act 1958* s 51G(1)).
4. For information on the meaning of 'material', see 7.3.26 Production of child abuse material.
5. This offence uses the common law meaning of possession (see, in relation to similar legislation, *R v Shew* [1998] QCA 333; *Police v Kennedy* (1998) 71 SASR 175). Possession requires proof that the accused has custody or control of material and an intention to possess that material (*He Kaw Teh v The Queen* (1985) 157 CLR 523; *R v Maio* [1989] VR 281). For more information on those issues, see 7.6.3 Possession of a drug of dependence.
6. Once a person has possession of goods, he or she remains in possession of goods that are in his or her control, even if he or she has forgotten of the existence of those goods (*Police v Kennedy* (1998) 71 SASR 175).
7. A person possesses electronic material if he or she controls access to the material. It is not necessary to show that the accused had physical possession of the material (*Crimes Act 1958* s 51G(3)).
8. Section 51G provides two examples on how possession of electronic material operates:

    1 A has an online storage account for electronic material accessible with a username and password. A has control of what is stored in the account and can move material around within the account or delete material from the account. A has an electronic folder in the account that A has titled 'personal' in which A puts some electronic child abuse material. A knowingly has possession of child abuse material.

    2 In an online chat A is given a password for a joint email account that is shared with multiple users that A doesn't know. A logs into the email account and views emails that contain child abuse material images. While logged in A has the ability to view, move or delete emails that contain child abuse material. A continues to access the email account to view images. A knowingly has possession of child abuse material.

9. Examples are not exhaustive and may extend but do not limit the meaning of a provision (*Interpretation of Legislation Act 1984* s 36A)(1)).

Child abuse material

10. The second element the prosecution must prove is that the material is child abuse material (*Crimes Act 1958* s 51G(1)).
11. For information on the meaning of 'child abuse material', see 7.3.26 Production of child abuse material.

Knowingly possessing child abuse material

12. Section 51G requires that the accused must 'knowingly' possess child abuse material. This is consistent with the predecessor offence, which required proof that the accused knowingly possessed child pornography. While there have not been any cases on it, it is likely the requirement of knowing possessing requires proof that the accused knew the material was, or probably was child abuse material. As explained in 7.3.26 Production of child abuse material, this requires proof that the accused knew the material met or probably met both the content limb and the offensiveness limb of the definition of child abuse material.

Territorial operation

13. It does not matter that electronic material was outside Victoria, provided the accused was in Victoria at the time of some of all of the conduct constituting the offence (*Crimes Act 1958* s 51G(4)).

14. Further, it does not matter that the accused was outside Victoria for some or all of the time of the conduct constituting the offence, as long as the electronic material was in Victoria (*Crimes Act 1958* s 51G(5)).

Exceptions and defences

15. The *Crimes Act 1958* provides three exceptions and seven defences to the offence of possessing child abuse material (see *Crimes Act 1958* ss 51J, 51K, 51L, 51M, 51N, 51O, 51P, 51Q, 51R, 51T).

16. Three of the defences are only available if the accused has not distributed the child abuse material to a person other than the child depicted (*Crimes Act 1958* ss 51P, 51Q, 51R), or at all (*Crimes Act 1958* s 51O). Distribution for the purposes of these defences includes publishing, exhibiting, communicating, sending, supplying or transmitting the material or making it available to another person (*Crimes Act 1958* s 51A(2)(b)).

17. Most of the applicable defences are explained in 7.3.26 Production of child abuse material. The exception is unsolicited possession under *Crimes Act 1958* s 51T, which is described below.

18. It is a defence for the accused to prove, on the balance of probabilities, that:

    - The accused did not intentionally come into possession of child abuse material; and
    - On becoming aware of having come into possession of child abuse material, the accused, as soon as practicable, took all reasonable steps in the circumstances to cease possessing the material (*Crimes Act 1958* s 51T).

Last updated: 17 March 2020

7.3.29.1 Charge: Possessing Child Abuse Material

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This direction is designed for cases where the child abuse material depicts the child engaged in, or apparently engaging in, a sexual pose or sexual activity. If the prosecution relies on other limbs of the definition of child abuse material, then the direction must be modified.

I must now direct you about the crime of possessing child abuse material. To prove this crime, the prosecution must prove the following three elements beyond reasonable doubt:

One – The accused possessed material.

Two – The material is child abuse material.

Three – The accused knowingly possessed child abuse material.

I will now explain these each of these elements in more detail.

Possessing material

The first element the prosecution must prove is that the accused possessed material.

This requires the prosecution to show that the accused had the photos in his/her custody or control.

[*If the case involves electronic material, add the following direction.*]

The law states that a person has possession of electronic material if s/he controls access to that material. It is not necessary to show the accused has physical control of the electronic files.[798]

The prosecution must also show the accused intended to possess the photos. This requires you to draw a conclusion about the accused's state of mind.

[*Refer to relevant evidence and arguments.*]

Child abuse material

The second element that the prosecution must prove is that the material is child abuse material.

The law provides that child abuse material comes in many forms. You must consider three questions:

- One – Does the material depict a person who is child or who appears to be a child?
- Two – Does the material depict the person engaged in a sexual pose or activity?[799]
- Three – Would a reasonable person regard the material as offensive, given all the circumstances?

If you answer yes to each question, then the material is child abuse material.

Depicts or describes a child or someone who is or who appears to be a child

The first question requires the prosecution to show that the person depicted is a child or appears to be a child. For the purpose of this offence, a child is a person under the age of 18.

To prove this first part of the element, the prosecution says [*identify relevant evidence and arguments*]. In response, the defence says [*identify relevant evidence and arguments*].

As part of this element, you can take into account your own life experience about how young the relevant person appears to be. You can also take into account how that person is depicted. If the person is depicted as a child, then this part of the element would be proved, even if the person was actually an adult.

Subject matter of the material

The second question looks at what the material shows. It must show the person in a sexual pose or sexual activity.[800]

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[798] If necessary, a judge may provide the jury with an example of possessing electronic material, such as the examples included in *Crimes Act 1958* s 51G.

[799] If the prosecution relies on a different limb of the definition of child abuse material, this question should be modified accordingly, such as by asking whether the material depicts the genital or anal region of a person, or the breast area of a person who is or who appears to be female.

[800] If the prosecution relies on a different limb of the definition of child abuse material, this question should be modified accordingly, such as by asking whether the material depicts the genital or anal region of a person, or the breast area of a person who is or who appears to be female.

To prove this second part of the element, the prosecution says [*identify relevant evidence and arguments*]. In response, the defence says [*identify relevant evidence and arguments*].

Offensive to reasonable persons

The third question requires you to decide whether reasonable people would regard the material as being offensive in the circumstances.

For this question you must consider current community standards and values. You must decide whether it offensive when measured against the standards of morality, decency and propriety generally accepted by reasonable adults.

To prove this third part of the element, the prosecution says [*identify relevant evidence and arguments*]. In response, the defence says [*identify relevant evidence and arguments*].

Knowingly possessing child abuse material

The third element the prosecution must prove is that the accused knowingly possessed the child abuse material.

This requires the prosecution to prove the accused knew that the material contained, or probably contained, the three features that make something child abuse material.

That is, first, the accused knew that the material depicted, or probably depicted, a person who was or appeared to be under the age of 18 years; secondly, that the accused knew that the material depicted, or probably depicted, the person engaging in a sexual pose or sexual activity; and, thirdly, that the accused knew that reasonable persons would, or probably would, regard the material as being offensive in the circumstances.

[*Identify relevant evidence and arguments.*]

Defences

[*If the defence has raised any relevant defence or exception, insert appropriate directions on that defence or exception here.*]

Summary

To summarise, before you can find the accused guilty, you must be satisfied that the prosecution has proved the following three elements beyond reasonable doubt:

One – NOA possessed material;

Two – The material is child abuse material;

Three – NOA knowingly possessed child abuse material.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of possessing child abuse material.

Last updated: 17 March 2020

7.3.29.2 Checklist: Possessing Child Abuse Material

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This checklist is drafted on the assumption that the prosecution relies on clause (i)(C) of the definition of child abuse material. The checklist must be modified if the prosecution relies on a different limb of the definition.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused possessed material; and

2. The material was child abuse material; and

3. The accused knowingly possessed child abuse material.

Possessing material

1. Did the accused possess material?

1.1. Is the item in question material?

If Yes, then go to 1.2

If No, then the accused is not guilty of Possessing Child Abuse Material

1.2. Did the accused have the material in his or her custody or control?

If Yes, then go to 2

If No, then the accused is not guilty of Possessing Child Abuse Material

Child Abuse Material

2. Is the material child abuse material?

2.1. Did it describe or depict someone who was, or appears to be, under the age of 18 years?

Consider – The person described or depicted does not need to be a real person

If Yes, then go to 2.2

If No, then the accused is not guilty of Possessing Child Abuse Material

2.2. Did the material describe or depict that person engaged in, or apparently engaging in, a sexual pose or sexual activity?

If Yes, then go to 2.3

If No, then the accused is not guilty of Possessing Child Abuse Material

2.3. In the circumstances, would reasonable persons regard the material as being offensive?

If Yes, then go to 3

If No, then the accused is not guilty of Possessing Child Abuse Material

Knowingly possessing child abuse material

3. Did the accused know that the material was, or probably was, child abuse material?

3.1. Did the accused know the material described or depicted, or probably described or depicted, someone who was, or appeared to be, under the age of 18 years?

If Yes, then go to 3.2

If No, then the accused is not guilty of Possessing Child Abuse Material

3.2. Did the accused know the material described or depicted, or probably described or depicted, that person engaged in, or apparently engaging in, a sexual pose or sexual activity?

If Yes, then go to 3.3

If No, then the accused is not guilty of Possessing Child Abuse Material

3.3. Did the accused know that reasonable persons would, or probably would, regard the material as being offensive?

If Yes, then the accused is guilty of Possessing Child Abuse Material (as long as you have answered Yes to all previous questions)

If No, then the accused is not guilty of Possessing Child Abuse Material

Last updated: 17 March 2020

7.3.30 Possession of Child Pornography

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Commencement Information

1. The offence of Possession of Child Pornography (*Crimes Act 1958* s 70) commenced operation on 1 January 1996.
2. This offence was amended by the *Justice Legislation (Sexual Offences and Bail) Act 2004*, to increase the relevant age of a child from "under 16" to "under 18". The revised age limit applies to offences alleged to have been committed on or after 18 May 2004.

Overview of Elements

3. Possession of Child Pornography has the following three elements, each of which must be proven beyond reasonable doubt:

   i) The accused knowingly possessed a film, photograph, publication or computer game;

   ii) That film, photograph, publication or computer game describes or depicts a person:

      (a) engaging in sexual activity; or

(b) depicted in an indecent sexual manner or context; and

iii) The person described or depicted in that way is, or appears to be, a minor.

Possession of a Film, Photograph, Publication or Game

4. There are two aspects to the first element:

   i) The accused must have knowingly possessed certain material; and

   ii) The material possessed must have been a film, photograph, publication or computer game.

Possession

5. The law relating to possession of child pornography is the common law of possession (*R v Shew* [1998] QCA 333; *Police v Kennedy* (1998) 71 SASR 175).

6. At common law, people have in their possession whatever is, to their knowledge, physically in their custody or under their physical control (*DPP v Brooks* [1974] AC 862; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Maio* [1989] VR 281; *R v Mateiasevici* [1999] 3 VR 185).

7. According to this definition, to prove that the accused possessed the relevant material, the prosecution must show that:

   i) The accused had physical custody of or control over that material;

   ii) The accused intended to have custody of or exercise control over that material; and

   iii) The accused knew the nature of the material, or was aware of its likely nature (*R v Maio* [1989] VR 281. See also *He Kaw Teh v R* (1985) 157 CLR 523).

Custody and Control

8. People may have possession of an item even though they are not carrying the item or do not have it on them, as long as they have physical custody or control over the item (*R v Maio* [1989] VR 281; *R v Mateiasevici* [1999] 3 VR 185).

9. A person continues to be in possession of an item even if s/he forgets about its existence. In the absence of external intervention, once a person has possession of an item, s/he will continue to be in possession of that item until s/he takes some step to dispose of the item. The status of an item does not change with fluctuations in the memory of the possessor (*Police v Kennedy* (1998) 71 SASR 175; *R v Buswell* [1972] 1 All ER 75).

10. A person will generally not have possession of a film unless the user records or stores the film in some manner. This requires control over the recording, and capacity for subsequent viewing or reproduction (*DPP v Kear* [2006] NSWSC 1145).

Intention

11. A person will generally not have an intention to possess material that is automatically downloaded from the Internet onto his or her computer (*R v Wescott* Vic CC 26/5/2005; *R v Bowden* [2000] 2 All ER 418; *R v Atkins* [2000] 2 Cr App R 248; *R v Smith* [2003] 1 Cr App R 13; *DPP v Kear* [2006] NSWSC 1145).

12. This may occur due to the way in which the Internet works. When a computer user views an image on the Internet, that image will automatically be copied to a "temporary Internet cache", where it will remain until the user deletes it, or until the computer overwrites the image after a certain period of time. If a particular user is unaware of the existence and operation of this cache, he or she cannot be said to intentionally possess the images stored there (*R v Smith* [2003] 1 Cr App R 13; *DPP v Kear* [2006] NSWSC 1145).

13. A person will therefore generally not be guilty of possession of child pornography if s/he simply browses Internet sites which contain pornographic images. S/he must intend to possess those images (*R v Wescott* Vic CC 26/5/2005).

Knowledge

14. It has not yet been determined in Victoria precisely what the accused must have known about the material in his or her custody or control.

15. Following the principles in *He Kaw Teh v R* (1985) 157 CLR 523, it appears likely that the accused will have to have known, or been aware that it was likely, that s/he possessed pornographic images of a minor.

16. It will be sufficient for the prosecution to prove that the accused once knew that s/he had the relevant material in his or her possession, even if s/he had forgotten about it. This is because a person continues to possess an object s/he has taken possession of, until s/he does something to rid him/herself of it (*Police v Kennedy* (1998) 71 SASR 175; *McCalla v R* (1988) 87 Cr App R 372).

Photograph, Film, Publication or Game

17. The material possessed by the accused must have been a photograph, film, publication or computer game (*Crimes Act 1958* s 67A).

18. The definition of a "photograph" includes a photocopy or other reproduction of a photograph (*Crimes Act 1958* s 67A).

19. *Crimes Act* s 67A specifies that the terms "film", "publication" and "computer game" are to be given the same meaning as in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

20. A "film" is defined to include any form of recording from which a visual image may be reproduced. This includes cinematographic films, slides, video tapes or video disks (*Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5).

21. A series of separate images downloaded to a computer by a user may also be considered to be a "film" (*DPP v Kear* [2006] NSWSC 1145).

22. A "computer game" is defined as a computer program capable of generating a display that allows for the playing of an interactive game (*Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5A).[801]

23. Although a "publication" is defined as any written or pictorial material which is not a film, computer game or advertisement for a publication, film or computer game (*Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5), private expressions of thought intended exclusively for private use, and which are not intended or likely to be distributed or disseminated, are not publications (*R v Quick* [2004] VSC 270).

24. Advertisements for publications, films or computer games are excluded from the definitions of those terms (*Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5). It therefore seems that a person who possesses an advertisement containing child pornography will only be guilty of this offence if the advertisement is photographic.

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[801] An "interactive game" is one where the way in which the game proceeds, and the result achieved at various stages of the game, is determined in response to the decisions, inputs and direct involvement of the player (*Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5).

Sexual Activity or Indecent Sexual Context

25. The second element of this offence requires the film, photograph, publication or computer game to depict or describe a person "engaging in sexual activity or depicted in an indecent sexual manner or context" (*Crimes Act 1958* s 67A).

26. It is not necessary that the person be engaging in sexual conduct or adopting a sexual pose. It is sufficient if the depiction is of a sexual character, nature or context (*Walls v R* Vic CC 14/07/2003).

27. It is not necessary that the depiction be of an event that has actually taken place. A fictitious account may depict or describe conduct constituting child pornography (*R v Quick* [2004] VSC 270).

28. The people depicted in the material do not need to be real people. An account involving fictitious people described as minors will be sufficient for this element to be met (*Holland v The Queen* (2005) 30 WAR 231).

29. In determining whether material is "indecent", it is necessary to apply contemporary standards and values. This must be assessed using community standards rather than the standards of any particular member of the jury (*Walls v R* Vic CC 14/07/2003; *Phillips v SA Police* (1994) 75 A Crim R 480; *Crowe v Graham* (1969) 121 CLR 375).

30. The context and purpose of the act will be relevant in determining whether it is indecent. For example, an act done for a legitimate medical purpose may not be indecent, even if the same act would be indecent if done for a prurient purpose (*R v EG* [2002] ACTSC 85; *R v Court* [1989] AC 28).

Age of the Victim

31. The third element of this offence requires a person depicted or described in the way outlined above to be, or appear to be, a minor (*Crimes Act 1958* s 67A).

32. The age requirement for this section varies, depending on when the offence is alleged to have been committed:

    - For offences alleged to have been committed on or after 18 May 2004, the person depicted or described in the relevant way must be under the age of 18 (*Crimes Act 1958* s 67A).
    - For offences alleged to have been committed prior to 18 May 2004, the person depicted or described in the relevant way must be under the age of 16 (*Justice Legislation (Sexual Offences and Bail) Act 2004* s 4).

33. This element will be satisfied if the person depicted or described is under the relevant age limit, even if he or she does not appear to be so (*Police v Kennedy* (1998) 71 SASR 175).

34. In determining whether the victim "appears to be" a minor, the jury is required to make its own assessment of his or her apparent age (*Police v Kennedy* (1998) 71 SASR 175).

35. The jury must be satisfied that this element has been proven beyond reasonable doubt. Where the prosecution relies on the victim's "apparent age", this means that the jury must be satisfied, beyond reasonable doubt, that the accused appears to be a minor (*R v Wescott* Vic CC 26/5/2005).

Exceptions

36. Section 70AAA of the *Crimes Act 1958* sets out four exceptions to the offences of production of child pornography, procurement of minor for child pornography and possession of child pornography.

37. Section 70AAA commenced on 3 November 2014, and applies to all proceedings, regardless of when the offence is alleged to have been committed (*Crimes Act 1958*, s 626(5)).

38. Whenever one of the four exceptions requires a belief by the accused on reasonable grounds, the accused has the burden of proving this matter on a balance of probabilities (s 70AAA(7)).

39. For other matters, the prosecution bears the burden of disproving the exception.

40. These exceptions are explained in 7.3.28 Production of child pornography and apply, with any necessary alterations, to this offence.

Defences and Exemptions

41. Section 70(2) of the *Crimes Act 1958* specifies five defences to Possession of Child Pornography:
    (a) Classification by the Office of Film and Literature Classification;
    (b) Artistic merit or genuine medical, legal, scientific or educational purposes;
    (c) Belief on reasonable grounds that:
        - The minor was 18 or older; or
        - The accused was married to the minor;
    (d) The accused was not more than 2 years older than the minor; and
    (e) The accused was one of the minors depicted.
42. It seems likely that the accused will bear the onus of establishing these defences on the balance of probabilities. This was the position agreed to by the parties, and taken by the judge, in *Walls v R* Vic CC 14/07/2003, in relation to the defence of artistic merit (s 70(2)(b)).
43. Certain acts by law enforcement officers are also exempted from the offence (s 70(4)).

Classification by the OFLC

44. The accused will have a defence if s/he possessed a film, a photograph contained in a publication, or a computer game which, at the time of the alleged offence:
    - Was classified by the Office of Film and Literature Classification (OFLC) as being other than RC,[802] X or X 18+; or
    - Would, if classified by the OFLC, be classified as being other than RC, X or X 18+ (*Crimes Act 1958* s 70(2)).
45. This defence does not cover non-photographic aspects of publications, or photographs which are not contained in publications (*Crimes Act 1958* s 70(2). See also *R v Quick* [2004] VSC 270).

Legitimate Purposes

46. The accused will also have a defence if s/he can prove on the balance of probabilities that the film, photograph, publication or computer game:
    - Possesses artistic merit; or
    - Is for a genuine medical, legal, scientific or educational purpose (*Crimes Act 1958* s 70(2)(b)).
47. The defence of artistic merit does not apply if the prosecution proves that the person depicted in the pornography was actually under the age of 18 (as opposed to simply appearing to be under 18) (*Crimes Act 1958* s 70(3)).
48. A person can only be "actually" under the age of 18 if they are a real person (rather than a fictitious person) (*Walls v R* Vic CC 14/07/2003).
49. "Artistic merit" is not defined in the Act and should be given its ordinary meaning (*Walls v R* Vic CC 14/07/2003).

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[802] RC means "Refused Classification" (*Classification (Publications, Films and Computer Games) Act 1995* s 7).

50. For material to possess "artistic merit" it must possess a quality which gives it worth or value according to the standards of art. Art includes exercises in human creative skill and imagination. The expression "artistic merit" suggests an evaluation of the visual impression given by a work, but it does not restrict the assessment to visual impression without regard to the nature and purpose of the work (*Walls v R* Vic CC 14/07/2003; *Kelly-County v Beers* (2004) 207 ALR 421).

51. An act is done for a "genuine purpose" if the purpose alleged by the actor is the actual purpose behind the act. Where an act is motivated by several purposes, the dominant purpose must be a medical, legal, scientific or educational purpose (*Catch the Fire Ministries v Islamic Council of Victoria* (2006) 15 VR 207).

52. There have not yet been any decisions about the meaning of a "medical, legal, scientific or educational purpose". These words are likely to be given their ordinary English meaning.

Belief on Reasonable Grounds

53. It is a defence to prove on the balance of probabilities that the accused believed on reasonable grounds that:

    (a) The minor was aged 18 years or older; or

    (b) The accused was married to the minor (Crimes Act 1958 s 70(2)(c)).

54. For there to be reasonable grounds for a state of mind (such as belief), there must exist facts which are sufficient to induce that state of mind in a reasonable person (*George v Rockett* (1990) 170 CLR 104).

55. Where a jury finds that a person "appears to be" under the age of 18, it is likely that any belief of the accused's that the person was aged 18 or over would be unreasonable. This limits the practical availability of the defence where the prosecution relies on the apparent age of the minor (*Police v Kennedy* (1998) 71 SASR 175).

Youth of the Accused

56. In relation to cases involving the possession of films or photographs, the accused may have a defence if:

    - S/he personally made the film or took the photograph; or
    - S/he was given the film or photograph by the minor involved.

57. In such cases, the accused will have a defence if s/he can prove on the balance of probabilities that when s/he made the film or took the photograph, or when she was given the film or photograph, s/he was not more than 2 years older than the minor was or appeared to be (*Crimes Act 1958* s 70(2)(d)).

Depiction of the Accused

58. It is a defence to prove that the accused was one of the minors depicted in the film or photograph (*Crimes Act 1958* s 70(2)(e)). See also "Exceptions" above.

Law Enforcement

59. The Act exempts the conduct of the following people who possess child pornography in the exercise of functions conferred under the *Crimes Act 1958*, any other Act, or the common law:

    (a) A member or officer of a law enforcement agency;

    (b) A person authorised in writing by the Chief Commissioner of Police who is assisting a member or officer;

(c) A person belonging to a class of persons who have been authorised in writing by the Chief Commissioner of Police assisting a member or officer (Crimes Act 1958 s 70(4)).

Last updated: 8 December 2014

7.3.30.1 Charge: Possession of Child Pornography

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I must now direct you about the crime of possessing child pornography. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – NOA knowingly possessed a [film/photograph/publication/computer game].

Two – the [film/photograph/publication/computer game] describes or depicts a person engaging in sexual activity or depicts a person in an indecent sexual context.

Three – the person depicted or described in that way is, or appears to be, under the age of [16/18].[803]

I will now explain each of these elements in more detail.

Possession of a film, photograph, publication or computer game

The first element that the prosecution must prove is that the accused knowingly possessed a [film/photograph/publication/computer game].

There are two parts to this element, both of which must be proven beyond reasonable doubt:

- First, the item in question – in this case the [*describe relevant item*] – must be a [film/photograph/publication/computer game].
- Second, the accused must have knowingly possessed that [film/photograph/publication/computer game].

Film, photograph, publication or computer game

[*If it is not disputed that the relevant item is a film, photograph, publication or computer game, add the following shaded section.*]

In this case, it is not disputed that the [*describe relevant item*] is a [film/photograph/publication/computer game], so you should have no difficulty finding this to be the case.

[*If it is disputed that the relevant item is a film, photograph, publication or computer game, add the following shaded section.*]

[*For cases involving films, add the following darker shaded section.*]

The law says that a "film" is any form of recording from which a visual image may be reproduced. This includes [*insert any relevant examples, such as slides, video tapes, cinematographic films*].[804]

[*For cases involving photographs, add the following darker shaded section.*]

---

[803] The relevant age is 16 for offences alleged to have been committed before 18 May 2004, and 18 for offences alleged to have committed on or after that date.

[804] The definition of a "film" excludes advertisements. If it is contended that the relevant item was an advertisement rather than a film, this issue will need to be addressed.

"Photograph" is an ordinary English word and does not have any special legal meaning. [*If it is alleged that the photograph is a photocopy or reproduction, add*: For the purposes of this offence, it includes photocopies or other reproductions of a photograph.]

[*For cases involving publications, add the following darker shaded section.*]

The law says that a "publication" is any published picture or piece of writing that is not a film, computer game or an advertisement. Because the writing or pictures must be "published", this definition does not include private expressions of thought which are not intended to be circulated or distributed to others – such as those contained in a personal diary or journal.

[*For cases involving computer games, add the following darker shaded section.*]

The law says that a "computer game" is a computer program that is capable of generating a display that allows for the playing of an interactive game. That is, it is a visual computer program that a person is directly involved in playing. He or she makes various decisions, which are input into the computer. The way in which the game proceeds, and the results achieved at the different stages of the game, will be determined in response to the player's input.

According to the prosecution, the [*describe relevant item*] is a [film/photograph/publication/computer game], because [*insert relevant prosecution evidence and/or arguments*]. The defence denies this, claiming that [*insert relevant defence evidence and/or arguments*].

It is for you to determine whether the [*describe relevant item*] is a [film/photograph/publication/computer game]. If you are not satisfied, beyond reasonable doubt, that it is, then you must find NOA not guilty of this offence.

Possession

If you are satisfied that the [*describe relevant item*] is a [film/photograph/publication/computer game], you must then determine whether NOA knowingly possessed that [film/photograph/publication/computer game].

According to the law, people are said to have in their possession whatever is, to their knowledge, physically in their custody or under their control. This definition of possession requires the prosecution to prove three matters beyond reasonable doubt.

First, the prosecution must prove that the accused had physical custody of, or control over, the [*describe relevant item*].

[*If the case involves internet browsing, add the following shaded section.*]

In relation to the Internet, this means that a person will not possess material that they merely look at, or "browse", on a website. To possess that material, a person must do something to take control over it. That is, s/he must do something that gives him/her the ability to control the viewing and reproduction of the relevant material.

Second, the prosecution must prove that the accused intended to have custody or exercise control over the [*describe relevant item*].

[*If it is alleged that the accused unintentionally downloaded a file from the Internet onto his or her computer, add the following shaded section.*]

In this case, the defence has argued that the relevant file was unintentionally downloaded onto his/her computer, and that s/he therefore did not intend to possess that file. [*Explain relevant evidence.*]

If a person is not aware that s/he is downloading a file to his/her computer, s/he cannot be said to have intended to possess that file. This element will therefore only be satisfied if the prosecution can

prove, beyond reasonable doubt, that NOA was aware that the file was being downloaded, and intended to possess it.

Third, the prosecution must prove that the accused knew that the [*describe relevant item*] contained child pornography, or was aware that this was likely.

This requires the accused to have known, or to have been aware that it was likely that, the [film/photograph/publication/computer game] described or depicted a person engaging in sexual activity, or in an indecent sexual manner or context.

It also requires the accused to have known, or to have been aware that it was likely, that [the person/at least one of the people] depicted in that way was under the age of [16/18], or appeared to be under that age.

[*If there is a dispute over whether the accused had physical custody of the item, add the following shaded section.*]

NOA does not need to have been carrying the [*describe relevant item*], or to have had it on him/her, to have had it in his/her possession. S/he will have been in possession of whatever was, to his/her knowledge, in his/her custody or under his/her control, even if it was not with him/her.

[*In cases of joint possession, add the following shaded section.*]

It is possible for more than one person to possess an item – so long as they each meet all of the requirements I have just mentioned.

[*If the accused claimed to have forgotten that s/he possessed the relevant material, add the following shaded section.*]

You have heard evidence in this case that [*summarise relevant evidence*]. If you find that NOA never knew that s/he possessed the [*describe relevant item*], then clearly this element will not be satisfied, for s/he will neither have intended to possess it nor have known of its sexual nature.

However, if you find that NOA once knew that s/he possessed the [*describe relevant item*], but had simply forgotten about it, then this element may be satisfied. It will be satisfied if you decide that NOA once had an intention to possess the [*describe relevant item*], knew of its sexual nature, and continued to have custody and control over it.

This is because, according to the law, a person continues to have an intention to possess an item s/he has taken possession of in the past, unless s/he take steps to get rid it. His/her possession of that item does not vary according to whether s/he remembers s/he has it or not.

In this case, the prosecution alleged that NOA was knowingly in possession of [*describe relevant item and insert relevant evidence*]. The defence responded [*insert any relevant evidence or arguments*].

Summary of First Element

To summarise, for this first element to be met, the prosecution must prove:

1. That [*describe relevant item*] is a [film/photograph/publication/computer game]; and
2. That NOA knowingly possessed that [film/photograph/publication/computer game]. That is, s/he had physical custody or control of it, s/he intended to have such custody or control, and s/he knew that it contained child pornography, or was aware that this was likely.

It is for you to determine, based on all of the evidence, whether all of these requirements have been met. It is only if you are satisfied that the prosecution has proven each of them, beyond reasonable doubt, that this first element will be established.

Sexual Activity or Indecent Sexual Context

The second element that the prosecution must prove is that the [film/photograph/publication/computer game] describes or depicts a person engaging in sexual activity, or depicts a person in an indecent sexual manner or context.

[*If this element is not in issue, add the following shaded section*.]

In this case, it has not been disputed that the [*describe relevant item*] [describes or depicts a person engaging in sexual activity/depicts a person in an indecent sexual manner or context]. You should therefore have no difficulty finding that this element has been established.

[*If this element is in issue add the following shaded section.*]

[*If the relevant material does not show people engaging in sexual conduct, add the following darker shaded section*.]

For this element to be satisfied, it is not necessary that the people involved actually be engaging in sexual conduct, or adopting an explicitly sexual pose. It is sufficient if the depiction in the material is of a sexual character, nature or context.

[*If the relevant material does not depict real people, add the following darker shaded section.*]

The people described or depicted in this way do not need to be real people. This element will be satisfied even if the people described as engaging in sexual activity, or depicted in an indecent sexual manner or context, are fictitious.

[*If it is alleged that the material depicts a person in an indecent sexual context, add the following darker shaded section.*]

In this case, it is alleged that the [film/photograph/publication/computer game] depicts a person in an "indecent" sexual manner or context. It is for you to decide whether this is so.

To determine whether something is indecent, you must consider contemporary community standards and values. That is, you must decide whether an ordinary member of the community would consider the depiction to be indecent, in light of our current standards of decency.

In making your determination, you must consider the context in which the [film/photograph/publication/computer game] was produced, and the purpose of its production. For example, a photograph of a naked child in a medical journal may not be indecent, even though the same photograph may be considered indecent if it was in a pornographic magazine.

In this case, the prosecution contends that the [*describe relevant item*] [describes or depicts a person engaging in sexual activity/depicts a person in an indecent sexual manner or context] because [*describe relevant prosecution evidence and/or arguments*]. The defence denies this, arguing that [*describe relevant defence evidence and/or arguments*].

It is only if you are satisfied, beyond reasonable doubt, that the [film/photograph/publication/computer game] does describe or depict a person engaging in sexual activity, or does depict a person in an indecent sexual manner or context, that this second element will be met.

Age

The third element that the prosecution must prove relates to the age of the [person/people] described or depicted in the way I have just outlined. For this element to be met, [he/she/one of them] must either be under the age of [16/18], or must appear to be under that age.[805]

These are alternatives. It is not necessary for the prosecution to prove that a person in the material is both under [16/18] and appears to be that young. It will be sufficient if they can prove one or other of these facts beyond reasonable doubt.

[*If this element is not in issue, add the following shaded section.*]

In this case, it is not contested that a person in the [*describe relevant material*] is, or appears to be, under the age of [16/18]. You should therefore have no difficulty finding that this element has been satisfied.

[*If this element is in issue, and the prosecution has provided evidence of actual age, add the following shaded section.*]

In this case, you have heard evidence that NOV was under [16/18] when the [film/photograph/publication/computer game] was produced. [*Summarise relevant prosecution evidence.*] The defence denies this, contending [*summarise relevant defence evidence and/or arguments*].

It is for you to determine if NOV was under [16/18] when the [*describe relevant item*] was made. If you find that s/he was, then this element will be met.

However, if you find that this has not been proven, you must then consider NOV's apparent age in the [film/photograph/publication/computer game].

Determining a person's apparent age is something you probably do every day. For example, you may look at a person who you don't know, and based on their physical characteristics you may estimate that they are over 50, or that they are under 20.

That is the same process that you need to apply here. You must carefully consider NOV's appearance, and determine whether s/he seems to be under [16/18]. If you find, beyond reasonable doubt, that s/he does appear to be under that age, then this third element will be established.

[*If this element is in issue, and the prosecution is relying on apparent age, add the following shaded section.*]

In this case, the prosecution has not provided any evidence that a person depicted in the material was actually under [16/18]. Instead, they have contended that this element has been met because [a person/people] in the [film/photograph/publication/computer game] appear[s] to be under that age. You must therefore consider the apparent age of the [person/people] in the [film/photograph/publication/computer game].

Determining a person's apparent age is something you probably do every day. For example, you may look at a person who you don't know, and based on their physical characteristics you may estimate that they are over 50, or that they are under 20.

That is the same process that you need to apply here. You must carefully consider the relevant material, and determine whether [the person/any of the people] depicted in it appear[s] to be under [16/18]. If you find, beyond reasonable doubt, that [he/she/at least one of them] does appear to be under that age, then this third element will be established.

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[805] The relevant age is 16 for offences alleged to have been committed before 18 May 2004, and 18 for offences alleged to have been committed on or after that date.

Defences[806]

[*If any of the exceptions in s 70AAA are relevant, insert appropriate directions on that exception/those exceptions here. See* 7.3.28 Possession of Child Pornography *for guidance.*]

Even if you find that the prosecution has proven all three elements of this offence, NOA will not necessarily be guilty of this offence. This is because there are certain circumstances in which a person is allowed to possess child pornography. That is, they have a defence to the charge.

[*If the defence of artistic merit is open on the evidence, add the following shaded section*.]

Of relevance to this case, the law says that NOA will have a defence to this offence if s/he can prove that the [*describe relevant item*] possesses artistic merit.

This is an ordinary, English term, which does not have a specific legal meaning. It is for you to determine whether [*describe relevant item*] has artistic merit.

In deciding this, you should consider the nature of the item and the context in which it was possessed. You may also consider factors such as whether the [*describe relevant item*] exists to appeal to the aesthetic, rather than erotic, tastes of those who view it, and whether it is a product of human creativity and imagination. However, these are only guides. It is your decision to make, taking into account all of the evidence.

[*If the defence of genuine medical, legal, scientific or educational purpose is open on the evidence, add the following shaded section*.]

Of relevance to this case, the law says that NOA will have a defence to this offence if s/he can prove that s/he possessed the [*describe relevant item*] for a genuine [medical/legal/scientific/educational] purpose.

This is an ordinary English phrase, which does not have a specific legal meaning. It is for you to determine, based on all the evidence, whether NOA genuinely possessed the [*describe relevant item*] for a [medical/legal/scientific/educational] purpose. That must have been their dominant purpose for having that material.

[*If the defendant claims to have believed on reasonable grounds that the minor was aged 18 years or older, add the following shaded section*.]

Of relevance to this case, the law says that NOA will have a defence to this offence if s/he can prove that s/he believed on reasonable grounds that the person depicted or described in the [*describe relevant material*] was aged 18 or older.

This requires the defence to prove that NOA believed that the person depicted or described in the [*describe relevant material*] was aged 18 or older. It also requires the defence to prove that NOA had reasonable grounds for that belief. For there to be reasonable grounds for a belief, you must be satisfied that the belief was based on facts which would have caused a reasonable person to believe the same thing.

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[806] If the defendant relies on *Crimes Act 1958* s 70(2)(a) (Classification other than RC, X or X18+), then the jury must be directed on this defence. 7.3.28.1 Charge: Production of Child Pornography contains a sample charge for this defence.

This is one of those rare situations in which a matter must be proved by the accused. It is defence counsel who must prove to you that [the item possessed artistic merit/NOA possessed the item for a genuine [medical/legal/scientific/educational] purpose/NOA believed on reasonable grounds that the person was aged 18 over].

This means that, if you are satisfied that the prosecution has proven all of the elements of the offence, you must find NOA guilty unless s/he can prove that s/he met all the requirements of [one of] the defence[s].

However, unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – defence counsel only needs to prove these requirements on what is called the "balance of probabilities". This is a much lower standard than that required of the prosecution when proving an element of an offence. It only requires defence counsel to prove that it is more probable than not that the [item possessed artistic merit/NOA possessed the item for a genuine [medical/legal/scientific/educational] purpose/NOA believed on reasonable grounds that the person was aged 18 or over].

In this case, defence counsel argued that [*describe relevant defence evidence and/or arguments*]. The prosecution rejected these arguments, contending that [*describe relevant prosecution evidence and/or arguments*].

[*Insert any other relevant defences here.*]

Summary

To summarise, before you can find NOA guilty of possession of child pornography, the prosecution must prove, beyond reasonable doubt:

One – That NOA knowingly possessed a [film/photograph/publication/computer game]. That is:

- The item possessed by NOA was a [film/photograph/publication/computer game]; and
- NOA had physical custody of or control over that [film/photograph/publication/computer game], intended to have custody or exercise control over it; and knew that it contained child pornography, or was at least aware that this was likely; and

Two – That the [film/photograph/publication/computer game] describes or depicts a person engaging in sexual activity, or depicts a person in an indecent sexual manner or context; and

Three – That the person described or depicted in that way is, or appears to be, under the age of [16/18].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of possession of child pornography.

[*If a defence is open on the evidence, add the following shaded section.*]

However, even if the prosecution has proven each of these elements to you, NOA will not be guilty of this offence if s/he has proven that it is more probable than not that [the item possessed artistic merit/NOA possessed the item for a genuine [medical/legal/scientific/educational] purpose/NOA believed on reasonable grounds that the person was 18 or over].

Last updated: 8 December 2014

7.3.30.2 Checklist: Possession of Child Pornography

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused knowingly possessed a [film/photograph/publication/computer game]; and
2. The [film/photograph/publication/computer game] describes or depicts a person engaging in sexual activity, or depicts a person in an indecent manner or sexual context; and

3. A person described or depicted in that way is, or appears to be, under the age of [16/18].[807]

Knowing Possession

1. Did the accused knowingly possess a [film/photograph/publication/computer game]?

1.1 Is the item in question a [film/photograph/publication/computer game]?

If Yes, then go to 1.2

If No, then the accused is not guilty of Possession of Child Pornography

1.2 Did the accused have physical custody or control over that [film/photograph/publication/computer game]?

If Yes, then go to 1.3

If No, then the accused is not guilty of Possession of Child Pornography

1.3 Did the accused intend to have custody or exercise control over that [film/photograph/publication/computer game]?

If Yes, then go to 1.4

If No, then the accused is not guilty of Possession of Child Pornography

1.4 Did the accused know that the [film/photograph/publication/computer game] contained child pornography, or was the accused aware that that was likely?

1.4.1 Did the accused know that the [film/photograph/publication/computer game] described or depicted someone who was under [16/18], or who appeared to be under [16/18], engaging in sexual activity?

If Yes, then go to 2.1

If No, then go to 1.4.2

1.4.2 Was the accused aware that it was likely that the [film/photograph/publication/computer game] described or depicted someone who was under [16/18], or who appeared to be under [16/18], engaging in sexual activity?

If Yes, then go to 2.1

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[807] The relevant age is 16 for offences alleged to have been committed before 18 May 2004, and 18 for offences alleged to have committed on or after that date.

If No, then go to 1.4.3

1.4.3 Did the accused know that the [film/photograph/publication/computer game] depicted someone who was under [16/18], or who appeared to be under [16/18], in an indecent sexual manner or context?

If Yes, then go to 2.1

If No, then go to 1.4.4

1.4.4 Was the accused aware that it was likely that the [film/photograph/publication/computer game] depicted someone who was under [16/18], or who appeared to be under [16/18], in an indecent sexual manner or context?

If Yes, then go to 2.1

If No, then the accused is not guilty of Possession of Child Pornography

Child Pornography

2.1 Does the [film/photograph/publication/computer game] describe or depict a person engaging in sexual activity?

If Yes, then go to 3.1

If No, then go to 2.2

2.2 Does the [film/photograph/publication/computer game] depict a person in an indecent sexual manner or context?

Consider – Would an ordinary member of the community consider the depiction to be indecent, in light of our current standards of decency?

If Yes, then go to 3.1

If No, then the accused is not guilty of Possession of Child Pornography

Age

3.1 Is a person described or depicted engaging in sexual activity, or in an indecent sexual manner or context, under the age of [16/18]?

If Yes, then the accused is guilty of Possession of Child Pornography (as long as you have also answered Yes to questions 1.1, 1.2 and 1.3, Yes to any of questions 1.4.1, 1.4.2, 1.4.3 or 1.4.4, and Yes to either question 2.1 or 2.2)

If No, then go to 3.2

3.2 Does a person described or depicted engaging in sexual activity, or in an indecent sexual manner or context, appear to be under the age of [16/18]?

If Yes, then the accused is guilty of Possession of Child Pornography (as long as you have also answered Yes to questions 1.1, 1.2 and 1.3, Yes to any of questions 1.4.1, 1.4.2, 1.4.3 or 1.4.4, and Yes to either question 2.1 or 2.2)

If No, then the accused is not guilty of Possession of Child Pornography

Last updated: 28 February 2008

7.4 Other Offences against the Person

7.4.1 Intentionally Causing Serious Injury in Circumstances of Gross Violence

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Overview

1. The offence of intentionally causing serious injury in circumstances of gross violence is created by *Crimes Act 1958* s 15A.
2. The offence has the following five elements:
   (a) The complainant suffered a "serious injury";
   (b) The accused caused the complainant's serious injury;
   (c) The accused intended to cause serious injury;
   (d) The injury was caused in circumstances of "gross violence"; and
   (e) The accused acted without lawful justification or excuse.
3. This offence is an aggravated form of intentionally causing serious injury and differs only in the additional element that the injury was caused in circumstances of "gross violence". This topic only addresses the meaning of gross violence. For information on the other elements, see 7.4.2 Intentionally Causing Serious Injury.

Commencement Date

4. This offence applies to offences committed on or after 1 July 2013, following the commencement of the *Crimes Amendment (Gross Violence Offences) Act 2013*.

Gross Violence

5. The prosecution must prove that the accused caused serious injury to another in circumstances of gross violence.
6. Section 15A(2) of the *Crimes Act 1958* exhaustively defines circumstances of gross violence as one or more of the following:

a) The offender planned in advance to engage in conduct and at the time of the planning–

i) The offender intended that the conduct would cause a serious injury; or

ii) The offender was reckless as to whether the conduct would cause a serious injury; or

iii) A reasonable person would have foreseen that the conduct would be likely to result in a serious injury;

b) The offender in company with 2 or more other persons caused the serious injury;

c) The offender entered into an agreement, arrangement or understanding with 2 or more other persons to cause a serious injury;

d) The offender planned in advance to have with him or her and to use an offensive weapon, firearm or imitation firearm and in fact used the offensive weapon, firearm or imitation firearm to cause the serious injury;

e) The offender continued to cause injury to the other person after the other person was incapacitated;

f) The offender caused the serious injury to the other person while the other person was incapacitated.

Planned in advance

7. The precise meaning of the phrase "planned in advance" has not been considered at an appellate level. In *Farha v R*, the trial judge had distinguished the sort of planning in advance required for this offence from the level of pre-concert required for complicity. The judge noted that while an agreement for the purpose of complicity could be formed moments before the offending, planning for the purpose of gross violence could not occur at the scene of offending. The Court of Appeal observed that this may have been favourable to the accused depending on what 'in advance' means (*Farha v The Queen* [2018] VSCA 310, [44]–[51]).

Foresight that conduct would likely cause a serious injury

8. The meaning of the word "likely" varies with context and can range between requiring proof that a matter is a "real chance" through to requiring proof that the matter is more likely than not (see *Attorney-General (NSW) v Winters* [2007] NSWSC 1071).

9. While there have not been any decisions on the meaning of likely for the purposes of section 15A(2), this Charge Book takes the prudential approach of requiring proof that a reasonable person would have realised that the conduct was more likely than not to cause a serious injury. It is not sufficient that serious injury was possible, or a "real chance" (compare *Boughey v R* (1986) 161 CLR 10 and *Hannes v Director of Public Prosecutions (No 2)* [2006] NSWCCA 373).

Incapacitation

10. While this provision has not been interpreted, it is likely that the word "incapacitated" in sections 15A(2)(e) and (f) carries its ordinary meaning of a person being unable to defend himself or herself.

11. In many cases, this will arise when the complainant is rendered unconscious. Future cases may also identify other possible causes of incapacitation.

Alternative offences

12. Intentionally causing serious injury is a statutory alternative to intentionally causing serious injury in circumstances of gross violence (*Crimes Act 1958* s 422).

13. Intentionally causing injury (*Crimes Act 1958* s 18) is an impliedly included offence to a charge of intentionally causing serious injury in circumstances of gross violence (see *R v Kane* (2001) 3 VR 542). See 3.10 Alternative Verdicts on when a judge needs to leave alternative offences.

Last updated: 6 November 2019

7.4.1.1 Charge: Intentionally Causing Serious Injury in Circumstances of Gross Violence

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This charge should be given if:

i) the offence was allegedly committed on or after 1 July 2013,

ii) the accused has been charged with Intentionally causing serious injury in circumstances of gross violence, and

iii) Intentionally causing serious injury and Intentionally causing injury are available alternative offences.

If intentionally causing serious injury or intentionally causing injury are not left as alternative offences, the charge must be modified accordingly.

This charge is designed for cases where the injury is one which endangers life or is substantial and protracted. If the injury involves the destruction of a foetus, the charge will need to be modified.

Charge

I must now direct you about the crime of intentionally causing serious injury in circumstances of gross violence. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the complainant suffered a serious injury.

Two – the accused caused the complainant's serious injury.

Three – the accused intended to cause the complainant serious injury.

Four – the accused caused the complainant's serious injury in circumstances of gross violence.

Five – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Serious Injury

The first element that the prosecution must prove is that the complainant suffered a serious injury.

The law defines the word injury to mean physical injury or harm to mental health, whether temporary or permanent. A serious injury is an injury which endangers life or is substantial and protracted.[808]

[*If multiple injuries were inflicted, add the following shaded section.*]

In making your decision, you do not have to look at each of NOC's injuries separately, and decide whether or not any one of them is a serious injury. A person may suffer a serious injury because of the cumulative effect of several injuries.

[*If the physical injuries caused ongoing psychological harm, add the following shaded section.*]

An injury may be substantial and protracted because of the combined effect of the immediate physical injuries and prolonged psychological injuries.

In this case, the prosecution alleges that NOC's injuries were serious, because [*insert prosecution evidence and/or arguments*]. The defence denies this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC's injury endangered his/her life or was substantial and protracted that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's serious injury.

[*If causation is not in issue, add the following shaded section.*]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be seriously injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from* 7.1.2.1 Charges: Causation *should be adapted and inserted here.*]

Intention

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he intended to seriously injure NOC.

This element will not be satisfied if NOA only intended to injure NOC, but happened to seriously injure him/her. For this element to be met, NOA must have intended to seriously injure NOC. That is, NOA must have intended to inflict an injury which would endanger NOC's life or which would be substantial and protracted [*if necessary, add*: or involved the destruction of a foetus other than in the course of a medical procedure].

It is not, however, necessary that NOA intended to inflict the injury that NOC actually suffered. This third element will be satisfied even if NOA intended to inflict a different kind of serious injury.

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[808] The judge should consider including an example of a serious injury, such as brain damage, or a stabbing which causes significant blood loss.

In this case the prosecution submitted that you can infer that NOA intentionally [*describe relevant act and describe relevant evidence and/or arguments*]. The defence responded [*insert relevant evidence and/or arguments*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Gross Violence

The fourth element that the prosecution must prove is that the accused caused the serious injury in circumstances of gross violence.

The phrase "circumstances of gross violence" has a special legal meaning. To prove this element, the prosecution must show that:

[*Add any of the following circumstances which are relevant:*

- NOA planned in advance to [*describe relevant conduct*] and at the time of the planning, s/he intended that the conduct would cause a serious injury;
- NOA planned in advance to [*describe relevant conduct*] and at the time of the planning, s/he was reckless as to whether the conduct would cause a serious injury;[809]
- NOA planned in advance to [*describe relevant conduct*] and at the time of the planning, a reasonable person would have foreseen that the conduct was more likely than not to result in serious injury;
- NOA caused the injury in company with 2 or more other people. In this case, the prosecution says that NOA committed the offence in company with [*identify alleged co-offenders*];
- NOA caused the serious injury as part of a joint criminal enterprise with 2 or more other people. You will recall what I have told you about a joint criminal enterprise;
- NOA planned in advance to have with him/her and use an offensive weapon, firearm or imitation firearm with him/her and s/he used the offensive weapon, firearm or imitation firearm to cause the serious injury;
- NOA continued to cause injury to NOC after NOC was incapacitated;
- NOA caused serious injury to NOC while NOC was incapacitated.]

[*If there is a dispute about whether NOC was incapacitated, add the following shaded section*.]

A person is incapacitated if he or she is no longer able to defend himself or herself in the circumstances. In this case, the prosecution says that NOV was incapacitated when [*describe alleged cause and circumstances of incapacitation*]. The defence disputes this, and argues that [*identify relevant defence evidence and arguments*].

[*Identify relevant prosecution and defence evidence and arguments.*]

To prove this fourth element, the prosecution must prove beyond reasonable doubt that one [*if necessary, add*: or more] of these circumstances of gross violence existed.

---

[809] See 7.4.5 Recklessly Causing Serious Injury and 7.4.5.1 Charge: Recklessly Causing Serious Injury (From 1/7/13) for guidance on the meaning of recklessness.

Without Lawful Justification or Excuse

The fifth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section.*]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see* Part 8: Victorian Defences.]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, before you can find NOA guilty of intentionally causing serious injury in circumstances of gross violence, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA intended to seriously injure NOC; and

Four – That NOA caused the serious injury in circumstances of gross violence; and

Five – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of intentionally causing serious injury in circumstances of gross violence.

Warning: The following directions should only be given if the judge leaves lesser alternative offences. See *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts on when to leave lesser alternative offences.

Intentionally Causing Serious Injury

I must also direct you about the crime of intentionally causing serious injury. This is an alternative to the offence of intentionally causing serious injury in circumstances of gross violence. That means that you only need to return a verdict on this offence if you find NOA not guilty of intentionally causing serious injury in circumstances of gross violence.

The only difference between this alternative offence and the offence on the indictment is that the prosecution does not need to prove that NOA caused the serious injury in circumstances of gross violence. Therefore, if you are satisfied that the other elements have been proved, but are not satisfied that the prosecution has proved the fourth element, then you may find the accused guilty of intentionally causing serious injury.

Intentionally Causing Injury

The next alternative offence is intentionally causing injury. This is an alternative to the offences of intentionally causing serious injury in circumstances of gross violence and intentionally causing serious injury.

The offence of intentionally causing injury is very similar to the offence of intentionally causing serious injury in circumstances of gross violence, with two important differences: first, the prosecution does not need to prove that circumstances of gross violence existed. Second, the accused only needs to have caused, and to have intended to cause, the complainant to suffer injury rather than serious injury.

So the four elements of intentionally causing injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA intended to injure NOC; and

Four – That NOA acted without lawful justification or excuse.

The way that you determine whether these elements have been proved is the same as for the offence of intentionally causing serious injury in circumstances of gross violence, apart from the difference in the level of injury required.

This means that, in relation to the first element, it is for you to determine whether NOC suffered physical injury or harm to his/her mental health. The law says that physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function. The law also says that harm to mental health includes psychological harm, but not emotional reactions such as distress, grief, fear or anger which do not result in psychological harm. You must therefore decide whether NOC has suffered an injury, as opposed to some superficial or trivial harm.

In relation to the second element, it means that you must be satisfied that it was the accused who caused the complainant's injury.

[*If causation is not in issue, add the following shaded section.*]

As I told you in relation to the offence of intentionally causing serious injury, it is not disputed that NOA [*insert relevant causal acts*], and that this caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

This requires you to be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a brief summary of the relevant issues should be inserted here.*]

In relation to the third element, you must be satisfied that NOA intended to injure NOC, and in relation to the fourth element you must be satisfied that s/he acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section.*]

Again, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding the fourth element proven.

[*If any defences are open on the evidence, summarise the relevant issues.*]

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of intentionally causing injury.

Last updated: 29 June 2015

7.4.1.2 Checklist: Intentionally Causing Serious Injury in Circumstances of Gross Violence

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Five elements the prosecution must prove beyond reasonable doubt:

1. The complainant suffered a serious injury; and

2. The accused caused the complainant's serious injury; and

3. The accused intended to cause serious injury to the complainant; and

4. The accused caused the complainant's serious injury in circumstances of gross violence; and

5. The accused acted without lawful justification or excuse.

Serious Injury

1. Did the complainant suffer a serious injury?

Consider – Injury means physical injury or harm to mental health, whether temporary or permanent

Consider – Serious injury means

(a) an injury (including the cumulative effect of several injuries) that:

(i) endangers life or

(ii) is substantial and protracted; or

(b) the destruction of the foetus of a pregnant woman, other than in the course of a medical procedure, whether or not the woman suffers any other harm

If Yes, then go to 2

If No, then the accused is not guilty of intentionally causing serious injury in circumstances of gross violence

---

Causation

2. Did the accused cause the complainant's serious injury?

*Consider – **Were the accused's actions a substantial or significant cause of the complainant's** serious injury?*

If Yes, then go to 3

If No, then the accused is not guilty of intentionally causing serious injury in circumstances of gross violence

---

Intention

3. Did the accused intend to cause serious injury to the complainant?

Consider – It is not sufficient for the accused to have only intended to cause injury.

If Yes, then go to 4

If No, then the accused is not guilty of intentionally causing serious injury in circumstances of gross violence

Circumstances of Gross Violence

4. Did the accused cause the serious injury in circumstances of gross violence?

Consider – Circumstances of gross violence include [identify relevant circumstances]

If Yes, then go to 5

If No, then the accused is not guilty of Intentionally Causing Serious Injury in Circumstances of Gross Violence

Lawful Justification or Excuse

5. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of intentionally causing serious injury in circumstances of gross violence (as long as you have also answered Yes to questions 1, 2, 3 and 4)

If No, then the accused is not guilty of intentionally causing serious injury in circumstances of gross violence

Last updated: 30 May 2014

7.4.2 Intentionally Causing Serious Injury

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Overview

1. The offence of intentionally causing serious injury is created by *Crimes Act 1958* s 16.
2. The offence has the following four elements:
   (a) The complainant suffered a "serious injury";
   (b) The accused caused the complainant's serious injury;
   (c) The accused intended to cause serious injury; and
   (d) The accused acted without lawful justification or excuse.

"Serious Injury"

3. The *Crimes Amendment (Gross Violence Offences) Act* 2013 substituted a new exhaustive definition for "serious injury", which had previously been defined inclusively. Due to the operation of the transitional provision, *Crimes Act 1958* s 618, the new definition only applies to offences committed on or after 1 July 2013.
4. Where an offence is alleged to have been committed between two dates, one date before and one date after 1 July 2013, the law in force prior to the amendments applies (*Crimes Act 1958* s 618).
5. This topic separately describes the operation of this element for offences committed before and after 1 July 2013.

Serious Injury after 1 July 2013

6. From 1 July 2013, *Crimes Act 1958* section 15 contains the following relevant definitions:

> Injury means:
>
> a) Physical injury; or
>
> b) Harm to mental health;
>
> whether temporary or permanent
>
> Serious injury means:
>
> a) An injury (including the cumulative effect of more than one injury) that–
>
> i) Endangers life; or
>
> ii) Is substantial and protracted;
>
> b) The destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm.

7. Physical injury and harm to mental health are both defined inclusively. Physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and impairment of bodily function. Harm to mental health includes psychological harm, but does not include emotions such as distress, grief, fear or anger unless such emotions result in psychological harm (*Crimes Act 1958* s 15).
8. Under the law in force before 1 July 2013, serious injury was inclusively defined to include a combination of injuries and the destruction of a foetus. Whether an injury was serious involved a value judgment by the jury (*R v Welsh & Flynn* Vic CCA 16/10/1987).
9. In contrast, for offences committed after 1 July 2013 the definition of serious injury is exclusive. Once a jury determines that an injury endangers life, is substantial and protracted, or involves the destruction of a foetus, there is no separate value judgment on whether the injury is a "serious injury".

Serious Injury before 1 July 2013

10. For offences committed before 1 July 2013, "serious injury" is an ordinary English term. It is for the jury to determine, as a question of fact, whether the complainant's injuries are sufficient to qualify as "serious" (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186).
11. In making this determination, the jury must make a value judgment about the gravity of the complainant's injuries (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186; *R v Cogley* [1989] VR 799).
12. The jury may compare the injury in question with injuries which common experience suggests would be superficial or trifling, and therefore fall short of being "serious injuries" (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186; *R v Cogley* [1989] VR 799).
13. The injury must be assessed in its context. The complainant's age, gender and state of health may all be relevant when assessing whether the injury is serious. An injury that is inflicted on a frail person may be more serious than the same injury inflicted on a person in good health (*R v Welsh & Flynn* Vic CCA 16/10/1987; *Reyne v The Queen* [2022] NSWCCA 201, [123]–[127]).
14. The jury does not need to find that the defendant inflicted "really serious" injury, as was previously the case when the offence required the accused to have caused grievous bodily harm (*R v Welsh & Flynn* Vic CCA 16/10/1987).

15. The jury is not restricted to considering physical injuries. "Injury" (and by implication "serious injury") includes unconsciousness, hysteria, pain and any substantial impairment of bodily function (*Crimes Act 1958* s 15).

16. Under this definition, injury can include infecting a person with a disease. This occurs at the time of infection. It does not matter that the disease or virus takes time to manifest, or that the victim may spontaneously clear the disease without developing symptoms or consequences. Causing injury does not require something immediate or require that future harm be inevitable or even likely (*Peters v The Queen (No 2)* (2019) 60 VR 231, [61]–[63]).

17. In the case of a disease, the likelihood of future consequences and the nature of those consequences is relevant to whether the injury is serious. This must be assessed at the time of infection, but may be informed by hindsight given subsequent events. The jury is required to decide whether the injury is serious, not whether the injury had serious consequences (*Peters v The Queen (No 2)* (2019) 60 VR 231, [62], [67]).

18. The prospect that medical treatment may reduce the impact of a disease cannot reverse the seriousness of the injury. The side effects of treatment may instead go to show that the injury is serious (*Peters v The Queen (No 2)* (2019) 60 VR 231, [69]).

19. The jury is also not restricted to considering the gravity of one particular injury. A serious injury includes a combination of injuries and includes the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm (*Crimes Act 1958* s 15).

20. At common law, there was no clear rule on whether a foetus was considered part of the mother, or whether it had a sui generis status until it was born. Instead, the matter depended on the specific legal context in which the question arose and the effect of any relevant legislation (*R v King* (2003) 59 NSWLR 472. See also *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245 and *R v Sullivan* [1991] 1 SCR 489).

21. Following amendments introduced by the *Abortion Law Reform Act 2008*, destruction of a foetus can constitute a serious injury, even if the mother does not herself suffer any other harm and it is not necessary to show that the foetus was born alive (*Crimes Act 1958* s 15).

22. The definitions of "serious" and "injury" in *Crimes Act 1958* s 15 as in force before 1 July 2013 are not exhaustive. Jurors are free to use their own experiences when determining whether or not the complainant has suffered a serious injury (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186).

23. It is ultimately a matter for the jury to determine whether an injury is sufficiently serious. It is unwise to attempt a more elaborate explanation (*R v Rhodes* (1984) 14 A Crim R 124).

Causing Serious Injury

24. The complainant's serious injury must have been caused by the accused. For detailed information about causation, see 7.1.2 Causation.

25. The injury does not need to have been caused by the accused personally assaulting the complainant. This element will be satisfied even if s/he caused the injury indirectly (*R v Salisbury* [1976] VR 452).

Intention to cause serious injury

26. It is not sufficient that the accused intended to do the *act* that injured the complainant. S/he must have intended to cause serious injury (*R v Westaway* (1991) 52 A Crim R 336).

27. It is also not sufficient for the accused to have intended only to cause injury. S/he must have intended to cause *serious* injury (*R v Westaway* (1991) 52 A Crim R 336; *R v Liewes* Vic CA 10/04/1997; *DPP v Fevaleaki* [2006] VSCA 212).

28. The accused does not need to have intended to have caused the precise injury that s/he ultimately caused. It is only necessary that the accused intended to cause an injury that is a serious injury, and actually causes a serious injury (*Royall v R* (1991) 172 CLR 378).

29. The nature of the accused's acts may provide evidence of his/her intention (*R v McKnoulty* (1995) 77 A Crim R 333).

30. Intention and causation must always be treated as separate issues. This is especially important if the accused did not directly cause the complainant's injuries. In such cases, the jury must separately assess whether the accused caused those injuries, and whether s/he *intended* to cause serious injury (*R v McKnoulty* (1995) 77 A Crim R 333; *Royall v R* (1991) 172 CLR 378).

31. The accused's capacity to form the relevant intention may have been affected by drugs and alcohol (*R v Mala* Vic CA 27/11/1997*; R v Kumar* (2006) 165 A Crim R 48*; R v Faure* [1999] 2 VR 537). See 8.7 Common Law Intoxication for further information on this point.

Without lawful excuse

32. The prosecution must disprove any defences which are open on the evidence (*R v Roach* [1988] VR 665).

33. Common defences in this area include self-defence (see 8.3 Common Law Self-defence, 8.2 Statutory (Pre-1/11/14) Self-defence and Defensive Homicide and 8.1 Statutory Self-defence (From 1/11/14)) and consent (see 7.4.8 Common Law Assault). See Part 8: Victorian Defences for information concerning other possible defences.

Alternative offences

34. From 1 July 2013, intentionally causing serious injury is a statutory alternative to the more serious offence of intentionally causing serious injury in circumstances of gross violence (*Crimes Act 1958* s 422).

35. Intentionally Causing Injury (*Crimes Act 1958* s 18) is an impliedly included offence to a charge of intentionally causing serious injury (see *R v Kane* (2001) 3 VR 542). For information on when to leave this as an alternative, see *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts.

Last updated: 27 October 2022

7.4.2.1 Charge: Intentionally Causing Serious Injury (From 1/7/13)

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This charge should be given if:

i) the offence was allegedly committed after 1 July 2013,

ii) the accused has been charged with Intentionally causing serious injury, and

iii) neither Recklessly causing serious injury nor Recklessly causing injury are available as alternative verdicts.

Charge

I must now direct you about the crime of intentionally causing serious injury. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the complainant suffered a serious injury.

Two – the accused caused the complainant's serious injury.

Three – the accused intended to cause the complainant serious injury.

Four – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Serious Injury

The first element that the prosecution must prove is that the complainant suffered a serious injury.

The law defines the word injury to mean physical injury or harm to mental health, whether temporary or permanent. A serious injury is an injury which endangers life or is substantial and protracted.[810]

[*If multiple injuries were inflicted, add the following shaded section.*]

In making your decision, you do not have to look at each of NOC's injuries separately, and decide whether or not any one of them is a serious injury. A person may suffer a serious injury because of the cumulative effect of several injuries.

[*If the physical injuries caused ongoing psychological harm, add the following shaded section.*]

An injury may be substantial and protracted because of the combined effect of the immediate physical injuries and prolonged psychological injuries.

In this case, the prosecution alleges that NOC's injuries were serious, because [*insert prosecution evidence and/or arguments*]. The defence denies this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC's injury endangered his/her life or was substantial and protracted that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's serious injury.

[*If causation is not in issue, add the following shaded section.*]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be seriously injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from Causation: Charges should be adapted and inserted here.*]

Intention

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he intended to seriously injure NOC.

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[810] The judge should consider including an example of a serious injury, such as brain damage, or a stabbing which causes significant blood loss.

This element will not be satisfied if NOA only intended to injure NOC, but happened to seriously injure him/her. For this element to be met, NOA must have intended to seriously injure NOC. That is, NOA must have intended to inflict an injury which would endanger NOC's life or which would be substantial and protracted [*if necessary, add*: or involved the destruction of a foetus other than in the course of a medical procedure].

It is not, however, necessary that NOA intended to inflict the injury that NOC actually suffered. This third element will be satisfied even if NOA intended to inflict a different kind of serious injury.

In this case the prosecution submitted that NOA intentionally [*describe relevant act and describe relevant evidence and/or arguments*]. The defence responded [*insert relevant evidence and/or arguments*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of intentionally causing serious injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA intended to seriously injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of intentionally causing serious injury.

Warning: The following directions should only be given if the judge leaves the lesser alternative offence. See *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts on when to leave lesser alternative offences.

Intentionally Causing Injury

If you find NOA not guilty of intentionally causing serious injury, you must next consider the offence of intentionally causing injury.[811]

[811] *Crimes Act 1958* s 18.

This is an alternative to the offence of intentionally causing serious injury. That means that you only be asked to return a verdict on this offence if you find NOA not guilty of intentionally causing serious injury.

The offence of intentionally causing injury is very similar to the offence of intentionally causing serious injury, with one important difference: the accused only needs to have caused, and to have intended to cause, the complainant to suffer injury rather than serious injury.

So the four elements of intentionally causing injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA intended to injure NOC; and

Four – That NOA acted without lawful justification or excuse.

The way that you determine whether these elements have been proved is the same as for the offence of intentionally causing serious injury, apart from the difference in the level of injury required.

This means that, in relation to the first element, it is for you to determine whether NOC suffered physical injury or harm to his/her mental health. The law says that physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function. It also includes all the things that you would, as a matter of ordinary experience, call an injury. The law also says that harm to mental health includes psychological harm, but not emotional reactions such as distress, grief, fear or anger which do not result in psychological harm. You must therefore decide whether NOC has suffered an injury, as opposed to some superficial or trivial harm.

In relation to the second element, it means that you must be satisfied that it was the accused who caused the complainant's injury.

[*If causation is* not in issue*, add the following shaded section*.]

As I told you in relation to the offence of intentionally causing serious injury, it is not disputed that NOA [*insert relevant causal acts*], and that this caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

This requires you to be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a brief summary of the relevant issues should be inserted here*.]

In relation to the third element, you must be satisfied that NOA intended to injure NOC, and in relation to the fourth element you must be satisfied that s/he acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

Again, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding the fourth element proven.

[*If any defences are open on the evidence, summarise the relevant issues*.]

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of intentionally causing injury.

Last updated: 29 June 2015

7.4.2.2 Checklist: Intentionally Causing Serious Injury (From 1/7/13)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The complainant suffered a serious injury; and
2. The accused caused the complainant's serious injury; and
3. The accused intended to cause serious injury to the complainant; and
4. The accused acted without lawful justification or excuse.

Serious Injury

1. Did the complainant suffer a serious injury?

Consider – Injury means physical injury or harm to mental health, whether temporary or permanent

Consider – Serious injury means

(a) an injury (including the cumulative effect of several injuries) that:

(i) endangers life or

(ii) is substantial and protracted.

(b) the destruction of the foetus of a pregnant woman, other than in the course of a medical procedure, whether or not the woman suffers any other harm

If Yes, then go to 2

If No, then the accused is not guilty of Intentionally Causing Serious Injury

Causation

2. Did the accused cause the complainant's serious injury?

*Consider – **Were the accused's actions a substantial or significant cause of the complainant's** serious injury?*

If Yes, then go to 3

If No, then the accused is not guilty of Intentionally Causing Serious Injury

Intention

3. Did the accused intend to cause serious injury to the complainant?

Consider – It is not sufficient for the accused to have only intended to cause injury.

If Yes, then go to 4

If No, then the accused is not guilty of Intentionally Causing Serious Injury

Lawful Justification or Excuse

4. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of Intentionally Causing Serious Injury (as long as you have also answered Yes to questions 1, 2 and 3)

If No, then the accused is not guilty of Intentionally Causing Serious Injury

Last updated: 5 May 2014

7.4.2.3 Charge: Intentionally Causing Serious Injury (Pre-1/7/13)

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This charge should be given if:

i) the offence was allegedly committed before 1 July 2013,

ii) the accused has been charged with Intentionally causing serious injury, and

iii) neither Recklessly causing serious injury nor Recklessly causing injury are available as alternative verdicts.

Charge

I must now direct you about the crime of intentionally causing serious injury. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the complainant suffered a serious injury.

Two – the accused caused the complainant's serious injury.

Three – the accused intended to cause the complainant serious injury.

Four – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Serious Injury

The first element that the prosecution must prove is that the complainant suffered a serious injury.

It is a matter for you whether the injury that NOC suffered was a "serious injury". This requires a value judgment, comparing NOC's injury with the range of injuries that a person may suffer.

The law defines the word "injury" to include "unconsciousness, hysteria, pain and any substantial impairment of bodily function". It also includes all the things that you would, as a matter of ordinary experience, call an injury.

For this element to be met, the Crown must prove that the accused caused not only an injury, but a "serious injury". In this context, there are two levels of harm known to the law: "injury" and "serious injury". There are no other classes such as "very serious injury" or "minor injury" or anything else.

You may consider NOC's injuries as lying somewhere on a spectrum of injuries. At one end are trivial injuries like a paper cut or a grazed knee. At the other end of the spectrum are life–threatening injuries or permanent brain damage and the like.

It is a matter for you where on that spectrum NOC's injuries lie. For this first element to be met, you must be satisfied that NOC's injuries justify the description "a serious injury".

In making your determination, you do not have to look at each of NOC's injuries separately, and assess whether or not any one of them is sufficiently "serious". A person may suffer a "serious injury" because of a combination of injuries.

In this case, the prosecution alleges that NOC's injuries were serious, because [*insert prosecution evidence and/or arguments*]. The defence denies this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC's injury is sufficient grave that it is a "serious injury" that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's serious injury.

[*If causation is* not in issue*, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be seriously injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from Causation: Charges should be adapted and inserted here*.]

Intention

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he intended to seriously injure NOC.

This element will not be satisfied if NOA only intended to injure NOC, but happened to seriously injure him/her. For this element to be met, NOA must have intended to seriously injure NOC.

It is not, however, necessary that NOA intended to inflict the injury that NOC actually suffered. This third element will be satisfied even if NOA intended to inflict a different kind of serious injury.

In this case the prosecution submitted that NOA intentionally [*describe relevant act and describe relevant evidence and/or arguments*]. The defence responded [*insert relevant evidence and/or arguments*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of intentionally causing serious injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA intended to seriously injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of intentionally causing serious injury.

Warning: The following directions should only be given if the judge leaves the lesser alternative offence. See *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts on when to leave lesser alternative offences.

Intentionally Causing Injury

I must also direct you about the crime of intentionally causing injury. This is an alternative to the offence of intentionally causing serious injury. That means that you only need to deliver a verdict on this offence if you are not satisfied that the prosecution has proved the offence of intentionally causing serious injury beyond reasonable doubt. If you decide that NOA is guilty of intentionally causing serious injury, then you do not need to deliver a verdict on this alternative.

The offence of intentionally causing injury is very similar to the offence of intentionally causing serious injury, with one important difference: the accused only needs to have caused, and to have intended to cause, the complainant to suffer injury rather than serious injury.

So the four elements of intentionally causing injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA intended to injure NOC; and

Four – That NOA acted without lawful justification or excuse.

The way that you determine whether these elements have been proved is the same as for the offence of intentionally causing serious injury, apart from the difference in the level of injury required.

This means that, in relation to the first element, it is for you to determine whether the harm NOC suffered was sufficiently severe to be called an "injury", as opposed to merely being superficial or trivial harm.

In relation to the second element, it means that you must be satisfied that it was the accused who caused the complainant's injury.

[*If causation is not in issue, add the following shaded section*.]

As I told you in relation to the offence of intentionally causing serious injury, it is not disputed that NOA [*insert relevant causal acts*], and that this caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

This requires you to be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a brief summary of the relevant issues should be inserted here.*]

In relation to the third element, you must be satisfied that NOA intended to injure NOC, and in relation to the fourth element you must be satisfied that s/he acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

Again, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding the fourth element proven.

[*If any defences are open on the evidence, summarise the relevant issues.*]

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of intentionally causing injury.

Last updated: 29 June 2015

7.4.2.4 Checklist: Intentionally Causing Serious Injury (Pre-1/7/13)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The complainant suffered a serious injury; and
2. The accused caused the complainant's serious injury; and
3. The accused intended to cause serious injury to the complainant; and
4. The accused acted without lawful justification or excuse.

Serious Injury

1. Did the complainant suffer a serious injury?

Consider – Injury includes unconsciousness, hysteria, pain and any substantial impairment of bodily function; and

Serious injury includes a combination of injuries.

If Yes, then go to 2

If No, then the accused is not guilty of Intentionally Causing Serious Injury

Causation

2. Did the accused cause the complainant's serious injury?

*Consider – **Were the accused's actions a substantial or significant cause of the complainant's** serious injury?*

If Yes, then go to 3

If No, then the accused is not guilty of Intentionally Causing Serious Injury

Intention

3. Did the accused intend to cause serious injury to the complainant?

Consider – It is not sufficient for the accused to have only intended to cause injury.

If Yes, then go to 4

If No, then the accused is not guilty of Intentionally Causing Serious Injury

Lawful Justification or Excuse

4. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of Intentionally Causing Serious Injury (as long as you have also answered Yes to questions 1, 2 and 3)

If No, then the accused is not guilty of Intentionally Causing Serious Injury

Last updated: 1 July 2013

7.4.2.5 Charge: Intentionally or Recklessly Causing Serious Injury (From 1/7/13)

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This charge should be given if:

i) the offence was allegedly committed after 1 July 2013,

ii) the accused has been charged with *I*ntentionally causing serious injury,

iii) Recklessly causing serious injury is available as an alternative verdict, and

iv) neither Intentionally causing injury nor Recklessly causing injury are available as alternative verdicts.

Intentionally Causing Serious Injury

I must now direct you about the crime of intentionally causing serious injury. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the complainant suffered a serious injury.

Two – the accused caused the complainant's serious injury.

Three – the accused intended to cause the complainant serious injury.

Four – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Serious Injury

The first element that the prosecution must prove is that the complainant suffered a serious injury.

The law defines the word injury to mean physical injury or harm to mental health, whether temporary or permanent. A serious injury is an injury which endangers life or is substantial and protracted.[812]

[*If multiple injuries were inflicted, add the following shaded section.*]

In making your decision, you do not have to look at each of NOC's injuries separately, and decide whether or not any one of them is a serious injury. A person may suffer a serious injury because of the cumulative effect of several injuries.

[*If the physical injuries caused ongoing psychological harm, add the following shaded section*.]

An injury may be substantial and protracted because of the combined effect of the immediate physical injuries and prolonged psychological injuries.

In this case, the prosecution alleges that NOC's injuries were serious, because [*insert prosecution evidence and/or arguments*]. The defence denies this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC's injury endangered his/her life or was substantial and protracted that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's serious injury.

[*If causation is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proved.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be seriously injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from Causation: Charges should be adapted and inserted here.*]

Intention

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he intended to seriously injure NOC.

This element will not be satisfied if NOA only intended to injure NOC, but happened to seriously injure him/her. For this element to be met, NOA must have intended to seriously injure NOC. That is, NOA must have intended to inflict an injury which would endanger NOC's life or which would be substantial and protracted [*if necessary, add*: or involved the destruction of a foetus other than in the course of a medical procedure].

It is not, however, necessary that NOA intended to inflict the injury that NOC actually suffered. This third element will be satisfied even if NOA intended to inflict a different kind of serious injury.

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[812] The judge should consider including an example of a serious injury, such as brain damage, or a stabbing which causes significant blood loss.

In this case the prosecution submitted that NOA intentionally [*describe relevant act and describe relevant evidence and/or arguments*]. The defence responded [*insert relevant evidence and/or arguments*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proved.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of intentionally causing serious injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA intended to seriously injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of intentionally causing serious injury.

Warning: The following directions should only be given if the judge leaves the lesser alternative offence. See *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts on when to leave lesser alternative offences.

Recklessly Causing Serious Injury

If you find NOA not guilty of intentionally causing serious injury, you must next consider the offence of recklessly causing serious injury.[813]

This is an alternative to the offence of intentionally causing serious injury. That means that you will only be asked to return a verdict on this offence if you are not satisfied that the prosecution has proved beyond reasonable doubt that that the accused committed the offence of intentionally causing serious injury.

The only difference between the offence of recklessly causing serious injury and the offence of intentionally causing serious injury relates to the accused's state of mind – the third element of the offence. The other three elements of the offences are identical.

[813] *Crimes Act 1958* s 17.

For the third element of recklessly causing serious injury to be met, the prosecution does not need to prove that the accused intended to seriously injure the complainant. Instead, they must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he was aware that those acts would probably result in the complainant being seriously injured, but decided to go ahead anyway.[814] That is, NOA knew that NOC was likely to be seriously injured by his/her actions.

It is not sufficient for NOA to have known that it was possible that NOC would be seriously injured. S/he must have known that that consequence was probable.

It is also not sufficient for NOA to have known that it was probable that NOC would be injured by his/her actions. For this element to be met, NOA must have known that it was probable that his/her acts would seriously injure NOC.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the probability of NOC's injury. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*].

Inferring states of mind

[*If the jury might infer recklessness by using an objective test, add the following shaded section*.]

In determining whether NOA knew that NOC would probably suffer serious injury due to his/her actions, you [can/have been asked to] draw an inference from the probability that [you/the reasonable person] would have foreseen such a consequence in the accused's situation.

I must warn you that, although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat this factor as decisive of the issue. It is not enough that you, or any other person, would have had such an awareness in the circumstances. You must be satisfied that NOA him/herself actually knew that it was likely that NOC would be seriously injured if s/he acted in that way.

In this case the prosecution submitted that NOA was aware of the likelihood that NOC would be seriously injured. [*Describe relevant act and describe relevant evidence and/or arguments.*] The defence responded [*insert relevant evidence and/or arguments*].

Summary

As I mentioned, the other three elements of recklessly causing serious injury are identical to the elements of intentionally causing serious injury. So the four elements of recklessly causing serious injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA was aware that his/her acts would probably cause serious injury to NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing serious injury.

Last updated: 2 July 2020

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[814] The words "but decided to go ahead anyway" can be omitted if the judge thinks they are unnecessary or could confuse the jury. See 7.1.3 Recklessness.

7.4.2.6 Charge: Intentionally or Recklessly Causing Serious Injury (Pre-1/7/13)

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This charge should be given if:

i) the offence was allegedly committed before 1 July 2013,

ii) the accused has been charged with *I*ntentionally causing serious injury,

iii) Recklessly causing serious injury is available as an alternative verdict, and

iv) neither Intentionally causing injury nor Recklessly causing injury are available as alternative verdicts.

Intentionally Causing Serious Injury

I must now direct you about the crime of intentionally causing serious injury. To prove this crime, the prosecution must prove the following four elements beyond reasonable doubt:

One – that the complainant suffered a serious injury;

Two – that the accused caused the complainant's serious injury;

Three – that the accused intended to cause the complainant's serious injury;

Four – that the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Serious Injury

The first element that the prosecution must prove is that the complainant suffered a serious injury.

It is a matter for you whether the injury that NOC suffered was a "serious injury". This requires a value judgment, comparing NOC's injury with the range of injuries that a person may suffer.

The law defines the word "injury" to include "unconsciousness, hysteria, pain and any substantial impairment of bodily function". It also includes all the things that you would, as a matter of ordinary experience, call an injury.

For this element to be met, the prosecution must prove that the accused caused not only an injury, but a "serious injury". In this context, there are two levels of harm known to the law: "injury" and "serious injury". There are no other classes such as "very serious injury" or "minor injury" or anything else.

You may consider NOC's injuries as lying somewhere on a spectrum of injuries. At one end are trivial injuries like a paper cut or a grazed knee. At the other end of the spectrum are life–threatening injuries or permanent brain damage and the like.

It is a matter for you where on that spectrum NOC's injuries lie. For this first element to be met, you must be satisfied that NOC's injuries justify the description "a serious injury".

In making your determination, you do not have to look at each of NOC's injuries separately, and assess whether or not any one of them is sufficiently "serious". A person may suffer a "serious injury" because of a combination of injuries.

In this case, the prosecution alleges that NOC's injuries were serious, because [*insert prosecution evidence and/or arguments*]. The defence denies this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC's injury is sufficient grave that it is a "serious injury" that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's serious injury.

[*If causation is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proved.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section*.]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be seriously injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from* 7.1.2.1 Charges: Causation *should be adapted and inserted here.*]

Intention

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he intended to seriously injure NOC.

This element will not be satisfied if NOA only intended to injure NOC, but happened to seriously injure him/her. For this element to be met, NOA must have intended to seriously injure NOC.

It is not, however, necessary that NOA intended to inflict the injury that NOC actually suffered. This third element will be satisfied even if NOA intended to inflict a different kind of serious injury.

In this case the prosecution submitted that you can infer that NOA intentionally [*describe relevant act and describe relevant evidence and/or arguments*]. The defence responded [*insert relevant evidence and/or arguments*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proved.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of intentionally causing serious injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA intended to seriously injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of intentionally causing serious injury.

Warning: The following directions should only be given if the judge leaves lesser alternative offences. See *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts on when to leave lesser alternative offences.

Recklessly Causing Serious Injury

If you find NOA not guilty of intentionally causing serious injury, you must next consider the offence of recklessly causing serious injury.[815]

This is an alternative to the offence of intentionally causing serious injury. That means that you will only be asked to return a verdict on this offence if you are not satisfied that the prosecution has proved beyond reasonable doubt that that the accused committed the offence of intentionally causing serious injury.

The only difference between the offence of recklessly causing serious injury and the offence of intentionally causing serious injury relates to the accused's state of mind – the third element of the offence. The other three elements of the offences are identical.

For the third element of recklessly causing serious injury to be met, the prosecution does not need to prove that the accused intended to seriously injure the complainant. Instead, they must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he was aware that those acts would probably result in the complainant being seriously injured, but decided to go ahead anyway.[816] That is, NOA knew that NOC was likely to be seriously injured by his/her actions.

It is not sufficient for NOA to have known that it was possible that NOC would be seriously injured. S/he must have known that that consequence was probable.

It is also not sufficient for NOA to have known that it was probable that NOC would be injured by his/her actions. For this element to be met, NOA must have known that it was probable that his/her acts would seriously injure NOC.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the probability of NOC's injury. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*].

Inferring states of mind

[*If the jury might infer recklessness by using an objective test, add the following shaded section*.]

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[815] *Crimes Act 1958* s 17.

[816] The words "but decided to go ahead anyway" can be omitted if the judge thinks they are unnecessary or could confuse the jury. See 7.1.3 Recklessness.

*I*n determining whether NOA knew that NOC would probably suffer serious injury due to his/her actions, you [can/have been asked to] draw an inference from the probability that [you/the reasonable person] would have foreseen such a consequence in the accused's situation.

I must warn you that, although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat this factor as decisive of the issue. It is not enough that you, or any other person, would have had such an awareness in the circumstances. You must be satisfied that NOA him/herself actually knew that it was likely that NOC would be seriously injured if s/he acted in that way.

In this case the prosecution submitted that NOA was aware of the likelihood that NOC would be seriously injured. [*Describe relevant act and describe relevant evidence and/or arguments*.] The defence responded [*insert relevant evidence and/or arguments*].

Summary

As I mentioned, the other three elements of recklessly causing serious injury are identical to the elements of intentionally causing serious injury. So the four elements of recklessly causing serious injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA was aware that his/her acts would probably cause serious injury to NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing serious injury.

Last updated: 2 July 2020

7.4.2.7 Charge: Intentionally or Recklessly Causing Serious Injury or Injury (From 1/7/13)

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This charge should be given if the offence was allegedly committed on or after 1 July 2013, the accused has been charged with intentionally causing serious injury, and Recklessly causing serious injury, intentionally causing serious injury and recklessly causing injury are all available as alternative verdicts.

If the offence was allegedly committed before 1 July 2013, use Charge: Intentionally or Recklessly Causing Serious Injury or Injury (Pre-1/7/13).

If recklessly causing serious injury is available as an alternative verdict, but intentionally and recklessly causing injury are not, use 7.4.2.5 Charge: Intentionally or Recklessly Causing Serious Injury (From 1/7/13).

If neither recklessly causing serious injury nor recklessly causing injury are available as alternative verdicts, use 7.4.2.1 Charge: Intentionally Causing Serious Injury (From 1/7/13).

This charge is designed for cases where the injury is one which endangers life or is substantial and protracted. If the injury involves the destruction of a foetus, the charge will need to be modified.

Intentionally Causing Serious Injury

I must now direct you about the crime of intentionally causing serious injury. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the complainant suffered a serious injury.

Two – the accused caused the complainant's serious injury.

Three – the accused intended to cause the complainant serious injury.

Four – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Serious Injury

The first element that the prosecution must prove is that the complainant suffered a serious injury.

The law defines the word injury to mean physical injury or harm to mental health, whether temporary or permanent. A serious injury is an injury which endangers life or is substantial and protracted.[817]

[*If multiple injuries were inflicted, add the following shaded section*.]

In making your decision, you do not have to look at each of NOC's injuries separately, and decide whether or not any one of them is a serious injury. A person may suffer a serious injury because of the cumulative effect of several injuries.

[*If the physical injuries caused ongoing psychological harm, add the following shaded section*.]

An injury may be substantial and protracted because of the combined effect of the immediate physical injuries and prolonged psychological injuries.

In this case, the prosecution alleges that NOC's injuries were serious, because [*insert prosecution evidence and/or arguments*]. The defence denies this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC's injury endangered his/her life or was substantial and protracted that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's serious injury.

[*If causation is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be seriously injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from Causation: Charges should be adapted and inserted here*.]

---

[817] The judge should consider including an example of a serious injury, such as brain damage, or a stabbing which causes significant blood loss.

Intention

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he intended to seriously injure NOC.

This element will not be satisfied if NOA only intended to injure NOC, but happened to seriously injure him/her. For this element to be met, NOA must have intended to seriously injure NOC. That is, NOA must have intended to inflict an injury which would endanger NOC's life or which would be substantial and protracted [*if necessary, add*: or involved the destruction of a foetus other than in the course of a medical procedure].

It is not, however, necessary that NOA intended to inflict the injury that NOC actually suffered. This third element will be satisfied even if NOA intended to inflict a different kind of serious injury.

In this case the prosecution submitted that NOA intentionally [*describe relevant act and describe relevant evidence and/or arguments*]. The defence responded [*insert relevant evidence and/or arguments*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, before you can find NOA guilty of intentionally causing serious injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA intended to seriously injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of intentionally causing serious injury.

Warning: The following directions should only be given if the judge leaves the lesser alternative offence. See *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts on when to leave lesser alternative offences.

Recklessly Causing Serious Injury

If you find NOA not guilty of intentionally causing serious injury, you must next consider the offence of recklessly causing serious injury.[818]

This is an alternative to the offence of intentionally causing serious injury. That means that you will only be asked to return a verdict on this offence if you are not satisfied that the prosecution has proved beyond reasonable doubt that that the accused committed the offence of intentionally causing serious injury.

The only difference between the offence of recklessly causing serious injury and the offence of intentionally causing serious injury relates to the accused's state of mind – the third element of the offence. The other three elements of the offences are identical.

For the third element of recklessly causing serious injury to be met, the prosecution does not need to prove that the accused intended to seriously injure the complainant. Instead, they must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he was aware that those acts would probably result in the complainant being seriously injured, but decided to go ahead anyway.[819] That is, NOA knew that NOC was likely to be seriously injured by his/her actions.

It is not sufficient for NOA to have known that it was possible that NOC would be seriously injured. S/he must have known that that consequence was probable.

It is also not sufficient for NOA to have known that it was probable that NOC would be injured by his/her actions. For this element to be met, NOA must have known that it was probable that his/her acts would seriously injure NOC.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the probability of NOC's injury. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inference to be drawn from that evidence*].

Inferring states of mind

[*If the jury might infer recklessness by using an objective test, add the following shaded section*.]

In determining whether NOA knew that NOC would probably suffer serious injury due to his/her actions, you [can/have been asked to] draw an inference from the probability that [you/the reasonable person] would have foreseen such a consequence in the accused's situation.

I must warn you that, although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat this factor as decisive of the issue. It is not enough that you, or any other person, would have had such an awareness in the circumstances. You must be satisfied that NOA him/herself actually knew that it was likely that NOC would be seriously injured if s/he acted in that way.

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[818] *Crimes Act 1958* s 17.

[819] The words "but decided to go ahead anyway" can be omitted if the judge thinks they are unnecessary or could confuse the jury. See 7.1.3 Recklessness.

In this case the prosecution submitted that NOA was aware of the likelihood that NOC would be seriously injured. [*Describe relevant act and describe relevant evidence and/or arguments.*] The defence responded [*insert relevant evidence and/or arguments*].

Summary

As I mentioned, the other three elements of recklessly causing serious injury are identical to the elements of intentionally causing serious injury. So the four elements of recklessly causing serious injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA was aware that his/her acts would probably cause serious injury to NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing serious injury.

Intentionally Causing Injury

The next offence that you may need to consider is intentionally causing injury.[820] This is an alternative to the offences of intentionally causing serious injury and recklessly causing serious injury, which means that you will only be asked to return a verdict on this offence if you find NOA not guilty of both of those offences.

The offence of intentionally causing injury is very similar to the offence of intentionally causing serious injury, with one important difference: the accused only needs to have caused, and to have intended to cause, the complainant to suffer injury rather than serious injury.

So the four elements of intentionally causing injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA intended to injure NOC; and

Four – That NOA acted without lawful justification or excuse.

The way that you determine whether these elements have been proven is the same as for the offence of intentionally causing serious injury, apart from the difference in the level of injury required.

This means that, in relation to the first element, it is for you to determine whether NOC suffered physical injury or harm to his/her mental health. The law says that physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function. It also includes all the things that you would, as a matter of ordinary experience, call an injury. The law also says that harm to mental health includes psychological harm, but not emotional reactions such as distress, grief, fear or anger which do not result in psychological harm. You must therefore decide whether NOC has suffered an injury, as opposed to some superficial or trivial harm.

In relation to the second element, it means that you must be satisfied that it was the accused who caused the complainant's injury.

[*If causation is not in issue, add the following shaded section.*]

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[820] *Crimes Act 1958* s 18.

As I told you in relation to the offence of intentionally causing serious injury, it is not disputed that NOA [*insert relevant causal acts*], and that this caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

This requires you to be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a brief summary of the relevant issues should be inserted here.*]

In relation to the third element, you must be satisfied that NOA intended to injure NOC, and in relation to the fourth element you must be satisfied that s/he acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section.*]

Again, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding the fourth element proven.

[*If any defences are open on the evidence, summarise the relevant issues.*]

If you find that any of these four elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of intentionally causing injury.

Recklessly Causing Injury

There is one more alternative offence that you may need to consider – recklessly causing injury. This is an alternative to intentionally causing serious injury, recklessly causing serious injury and intentionally causing injury, which means that you will only be asked to return a verdict on this offence if you find the accused not guilty of those three offences.

This offence is identical to the offence of intentionally causing injury, except for the third element – the accused's state of mind. The accused does not need to have intended to cause the injury. Instead, s/he must have been aware that his/her acts would probably injure the complainant.

The way that you determine whether this element has been proved is the same as for the offence of recklessly causing serious injury, apart from the difference in the level of injury required. As I explained in relation to that offence, this element will therefore not be satisfied if NOA was only aware that that it was possible that NOC would be injured. S/he must have known that that consequence was probable, but decided to go ahead anyway.[821]

It is also not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances – you must be satisfied that NOA him/herself actually knew of the probability of NOC's injury.

So the four elements of recklessly causing injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was injured; and

Two – That NOA caused that injury; and

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[821] The words "but decided to go ahead anyway" can be omitted if the judge thinks they are unnecessary or could confuse the jury. See 7.1.3 Recklessness.

Three – That NOA was aware that his/her acts would probably injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing injury.

Last updated: 2 July 2020

7.4.2.8 Charge: Intentionally or Recklessly Causing Serious Injury or Injury (Pre-1/7/13)

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This charge should be given if the offence was allegedly committed before 1 July 2013, the accused has been charged with intentionally causing serious injury, and Recklessly causing serious injury, intentionally causing serious injury and recklessly causing injury are all available as alternative verdicts.

If the offence was allegedly committed after 1 July 2013, use Charge: Intentionally or Recklessly Causing Serious Injury or Injury (From 1/7/13).

Intentionally Causing Serious Injury

I must now direct you about the crime of intentionally causing serious injury. To prove this crime, the prosecution must prove the following four elements beyond reasonable doubt:

One – that the complainant suffered a serious injury;

Two – that the accused caused the complainant's serious injury;

Three – that the accused intended to cause the complainant's serious injury;

Four – that the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Serious Injury

The first element that the prosecution must prove is that the complainant suffered a serious injury.

It is a matter for you whether the injury that NOC suffered was a "serious injury". This requires a value judgment, comparing NOC's injury with the range of injuries that a person may suffer.

The law defines the word "injury" to include "unconsciousness, hysteria, pain and any substantial impairment of bodily function". It also includes all the things that you would, as a matter of ordinary experience, call an injury.

For this element to be met, the prosecution must prove that the accused caused not only an injury, but a "serious injury". In this context, there are two levels of harm known to the law: "injury" and "serious injury". There are no other classes such as "very serious injury" or "minor injury" or anything else.

You may consider NOC's injuries as lying somewhere on a spectrum of injuries. At one end are trivial injuries like a paper cut or a grazed knee. At the other end of the spectrum are life–threatening injuries or permanent brain damage and the like.

It is a matter for you where on that spectrum NOC's injuries lie. For this first element to be met, you must be satisfied that NOC's injuries justify the description "a serious injury".

In making your determination, you do not have to look at each of NOC's injuries separately, and assess whether or not any one of them is sufficiently "serious". A person may suffer a "serious injury" because of a combination of injuries.

In this case, the prosecution alleges that NOC's injuries were serious, because [*insert prosecution evidence and/or arguments*]. The defence denies this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC's injury is sufficient grave that it is a "serious injury" that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's serious injury.

[*If causation is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section*.]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be seriously injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from* 7.1.2.1 Charges: Causation *should be adapted and inserted here.*]

Intention

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he intended to seriously injure NOC.

This element will not be satisfied if NOA only intended to injure NOC, but happened to seriously injure him/her. For this element to be met, NOA must have intended to seriously injure NOC.

It is not, however, necessary that NOA intended to inflict the injury that NOC actually suffered. This third element will be satisfied even if NOA intended to inflict a different kind of serious injury.

In this case the prosecution submitted that NOA intentionally [*describe relevant act and describe relevant evidence and/or arguments*]. The defence responded [*insert relevant evidence and/or arguments*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences.)*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of intentionally causing serious injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA intended to seriously injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of intentionally causing serious injury.

Warning: The following directions should only be given if the judge leaves lesser alternative offences. See *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts on when to leave lesser alternative offences.

Recklessly Causing Serious Injury

If you find NOA not guilty of intentionally causing serious injury, you must next consider the offence of recklessly causing serious injury.[822]

This is an alternative to the offence of intentionally causing serious injury. That means that you will only be asked to return a verdict on this offence if you are not satisfied that the prosecution has proved beyond reasonable doubt that that the accused committed the offence of intentionally causing serious injury.

The only difference between the offence of recklessly causing serious injury and the offence of intentionally causing serious injury relates to the accused's state of mind – the third element of the offence. The other three elements of the offences are identical.

For the third element of recklessly causing serious injury to be met, the prosecution does not need to prove that the accused intended to seriously injure the complainant. Instead, they must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he was aware that those acts would probably result in the complainant being seriously injured, but decided to go ahead anyway.[823] That is, NOA knew that NOC was likely to be seriously injured by his/her actions.

It is not sufficient for NOA to have known that it was possible that NOC would be seriously injured. S/he must have known that that consequence was probable.

It is also not sufficient for NOA to have known that it was probable that NOC would be injured by his/her actions. For this element to be met, NOA must have known that it was probable that his/her acts would seriously injure NOC.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the probability of NOC's injury. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*].

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[822] *Crimes Act 1958* s 17.

[823] The words "but decided to go ahead anyway" can be omitted if the judge thinks they are unnecessary or could confuse the jury. See 7.1.3 Recklessness.

Inferring states of mind

[*If the jury might infer recklessness by using an objective test, add the following shaded section*.]

In determining whether NOA knew that NOC would probably suffer serious injury due to his/her actions, you [can/have been asked to] draw an inference from the probability that [you/the reasonable person] would have foreseen such a consequence in the accused's situation.

I must warn you that, although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat this factor as decisive of the issue. It is not enough that you, or any other person, would have had such an awareness in the circumstances. You must be satisfied that NOA him/herself actually knew that it was likely that NOC would be seriously injured if s/he acted in that way.

In this case the prosecution submitted that NOA was aware of the likelihood that NOC would be seriously injured. [*Describe relevant act and describe relevant evidence and/or arguments.*] The defence responded [*insert relevant evidence and/or arguments*].

Summary

As I mentioned, the other three elements of recklessly causing serious injury are identical to the elements of intentionally causing serious injury. So the four elements of recklessly causing serious injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA was aware that his/her acts would probably cause serious injury to NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing serious injury.

Intentionally Causing Injury

The next offence that you may need to consider is intentionally causing injury.[824] This is an alternative to the offences of intentionally causing serious injury and recklessly causing serious injury, which means that you will only be asked to return a verdict on this offence if you find NOA not guilty of both of those offences.

The offence of intentionally causing injury is very similar to the offence of intentionally causing serious injury, with one important difference: the accused only needs to have caused, and to have intended to cause, the complainant to suffer injury rather than serious injury.

So the four elements of intentionally causing injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA intended to injure NOC; and

---

[824] *Crimes Act 1958* s 18.

Four – That NOA acted without lawful justification or excuse.

The way that you determine whether these elements have been proved is the same as for the offence of intentionally causing serious injury, apart from the difference in the level of injury required.

This means that, in relation to the first element, it is for you to determine whether the harm NOC suffered was sufficiently severe to be called an "injury", as opposed to merely being superficial or trivial harm.

In relation to the second element, it means that you must be satisfied that it was the accused who caused the complainant's injury.

[*If causation is not in issue, add the following shaded section*.]

As I told you in relation to the offence of intentionally causing serious injury, it is not disputed that NOA [*insert relevant causal acts*], and that this caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section*.]

This requires you to be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a brief summary of the relevant issues should be inserted here.*]

In relation to the third element, you must be satisfied that NOA intended to injure NOC, and in relation to the fourth element you must be satisfied that s/he acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

Again, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding the fourth element proven.

[*If any defences are open on the evidence, summarise the relevant issues.*]

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of intentionally causing injury.

Recklessly Causing Injury

There is one more alternative offence that you may need to consider – recklessly causing injury. This is an alternative to intentionally causing serious injury, recklessly causing serious injury and intentionally causing injury, which means that you will only be asked to return a verdict on this offence if you find the accused not guilty of those three offences.

This offence is identical to the offence of intentionally causing injury, except for the third element – the accused's state of mind. The accused does not need to have intended to cause the injury. Instead, s/he must have been aware that his/her acts would probably injure the complainant.

The way that you determine whether this element has been proved is the same as for the offence of recklessly causing serious injury, apart from the difference in the level of injury required. As I explained in relation to that offence, this element will therefore not be satisfied if NOA was only aware that that it was possible that NOC would be injured. S/he must have known that that consequence was probable, but decided to go ahead anyway.[825]

It is also not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances – you must be satisfied that NOA him/herself actually knew of the probability of NOC's injury.

So the four elements of recklessly causing injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA was aware that his/her acts would probably injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing injury.

Last updated: 2 July 2020

7.4.3 Intentionally Causing Injury

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1. The offence of intentionally causing injury is created by *Crimes Act 1958* s 18.
2. The offence has the following four elements:
    i) The complainant suffered an "injury";
    ii) The accused caused the complainant's injury;
    iii) The accused intended to cause injury; and
    iv) The accused acted without lawful justification or excuse.
3. Although s 18 also proscribes recklessly causing injury, it is a separate offence (*R v His Honour Judge Hassett and Anor* (1994) 76 A Crim R 19). See 7.4.6 Recklessly Causing Injury for information concerning that offence.

"Injury"

4. The *Crimes Amendment (Gross Violence Offences) Act 2013* substituted a new definition for "injury", which had previously been defined inclusively. Due to the operation of the transitional provision, *Crimes Act 1958* s 618, the new definition only applies to offences committed on or after the commencement of the amending Act, 1 July 2013.
5. Where an offence is alleged to have been committed between two dates, one date before and one date after 1 July 2013, the law in force prior to the amendments applies (*Crimes Act 1958* s 618).

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[825] The words "but decided to go ahead anyway" can be omitted if the judge thinks they are unnecessary or could confuse the jury. See 7.1.3 Recklessness.

6. This topic separately describes the operation of this element for offences committed before and after 1 July 2013.

Injury after 1 July 2013

7. From 1 July 2013, *Crimes Act 1958* section 15 contains the following relevant definitions:

> Injury means:
>
> a) Physical injury; or
>
> b) Harm to mental health;
>
> whether temporary or permanent
>
> Harm to mental health includes psychological harm but does not include an emotional reaction such as distress, grief, fear or anger unless it results in psychological harm;
>
> Physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function.

Injury before 1 July 2013

8. For offences committed before 1 July 2013, "injury" is an ordinary English term. It is for the jury to determine, as a question of fact, whether the complainant suffered an injury (*R v Welsh & Flynn Vic* CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186).
9. The jury may compare the injury in question with harm which common experience suggests would be superficial or trifling, and therefore fall short of being an "injury" (*R v Welsh & Flynn Vic* CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186; *R v Cogley* [1989] VR 799).
10. The jury is not restricted to considering physical injuries. "Injury" includes unconsciousness, hysteria, pain and any substantial impairment of bodily function (*Crimes Act 1958* s 15).
11. The definition of "injury" as in force before 1 July 2013 is not exhaustive. Jurors are free to use their own experiences when determining whether or not the complainant has suffered an injury (*R v Welsh & Flynn Vic* CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186).
12. For offences committed on or after 1 July 2013, the *Crimes Amendment (Gross Violence Offences) Act 2013* expanded the meaning of the word "injury". Harm to mental health, disfigurement and infection with a disease were not expressly mentioned in the definition of "injury". Decisions from other jurisdictions that harm to mental health and infection with a disease could constitute "grievous bodily harm" may provide guidance on whether those harms can constitute "injury" (see *R v Ireland* [1998] AC 147; *R v Dica* [2004] QB 1257; *R v Aubrey* (2012) 82 NSWLR 748).

Causing Injury

13. The complainant's injury must have been caused by the accused. For detailed information about causation, see 7.1.2 Causation.
14. The injury does not need to have been caused by the accused personally assaulting the complainant. This element will be satisfied even if s/he caused the injury indirectly (*R v Salisbury* [1976] VR 452).

Intention

15. It is not sufficient that the accused intended to do the *act* that injured the complainant. S/he must have intended to inflict injury (see *R v Westaway* (1991) 52 A Crim R 336).

16. The nature of the accused's acts may provide evidence of his/her intention (*R v McKnoulty* (1995) 77 A Crim R 333).

17. The accused does not need to have intended the precise injury s/he ultimately caused. It is only necessary that the accused intended to cause an injury and actually causes an injury (*Royall v R* (1991) 172 CLR 378; *R v Demirian* [1989] VR 97).

18. Intention and causation must always be treated as separate issues. This is especially important if the accused did not directly cause the complainant's injury. In such cases, the jury must separately assess whether the accused caused the injury, and whether s/he *intended* to cause the injury (*R v McKnoulty* (1995) 77 A Crim R 333; *Royall v R* (1991) 172 CLR 378).

19. The accused's capacity to form the relevant intention may have been affected by drugs and alcohol (*R v Mala* Vic CA 27/11/1997*; R v Kumar* (2006) 165 A Crim R 48*; R v Faure* [1999] 2 VR 537). See 8.7 Common Law Intoxication for further information on this point.

Without Lawful Excuse

20. The prosecution must disprove any defences which are open on the evidence (*R v Roach* [1988] VR 665).

21. Common defences in this area include self-defence (see 8.3 Common Law Self-defence, 8.2 Statutory Self-defence (Pre-1/11/14) and Defensive Homicide and 8.1 Statutory Self-defence (From 1/11/14)), and consent (see 7.4.8 Common Law Assault). See Part 8: Victorian Defences for information concerning other possible defences.

Last updated: 1 November 2014

7.4.3.1 Charge: Intentionally Causing Injury (From 1/7/13)

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This charge should be given if the offence was allegedly committed on or after 1 July 2013. If the offence was allegedly committed before 1 July 2013, use Charge: Intentionally Causing Injury (Pre-1/7/13).

I must now direct you about the crime of intentionally causing injury. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the complainant suffered an injury.

Two – the accused caused the complainant's injury.

Three – the accused intended to injure the complainant.

Four – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Injury

The first element that the prosecution must prove is that the complainant suffered an injury.

The law says that injury means a physical injury or harm to mental health, whether temporary or permanent. Physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function. It also includes all the things that you would, as a matter of ordinary experience, call an injury. Harm to mental health includes psychological harm, but not emotional reactions such as distress, grief, fear or anger which do not result in psychological harm.

To prove this element, the prosecution must show that NOC suffered an injury, rather than some superficial or trivial harm.

In this case, the prosecution alleged that NOC suffered an injury because [*insert prosecution evidence and/or arguments*]. The defence denied this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC was injured that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's injury.

[*If causation is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from Causation: Charges should be adapted and inserted here*.]

Intention

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he intended to injure NOC.

It is not, however, necessary that NOA intended to inflict the injury that NOC actually suffered. This third element will be satisfied even if NOA intended to inflict a different kind of injury.

In this case the prosecution submitted that NOA intentionally [*describe relevant act and describe relevant evidence and/or arguments*]. The defence responded [*insert relevant evidence and/or arguments*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of intentionally causing injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA intended to injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of intentionally causing injury.

Last updated: 29 May 2015

7.4.3.2 Checklist: Intentionally Causing Injury (From 1/7/13)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The complainant suffered an injury; and
2. The accused caused the complainant's injury; and
3. The accused intended to cause injury to the complainant; and
4. The accused acted without lawful justification or excuse.

Injury

1. Did the complainant suffer an injury?

Consider – Injury means physical injury or harm to mental health, whether temporary or permanent

Consider – Physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function

Consider – Harm to mental health includes psychological harm but does not include an emotional reaction such as distress, grief, fear or anger unless it results in psychological harm

If Yes, then go to 2

If No, then the accused is not guilty of Intentionally Causing Injury

Causation

2. Did the accused cause the complainant's injury?

*Consider – **Were the accused's actions a substantial or significant cause of the complainant's** injury?*

If Yes, then go to 3

If No, then the accused is not guilty of Intentionally Causing Injury

Intention

3. Did the accused intend to cause injury to the complainant?

If Yes, then go to 4

If No, then the accused is not guilty of Intentionally Causing Injury

Lawful Justification or Excuse

4. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of Intentionally Causing Injury (as long as you have also answered Yes to questions 1, 2 and 3)

If No, then the accused is not guilty of Intentionally Causing Injury

Last updated: 1 July 2013

7.4.3.3 Charge: Intentionally Causing Injury (Pre-1/7/13)

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This charge should be given if the offence was allegedly committed before 1 July 2013. If the offence was allegedly committed on or after 1 July 2013, use Charge: Intentionally Causing Injury (From 1/7/13).

I must now direct you about the crime of intentionally causing injury. To prove this crime, the prosecution must prove the following four elements beyond reasonable doubt:

One – that the complainant suffered an injury.

Two – that the accused caused the complainant's injury.

Three – that the accused intended to injure the complainant.

Four – that the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Injury

The first element that the prosecution must prove is that the complainant suffered an injury.

The law defines the word "injury" to include "unconsciousness, hysteria, pain and any substantial impairment of bodily function". It also includes all the things that you would, as a matter of ordinary experience, call an injury.

In this case, the prosecution alleged that NOC suffered an injury because [*insert prosecution evidence and/or arguments*]. The defence denied this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC was injured that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's injury.

[*If causation is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section*.]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from Causation: Charges should be adapted and inserted here.*]

Intention

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he intended to injure NOC.

It is not, however, necessary that NOA intended to inflict the injury that NOC actually suffered. This third element will be satisfied even if NOA intended to inflict a different kind of injury.

In this case the prosecution submitted that NOA intentionally [*describe relevant act and describe relevant evidence and/or arguments*]. The defence responded [*insert relevant evidence and/or arguments*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section.*]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here.*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of intentionally causing injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA intended to injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of intentionally causing injury.

Last updated: 1 July 2013

7.4.3.4 Checklist: Intentionally Causing Injury (Pre-1/7/13)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The complainant suffered an injury; and

2. The accused caused the complainant's injury; and
3. The accused intended to cause injury to the complainant; and
4. The accused acted without lawful justification or excuse.

Injury

1. Did the complainant suffer an injury?

Consider – Injury includes unconsciousness, hysteria, pain and any substantial impairment of bodily function.

If Yes, then go to 2

If No, then the accused is not guilty of Intentionally Causing Injury

Causation

2. Did the accused cause the complainant's injury?

*Consider – **Were the accused's actions a substantial or significant cause of the complainant's injury?***

If Yes, then go to 3

If No, then the accused is not guilty of Intentionally Causing Injury

Intention

3. Did the accused intend to cause injury to the complainant?

If Yes, then go to 4

If No, then the accused is not guilty of Intentionally Causing Injury

Lawful Justification or Excuse

4. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of Intentionally Causing Injury (as long as you have also answered Yes to questions 1, 2 and 3)

If No, then the accused is not guilty of Intentionally Causing Injury

Last updated: 1 July 2013

7.4.4 Recklessly Causing Serious Injury in Circumstances of Gross Violence

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Overview

1. The offence of recklessly causing serious injury in circumstances of gross violence is created by *Crimes Act 1958* s 15B.

2. The offence has the following five elements:

   i) The complainant suffered a "serious injury";

   ii) The accused caused the complainant's serious injury;

   iii) The accused was reckless about causing serious injury;

   iv) The injury was caused in circumstances of "gross violence"; and

   v) The accused acted without lawful justification or excuse.

3. This offence is an aggravated form of recklessly causing serious injury and differs only in the additional element that the injury was caused in circumstances of "gross violence". This topic only addresses the meaning of gross violence. For information on the other elements, see 7.4.5 Recklessly Causing Serious Injury.

Commencement Date

4. This offence applies to offences committed on or after 1 July 2013, following the commencement of the *Crimes Amendment (Gross Violence Offences) Act 2013*.

Gross Violence

5. The prosecution must prove that the accused caused serious injury to another in circumstances of gross violence.

6. Section 15B(2) of the Crimes Act 1958 exhaustively defines circumstances of gross violence as one or more of the following:

(a) The offender planned in advance to engage in conduct and at the time of the planning–

a. The offender intended that the conduct would cause a serious injury; or

b. The offender was reckless as to whether the conduct would cause a serious injury; or

c. A reasonable person would have foreseen that the conduct would be likely to result in a serious injury;

(b) The offender in company with 2 or more other persons caused the serious injury;

(c) The offender entered into an agreement, arrangement or understanding with 2 or more other persons to cause a serious injury;

(d) The offender planned in advance to have with him or her and to use an offensive weapon, firearm or imitation firearm and in fact used the offensive weapon, firearm or imitation firearm to cause the serious injury;

(e) The offender continued to cause injury to the other person after the other person was incapacitated;

(f) The offender caused the serious injury to the other person while the other person was incapacitated.

Foresight that conduct would likely cause a serious injury

7. The meaning of the word "likely" varies with context and can range between requiring proof that a matter is a "real chance" through to requiring proof that the matter is more likely than not (see *Attorney-General (NSW) v Winters* [2007] NSWSC 1071).

8. While there have not been any decisions on the meaning of likely for the purposes of section 15B(2), this Charge Book takes the prudential approach of requiring proof that a reasonable person would have realised that the conduct was more likely than not to cause a serious injury. It is not sufficient that serious injury was possible, or a "real chance" (compare *Boughey v R* (1986) 161 CLR 10 and *Hannes v Director of Public Prosecutions (No 2)* [2006] NSWCCA 373).

Incapacitation

9. While this provision has not been interpreted, it is likely that the word "incapacitated" in sections 15B(2)(e) and (f) carries its ordinary meaning of a person being unable to defend himself or herself.

10. In many cases, this will arise when the complainant is rendered unconscious. Future cases may also identify other possible causes of incapacitation.

Alternative offences

11. Recklessly causing serious injury is a statutory alternative to recklessly causing serious injury in circumstances of gross violence (*Crimes Act 1958* s 422).

12. Recklessly causing injury (*Crimes Act 1958* s 18) is an impliedly included offence to a charge of recklessly causing serious injury in circumstances of gross violence (see *R v Kane* (2001) 3 VR 542). See *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts on when a judge needs to leave alternative offences.

Last updated: 6 November 2019

7.4.4.1 Charge: Recklessly Causing Serious Injury in Circumstances of Gross Violence

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This charge should be given if the offence was allegedly committed after 1 July 2013, the accused has been charged with recklessly causing serious injury in circumstances of gross violence, and Recklessly causing serious injury and Recklessly causing injury are both available offences.

If recklessly causing serious injury or recklessly causing injury are not left as alternative offences, the charge must be modified accordingly.

Charge

I must now direct you about the crime of recklessly causing serious injury in circumstances of gross violence. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the complainant suffered a serious injury.

Two – the accused caused the complainant's serious injury.

Three – the accused was aware that his/her acts would probably cause serious injury to the complainant.

Four – The accused caused the complainant's serious injury in circumstances of gross violence.

Five – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Serious Injury

The first element that the prosecution must prove is that the complainant suffered a serious injury.

The law defines the word injury to mean physical injury or harm to mental health, whether temporary or permanent. A serious injury is an injury which endangers life or is substantial and protracted.[826]

[*If multiple injuries were inflicted, add the following shaded section*.]

In making your decision, you do not have to look at each of NOC's injuries separately, and decide whether or not any one of them is a serious injury. A person may suffer a serious injury because of the cumulative effect of several injuries.

[*If the physical injuries caused ongoing psychological harm, add the following shaded section*.]

An injury may be substantial and protracted because of the combined effect of the immediate physical injuries and prolonged psychological injuries.

In this case, the prosecution alleges that NOC's injuries were serious, because [*insert prosecution evidence and/or arguments*]. The defence denies this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC's injury endangered his/her life or was substantial and protracted that this first element will be met.

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[826] The judge should consider including an example of a serious injury, such as brain damage, or a stabbing which causes significant blood loss.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's serious injury.

[*If causation is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section*.]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be seriously injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from 7.1.2.1 Charges: Causation should be adapted and inserted here.*]

Recklessness

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he was aware that those acts would probably result in the complainant being seriously injured, but decided to go ahead anyway.[827] That is, NOA knew that NOC was likely to be seriously injured by his/her actions.

It is not sufficient for NOA to have known that it was possible that NOC would be seriously injured. S/he must have known that that consequence was probable.

It is also not sufficient for NOA to have known that it was probable that NOC would be injured by his/her actions. For this element to be met, NOA must have known that it was probable that his/her acts would seriously injure NOC.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the probability of NOC's injury. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Inferring states of mind

[*If the jury might infer recklessness by using an objective test, add the following shaded section*.]

In determining whether NOA knew that NOC would probably suffer serious injury due to his/her actions, you [can/have been asked to] draw an inference from the probability that [you/the reasonable person] would have foreseen such a consequence in the accused's situation.

I must warn you that, although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat this factor as decisive of the issue. It is not enough that you, or any other person, would have had such an awareness in the circumstances. You must be satisfied

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[827] The words "but decided to go ahead anyway" can be omitted if the judge thinks they are unnecessary or could confuse the jury. See 7.1.3 Recklessness.

that NOA him/herself actually knew that it was likely that NOC would be seriously injured if s/he acted in that way.

In this case the prosecution submitted that NOA was aware of the likelihood that NOC would be seriously injured. [*Describe relevant act and describe relevant evidence and/or arguments.*] The defence responded [*insert relevant evidence and/or arguments*].

Gross Violence

The fourth element that the prosecution must prove is that the accused caused the serious injury in circumstances of gross violence.

The phrase "circumstances of gross violence" has a special legal meaning. To prove this element, the prosecution must show that:

[*Add any of the following circumstances which are relevant:*

- NOA planned in advance to [*describe relevant conduct*] and at the time of the planning, s/he intended that the conduct would cause a serious injury;
- NOA planned in advance to [*describe relevant conduct*] and at the time of the planning, s/he was aware that the conduct would probably cause a serious injury;
- NOA planned in advance to [*describe relevant conduct*] and at the time of the planning, a reasonable person would have foreseen that the conduct was more likely than not to result in serious injury;
- NOA caused the injury in company with 2 or more other people. In this case, the prosecution says that NOA committed the offence in company with [*identify alleged co-offenders*];
- NOA caused the serious injury as part of a joint criminal enterprise with 2 or more other people. You will recall what I have told you about a joint criminal enterprise;
- NOA planned in advance to have with him/her and use an offensive weapon, firearm or imitation firearm with him/her and s/he used the offensive weapon, firearm or imitation firearm to cause the serious injury;
- NOA continued to cause injury to NOC after NOC was incapacitated;
- NOA caused serious injury to NOC while NOC was incapacitated.]

[*If there is a dispute about whether NOC was incapacitated, add the following shaded section.*]

A person is incapacitated when he or she is no longer able to defend himself or herself in the circumstances. In this case, the prosecution says that NOV was incapacitated when [*describe alleged cause and circumstances of incapacitation*]. The defence disputes this, and argues that [*identify relevant defence evidence and arguments*].

[*Identify relevant prosecution and defence evidence and arguments.*]

To prove this fourth element, the prosecution must prove beyond reasonable doubt that one [*if necessary, add:* or more] of these circumstances of gross violence existed.

Without Lawful Justification or Excuse

The fifth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section.*]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of recklessly causing serious injury in circumstances of gross violence, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA was aware that his/her acts would probably cause serious injury to NOC; and

Four – That NOA caused the serious injury in circumstances of gross violence; and

Five – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of recklessly causing serious injury in circumstances of gross violence.

Warning: The following directions should only be given if the judge leaves lesser alternative offences. See *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts on when to leave lesser alternative offences.

Recklessly Causing Serious Injury

I must also direct you about the crime of recklessly causing serious injury. This is an alternative to the offence of recklessly causing serious injury in circumstances of gross violence. That means that you only need to return a verdict on this offence if you find NOA not guilty of recklessly causing serious injury in circumstances of gross violence.

The only difference between this alternative offence and the offence on the indictment is that the prosecution does not need to prove that NOA caused the serious injury in circumstances of gross violence. Therefore, if you are satisfied that the other elements have been proved, but are not satisfied that the prosecution has proved the fourth element, then you will find the accused guilty of recklessly causing serious injury.

Recklessly Causing Injury

The next alternative offence is recklessly causing injury. This is an alternative to the offences of recklessly causing serious injury in circumstances of gross violence and recklessly causing serious injury.

The offence of recklessly causing injury is very similar to the offence of recklessly causing serious injury in circumstances of gross violence, with two important differences: first, the prosecution does not need to prove that circumstances of gross violence existed. Second, the accused only needs to have caused, and to have been aware of the probability of causing, the complainant to suffer injury rather than serious injury.

So the four elements of recklessly causing injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA was aware that his/her acts would probably injure NOC; and

Four – That NOA acted without lawful justification or excuse.

The way that you determine whether these elements have been proved is the same as for the offence of recklessly causing serious injury in circumstances of gross violence, apart from the difference in the level of injury required.

This means that, in relation to the first element, it is for you to determine whether NOC suffered physical injury or harm to his/her mental health. The law says that physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function. The law also says that harm to mental health includes psychological harm, but not emotional reactions such as distress, grief, fear or anger which do not result in psychological harm. You must therefore decide whether NOC has suffered an injury, as opposed to some superficial or trivial harm.

In relation to the second element, it means that you must be satisfied that it was the accused who caused the complainant's injury.

[*If causation is not in issue, add the following shaded section*.]

As I told you in relation to the offence of recklessly causing serious injury, it is not disputed that NOA [*insert relevant causal acts*], and that this caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

This requires you to be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason(such as the existence of multiple possible causes, or the intervention of a third party), a brief summary of the relevant issues should be inserted here.*]

In relation to the third element, you must be satisfied that NOA was aware that his/her acts would probably injure NOC, and in relation to the fourth element you must be satisfied that s/he acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

Again, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding the fourth element proven.

[*If any defences are open on the evidence, summarise the relevant issues.*]

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing injury.

Last updated: 2 July 2020

7.4.4.2 Checklist: Recklessly Causing Serious Injury in Circumstances of Gross Violence

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Five elements the prosecution must prove beyond reasonable doubt:

1. The complainant suffered a serious injury; and

2. The accused caused the complainant's serious injury; and

3. The accused was aware that his or her acts would probable cause serious injury to the complainant; and

4. The accused caused the complainant's serious injury in circumstances of gross violence; and

5. The accused acted without lawful justification or excuse.

Serious Injury

1. Did the complainant suffer a serious injury?

Consider – Injury means physical injury or harm to mental health, whether temporary or permanent

Consider – Serious injury means an injury (including the cumulative effect of several injuries) that:

(i) endangers life or

(ii) is substantial and protracted.

If Yes, then go to 2

If No, then the accused is not guilty of recklessly causing serious injury in circumstances of gross violence

Causation

2. Did the accused cause the complainant's serious injury?

*Consider – **Were the accused's actions a substantial or significant cause of the complainant's** serious injury?*

If Yes, then go to 3

If No, then the accused is not guilty of recklessly causing serious injury in circumstances of gross violence

State of Mind

3. Was the accused aware that his/her conduct would probably cause serious injury to the complainant?

Consider – What did the accused think the likely consequences of his/her actions would be?

If Yes, then go to 4

If No, then the accused is not guilty of recklessly causing serious injury in circumstances of gross violence

Circumstances of Gross Violence

4. Did the accused cause the serious injury in circumstances of gross violence?

Consider – Circumstances of gross violence include [identify relevant circumstances]

If Yes, then go to 5

If No, then the accused is not guilty of recklessly causing serious injury in circumstances of gross violence

Lawful Justification or Excuse

5. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of recklessly causing serious injury in circumstances of gross violence (as long as you have also answered Yes to questions 1, 2, 3 and 4)

If No, then the accused is not guilty of recklessly causing serious injury in circumstances of gross violence

Last updated: 30 May 2014

7.4.5 Recklessly Causing Serious Injury

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1. The offence of recklessly causing serious injury is created by *Crimes Act 1958* s 17.
2. The offence has the following four elements:
   i) The complainant suffered a "serious injury";
   ii) The accused caused the complainant's serious injury;
   iii) The accused was reckless about causing serious injury; and
   iv) The accused acted without lawful justification or excuse.

"Serious Injury"

3. The *Crimes Amendment (Gross Violence Offences) Act 2013* substituted a new exhaustive definition for "serious injury", which had previously been defined inclusively. Due to the operation of the transitional provision, *Crimes Act 1958* s 618, the new definition only applies to offences committed on or after the commencement of the amending Act, 1 July 2013.
4. Where an offence is alleged to have been committed between two dates, one date before and one date after 1 July 2013, the law in force prior to the amendments applies (*Crimes Act 1958* s 618).
5. This topic separately describes the operation of this element for offences committed before and after 1 July 2013.

Serious Injury after 1 July 2013

6. From 1 July 2013, Crimes Act 1958 section 15 contains the following relevant definitions:

Injury means:

a) Physical injury; or

b) Harm to mental health;

whether temporary or permanent

Serious injury means:

a) An injury (including the cumulative effect of more than one injury) that–

i) Endangers life; or

ii) Is substantial and protracted;

b) The destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm.

7. Physical injury and harm to mental health are both defined inclusively. Physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and impairment of bodily function. Harm to mental health includes psychological harm, but does not include emotions such as distress, grief, fear or anger unless such emotions result in psychological harm (*Crimes Act 1958* s 15).
8. Under the law in force before 1 July 2013, serious injury was inclusively defined to include a combination of injuries and the destruction of a foetus. Whether an injury was serious involved a value judgment by the jury (*R v Welsh & Flynn* Vic CCA 16/10/1987).
9. In contrast, for offences committed after 1 July 2013 the definition of serious injury is exclusive. Once a jury determines that the injury endangers life, is substantial and protracted or involves the destruction of a foetus, there is no separate value judgment on whether the injury is a "serious injury".

Serious Injury before 1 July 2013

10. For offences committed before 1 July 2013, "serious injury" is an ordinary English term. It is for the jury to determine, as a question of fact, whether the complainant's injuries are sufficient to qualify as "serious" (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186).
11. In making this determination, the jury must make a value judgment about the gravity of the complainant's injuries (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186; *R v Cogley* [1989] VR 799).
12. The jury may compare the injury in question with injuries which common experience suggests would be superficial or trifling, and therefore fall short of being "serious injuries" (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186; *R v Cogley* [1989] VR 799).
13. The injury must be assessed in its context. The complainant's age, gender and state of health may all be relevant when assessing whether the injury is serious. An injury that is inflicted on a frail person may be more serious than the same injury inflicted on a person in good health (*R v Welsh & Flynn* Vic CCA 16/10/1987).
14. The jury does not need to find that the defendant inflicted "really serious" injury, as was previously the case when the offence required the accused to have caused grievous bodily harm (*R v Welsh & Flynn* Vic CCA 16/10/1987).
15. The jury is not restricted to considering physical injuries. "Injury" (and by implication "serious injury") includes unconsciousness, hysteria, pain and any substantial impairment of bodily function (*Crimes Act 1958* s 15).

16. The jury is also not restricted to considering the gravity of one particular injury. A serious injury includes a combination of injuries and includes the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm (*Crimes Act 1958* s 15).

17. At common law, there was no clear rule on whether a foetus was considered part of the mother, or whether it had a sui generis status until it was born. Instead, the matter depended on the specific legal context in which the question arose and the effect of any relevant legislation (*R v King* (2003) 59 NSWLR 472. See also *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245 and *R v Sullivan* [1991] 1 SCR 489).

18. Following amendments introduced by the Abortion Law Reform Act 2008, destruction of a foetus can constitute a serious injury, even if the mother does not herself suffer any other harm and it is not necessary to show that the foetus was born alive (*Crimes Act 1958* s 15).

19. The definitions of "serious" and "injury" in Crimes Act 1958 s 15 as in force before 1 July 2013 are not exhaustive. Jurors are free to use their own experiences when determining whether or not the complainant has suffered a serious injury (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186).

20. It is ultimately a matter for the jury to determine whether an injury is sufficiently serious. It is unwise to attempt a more elaborate explanation (*R v Rhodes* (1984) 14 A Crim R 124).

Causing Serious Injury

21. The complainant's serious injury must have been caused by the accused. For detailed information about causation, see 7.1.2 Causation.

22. The injury does not need to have been caused by the accused personally assaulting the complainant. This element will be satisfied even if s/he caused the injury indirectly (*R v Salisbury* [1976] VR 452).

Recklessness

23. To have been reckless about causing serious injury, the accused must have been aware, when s/he committed the relevant conduct, that it would probably cause serious injury (*DPP Reference No 1 of 2019* [2021] HCA 26; *DPP Reference No 1 of 2019* [2020] VSCA 181; *R v Campbell* [1997] 2 VR 585).

24. The accused must have been aware that serious injury was "probable" or "likely". It is not sufficient for him/her to have been aware that serious injury was merely "possible" or "might" result (*R v Crabbe* (1985) 156 CLR 464; *R v Campbell* [1997] 2 VR 585; *R v Nuri* [1990] VR 641; *Ignatova v R* [2010] VSCA 263; *Paton v R* [2011] VSCA 72; *DPP Reference No 1 of 2019* [2020] VSCA 181; *DPP Reference No 1 of 2019* [2021] HCA 26).

25. The accused him/herself must have been aware that his/her conduct would probably cause serious injury. It is not sufficient that a reasonable person in the accused's circumstances would have realised that their conduct would be likely to seriously injury the complainant (*R v Sofa* Vic CA 15/10/1990; c.f. *R v Nuri* [1990] VR 641).

26. When explaining this element, judges may tell the jury that the accused must have been aware that his or her conduct would probably cause serious injury, but decided to go ahead anyway. The words "but decided to go ahead anyway" do not make proof that the accused was indifferent to the consequences of his or her conduct an element of the offence. Instead, the purpose of the words is to distinguish recklessness from intention. Judges may modify or omit the words "but decided to go ahead anyway" if the words could mislead or confuse the jury (see *Ignatova v R* [2010] VSCA 263; *R v Crabbe* (1985) 156 CLR 464. Cf *R v Sofa* Vic CA 15/10/1990; *R v Nuri* [1990] VR 641; *R v Campbell* [1997] 2 VR 585; *R v Wilson* [2005] VSCA 78).

27. It is not appropriate to invite the jury to apply their normal understanding of the meaning of "recklessness". Conventional understanding of the term may include conduct that is negligent (*Banditt v The Queen* (2005) 224 CLR 262).

Without lawful excuse

28. The prosecution must disprove any defences which are open on the evidence.

Alternative offences

29. From 1 July 2013, recklessly causing serious injury is a statutory alternative to the more serious offence of recklessly causing serious injury in circumstances of gross violence (*Crimes Act 1958* s 422).

30. Recklessly causing injury (*Crimes Act 1958* s 18) is an impliedly included offence to a charge of recklessly causing serious injury (see *R v Kane* (2001) 3 VR 542). For information on when to leave this as an alternative, see *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts.

Last updated: 27 October 2022

7.4.5.1 Charge: Recklessly Causing Serious Injury (From 1/7/13)

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This charge should be given if the offence was allegedly committed after 1 July 2013. If the offence was allegedly committed before 1 July 2013, use Charge: Recklessly Causing Serious Injury (Pre-1/7/13).

This charge is designed for cases where the injury is one which endangers life or is substantial and protracted. If the injury involves the destruction of a foetus, the charge will need to be modified.

Charge

I must now direct you about the crime of recklessly causing serious injury. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the complainant suffered a serious injury.

Two – the accused caused the complainant's serious injury.

Three – the accused was aware that his/her acts would probably cause serious injury to the complainant.

Four – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Serious Injury

The first element that the prosecution must prove is that the complainant suffered a serious injury.

The law defines the word injury to mean physical injury or harm to mental health, whether temporary or permanent. A serious injury is an injury which endangers life or is substantial and protracted.[828]

[*If multiple injuries were inflicted, add the following shaded section*.]

[828] The judge should consider including an example of a serious injury, such as brain damage, or a stabbing which causes significant blood loss.

In making your decision, you do not have to look at each of NOC's injuries separately, and decide whether or not any one of them is a serious injury. A person may suffer a serious injury because of the cumulative effect of several injuries.

[*If the physical injuries caused ongoing psychological harm, add the following shaded section*.]

An injury may be substantial and protracted because of the combined effect of the immediate physical injuries and prolonged psychological injuries.

In this case, the prosecution alleges that NOC's injuries were serious, because [*insert prosecution evidence and/or arguments*]. The defence denies this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC's injury endangered his/her life or was substantial and protracted that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's serious injury.

[*If causation is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be seriously injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from* 7.1.2.1 Charges: Causation *should be adapted and inserted here.*]

Recklessness

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he was aware that those acts would probably result in the complainant being seriously injured, but decided to go ahead anyway.[829] That is, NOA knew that NOC was likely to be seriously injured by his/her actions.

It is not sufficient for NOA to have known that it was possible that NOC would be seriously injured. S/he must have known that that consequence was probable.

It is also not sufficient for NOA to have known that it was probable that NOC would be injured by his/her actions. For this element to be met, NOA must have known that it was probable that his/her acts would seriously injure NOC.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the probability of NOC's injury. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

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[829] The words "but decided to go ahead anyway" can be omitted if the judge thinks they are unnecessary or could confuse the jury. See 7.1.3 Recklessness.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Inferring states of mind

[*If the jury might infer recklessness by using an objective test, add the following shaded section*.]

In determining whether NOA knew that NOC would probably suffer serious injury due to his/her actions, you [can/have been asked to] draw an inference from the probability that [you/the reasonable person] would have foreseen such a consequence in the accused's situation.

I must warn you that, although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat this factor as decisive of the issue. It is not enough that you, or any other person, would have had such an awareness in the circumstances. You must be satisfied that NOA him/herself actually knew that it was likely that NOC would be seriously injured if s/he acted in that way.

In this case the prosecution submitted that NOA was aware of the likelihood that NOC would be seriously injured. [*Describe relevant act and describe relevant evidence and/or arguments.*] The defence responded [*insert relevant evidence and/or arguments*].

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of recklessly causing serious injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA was aware that his/her acts would probably cause serious injury to NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of recklessly causing serious injury.

Warning: The following directions should only be given if the judge leaves lesser alternative offences. See *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts on when to leave lesser alternative offences.

Recklessly Causing Injury

I must also direct you about the crime of recklessly causing injury. This is an alternative to the offence of recklessly causing serious injury. That means that you only need to deliver a verdict on this offence if you are not satisfied that the prosecution has proved the offence of recklessly causing serious injury beyond reasonable doubt. If you decide that NOA is guilty of recklessly causing serious injury, then you do not need to deliver a verdict on this alternative.

The offence of recklessly causing injury is very similar to the offence of recklessly causing serious injury, with one important difference: the accused only needs to have caused, and to have been aware of the probability of causing, the complainant to suffer injury rather than serious injury.

So the four elements of recklessly causing injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA was aware that his/her acts would probably injure NOC; and

Four – That NOA acted without lawful justification or excuse.

The way that you determine whether these elements have been proved is the same as for the offence of recklessly causing serious injury, apart from the difference in the level of injury required.

This means that, in relation to the first element, it is for you to determine whether NOC suffered physical injury or harm to his/her mental health. The law says that physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function. It also includes all the things that you would, as a matter of ordinary experience, call an injury. The law also says that harm to mental health includes psychological harm, but not emotional reactions such as distress, grief, fear or anger which do not result in psychological harm. You must therefore decide whether NOC has suffered an injury, as opposed to some superficial or trivial harm.

In relation to the second element, it means that you must be satisfied that it was the accused who caused the complainant's injury.

[*If causation is not in issue, add the following shaded section*.]

As I told you in relation to the offence of recklessly causing serious injury, it is not disputed that NOA [*insert relevant causal acts*], and that this caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

This requires you to be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a brief summary of the relevant issues should be inserted here*.]

In relation to the third element, you must be satisfied that NOA was aware that his/her acts were likely to injure NOC, and in relation to the fourth element you must be satisfied that s/he acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

Again, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding the fourth element proven.

[*If any defences are open on the evidence, summarise the relevant issues*.]

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing injury.

Last updated: 2 July 2020

7.4.5.2 Checklist: Recklessly Causing Serious Injury (From 1/7/13)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The complainant suffered a serious injury; and
2. The accused caused the complainant's serious injury; and
3. The accused knew that his/her acts would probably cause serious injury to the complainant; and
4. The accused acted without lawful justification or excuse.

Serious Injury

1. Did the complainant suffer a serious injury?

Consider – Injury means physical injury or harm to mental health, whether temporary or permanent

Consider – Serious injury means:

(a) an injury (including the cumulative effect of several injuries) that:

(i) endangers life or

(ii) is substantial and protracted.

(b) the destruction of the foetus of a pregnant woman, other than in the course of a medical procedure, whether or not the woman suffers any other harm

If Yes, then go to 2

If No, then the accused is not guilty of Recklessly Causing Serious Injury

Causation

2. Did the accused cause the complainant's serious injury?

*Consider – **Were the accused's actions a substantial or significant cause of the complainant's** serious injury?*

If Yes, then go to 3

If No, then the accused is not guilty of Recklessly Causing Serious Injury

State of Mind

3. Was the accused aware that his/her conduct would probably cause serious injury to the complainant?

Consider – What did the accused think the likely consequences of his/her actions would be?

If Yes, then go to 4

If No, then the accused is not guilty of Recklessly Causing Serious Injury

Lawful Justification or Excuse

4. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of Recklessly Causing Serious Injury (as long as you have also answered Yes to questions 1, 2 and 3)

If No, then the accused is not guilty of Recklessly Causing Serious Injury

Last updated: 1 July 2013

7.4.5.3 Charge: Recklessly Causing Serious Injury (Pre-1/7/13)

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This charge should be given if the offence was allegedly committed before 1 July 2013. If the offence was allegedly committed on or after 1 July 2013, use 7.4.5.1 Charge: Recklessly Causing Serious Injury (From 1/7/13).

I must now direct you about the crime of recklessly causing serious injury. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the complainant suffered a serious injury.

Two – the accused caused the complainant's serious injury.

Three – the accused was aware that his/her acts would probably cause serious injury to the complainant.

Four – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Serious Injury

The first element that the prosecution must prove is that the complainant suffered a serious injury.

It is a matter for you whether the injury that NOC suffered was a "serious injury". This requires a value judgment, comparing NOC's injury with the range of injuries that a person may suffer.

The law defines the word "injury" to include "unconsciousness, hysteria, pain and any substantial impairment of bodily function". It also includes all the things that you would, as a matter of ordinary experience, call an injury.

For this element to be met, the Crown must prove that the accused caused not only an injury, but a "serious injury". In this context, there are two levels of harm known to the law: "injury" and "serious injury". There are no other classes such as "very serious injury" or "minor injury" or anything else.

You may consider NOC's injuries as lying somewhere on a spectrum of injuries. At one end are trivial injuries like a paper cut or a grazed knee. At the other end of the spectrum are life–threatening injuries or permanent brain damage and the like.

It is a matter for you where on that spectrum NOC's injuries lie. For this first element to be met, you must be satisfied that NOC's injuries justify the description "a serious injury".

In making your determination, you do not have to look at each of NOC's injuries separately, and assess whether or not any one of them is sufficiently "serious". A person may suffer a "serious injury" because of a combination of injuries.

In this case, the prosecution alleges that NOC's injuries were serious, because [*insert prosecution evidence and/or arguments*]. The defence denies this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC's injury is sufficient grave that it is a "serious injury" that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's serious injury.

[*If causation is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proved.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section*.]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be seriously injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from* 7.1.2.1 Charges: Causation *should be adapted and inserted here.*]

Recklessness

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he was aware that those acts would probably result in the complainant being seriously injured, but decided to go ahead anyway.[830] That is, NOA knew that NOC was likely to be seriously injured by his/her actions.

It is not sufficient for NOA to have known that it was possible that NOC would be seriously injured. S/he must have known that that consequence was probable.

It is also not sufficient for NOA to have known that it was probable that NOC would be injured by his/her actions. For this element to be met, NOA must have known that it was probable that his/her acts would seriously injure NOC.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the probability of NOC's injury. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

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[830] The words "but decided to go ahead anyway" can be omitted if the judge thinks they are unnecessary or could confuse the jury. See 7.1.3 Recklessness.

Inferring states of mind

[*If the jury might infer recklessness by using an objective test, add the following shaded section*.]

In determining whether NOA knew that NOC would probably suffer serious injury due to his/her actions, you [can/have been asked to] draw an inference from the probability that [you/the reasonable person] would have foreseen such a consequence in the accused's situation.

I must warn you that, although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat this factor as decisive of the issue. It is not enough that you, or any other person, would have had such an awareness in the circumstances. You must be satisfied that NOA him/herself actually knew that it was likely that NOC would be seriously injured if s/he acted in that way.

In this case the prosecution submitted that NOA was aware of the likelihood that NOC would be seriously injured. [*Describe relevant act and describe relevant evidence and/or arguments.*] The defence responded [*insert relevant evidence and/or arguments*].

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proved.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of recklessly causing serious injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was seriously injured; and

Two – That NOA caused that serious injury; and

Three – That NOA was aware that his/her acts would probably cause serious injury to NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing serious injury.

Warning: The following directions should only be given if the judge leaves lesser alternative offences. See *Jury Directions Act 2015* s 11 and 3.10 Alternative Verdicts on when to leave lesser alternative offences.

Recklessly Causing Injury

I must also direct you about the crime of recklessly causing injury. This is an alternative to the offence of recklessly causing serious injury. That means that you only need to return a verdict on this offence if you find NOA not guilty of recklessly causing serious injury. If you decide that NOA is guilty of recklessly causing serious injury, then you do not need to deliver a verdict on this alternative.

The offence of recklessly causing injury is very similar to the offence of recklessly causing serious injury, with one important difference: the accused only needs to have caused, and to have been aware of the probability of causing, the complainant to suffer injury rather than serious injury.

So the four elements of recklessly causing injury that the prosecution have to prove beyond reasonable doubt are:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA was aware that his/her acts would probably injure NOC; and

Four – That NOA acted without lawful justification or excuse.

The way that you determine whether these elements have been proved is the same as for the offence of recklessly causing serious injury, apart from the difference in the level of injury required.

This means that, in relation to the first element, it is for you to determine whether NOC suffered an injury. The law says that an injury includes unconsciousness, hysteria, pain and any substantial impairment of bodily function. You must therefore decide whether NOC has suffered an injury, as opposed to some superficial or trivial harm.

In relation to the second element, it means that you must be satisfied that it was the accused who caused the complainant's injury.

[*If causation is not in issue, add the following shaded section*.]

As I told you in relation to the offence of recklessly causing serious injury, it is not disputed that NOA [*insert relevant causal acts*], and that this caused NOC's injury. You should therefore have no difficulty finding this element proved.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

This requires you to be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a brief summary of the relevant issues should be inserted here.*]

In relation to the third element, you must be satisfied that NOA was aware that his/her acts were likely to injure NOC, and in relation to the fourth element you must be satisfied that s/he acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

Again, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding the fourth element proved.

[*If any defences are open on the evidence, summarise the relevant issues*.]

If you find that any of these four elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing injury.

Last updated: 2 July 2020

7.4.5.4 Checklist: Recklessly Causing Serious Injury (Pre-1/7/13)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The complainant suffered a serious injury; and
2. The accused caused the complainant's serious injury; and
3. The accused knew that his/her acts would probably cause serious injury to the complainant; and
4. The accused acted without lawful justification or excuse.

Serious Injury

1. Did the complainant suffer a serious injury?

Consider – Injury includes unconsciousness, hysteria, pain and any substantial impairment of bodily function; and

Serious injury includes a combination of injuries

If Yes, then go to 2

If No, then the accused is not guilty of Recklessly Causing Serious Injury

Causation

2. Did the accused cause the complainant's serious injury?

*Consider – **Were the accused's actions a substantial or significant cause of the complainant's** serious injury?*

If Yes, then go to 3

If No, then the accused is not guilty of Recklessly Causing Serious Injury

State of Mind

3. Was the accused aware that his/her conduct would probably cause serious injury to the complainant?

Consider – What did the accused think the likely consequences of his/her actions would be?

If Yes, then go to 4

If No, then the accused is not guilty of Recklessly Causing Serious Injury

Lawful Justification or Excuse

4. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of Recklessly Causing Serious Injury (as long as you have also answered Yes to questions 1, 2 and 3)

If No, then the accused is not guilty of Recklessly Causing Serious Injury

Last updated: 1 July 2013

7.4.6 Recklessly Causing Injury

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1. The offence of recklessly causing injury is created by *Crimes Act 1958* s 18.
2. The offence has the following four elements:
   i) The complainant suffered an "injury";
   ii) The accused caused the complainant injury;
   iii) The accused was reckless about causing injury; and
   iv) The accused acted without lawful justification or excuse.
3. Although s 18 also proscribes intentionally causing injury, it is a separate offence (*R v His Honour Judge Hassett and Anor* (1994) 76 A Crim R 19). See 7.4.3 Intentionally Causing Injury for information concerning that offence.
4. The *Crimes Amendment (Gross Violence Offences) Act 2013* substituted a new definition for "injury", which had previously been defined inclusively. Due to the operation of the transitional provision, *Crimes Act 1958* s 618, the new definition only applies to offences committed on or after the commencement of the amending Act, 1 July 2013.
5. Where an offence is alleged to have been committed between two dates, one date before and one date after 1 July 2013, the law in force prior to the amendments applies (*Crimes Act 1958* s 618).
6. This topic separately describes the operation of this element for offences committed before and after 1 July 2013.

Injury after 1 July 2013

7. From 30 January 2014, *Crimes Act 1958* section 15 contains the following relevant definitions:

   Injury means:

   (a) Physical injury; or

   (b) Harm to mental health; whether temporary or permanent

   Harm to mental health includes psychological harm but does not include an emotional reaction such as distress, grief, fear or anger unless it results in psychological harm;

   Physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function.

Injury before 1 July 2013

8. For offences committed before 1 July 2013, "injury" is an ordinary English term. It is for the jury to determine, as a question of fact, whether the complainant suffered an injury (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186).
9. The jury may compare the injury in question with harm which common experience suggests would be superficial or trifling, and therefore fall short of being an "injury" (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186; *R v Cogley* [1989] VR 799).

10. The jury is not restricted to considering physical injuries. "Injury" includes unconsciousness, hysteria, pain and any substantial impairment of bodily function (*Crimes Act 1958* s 15).

11. The definition of "injury" as in force before 1 July 2013 is not exhaustive. Jurors are free to use their own experiences when determining whether or not the complainant has suffered an injury (*R v Welsh & Flynn* Vic CCA 16/10/1987; *R v Ferrari* [2002] VSCA 186).

12. For offences committed on or after 1 July 2013, the *Crimes Amendment (Gross Violence Offences) Act 2013* expanded the meaning of the word "injury". Harm to mental health, disfigurement and infection with a disease were not expressly mentioned in the definition of "injury". Decisions from other jurisdictions that harm to mental health and infection with a disease could constitute "grievous bodily harm" may provide guidance on whether those harms can constitute "injury" (see *R v Ireland* [1998] AC 147; *R v Dica* [2004] QB 1257; *R v Aubrey* (2012) 82 NSWLR 748; [2012] NSWCCA 254).

Causing Injury

13. The complainant's injury must have been caused by the accused. For detailed information about causation, see 7.1.2 Causation.

14. The injury does not need to have been caused by the accused personally assaulting the complainant. This element will be satisfied even if s/he caused the injury indirectly (*R v Salisbury* [1976] VR 452).

Recklessness

15. To have been reckless about causing injury, the accused must have been aware, when s/he committed the relevant conduct, that it would *probably* cause injury (*DPP Reference No 1 of 2019* [2021] HCA 26; *DPP Reference No 1 of 2019* [2020] VSCA 181; *R v Campbell* [1997] 2 VR 585).

16. The accused must have been aware that injury was "probable" or "likely". It is not sufficient for him/her to have been aware that injury was merely "possible" or "might" result (*R v Crabbe* (1985) 156 CLR 464; *R v Campbell* [1997] 2 VR 585; *R v Nuri* [1990] VR 641; *Ignatova v R* [2010] VSCA 263; *Paton v R* [2011] VSCA 72; *DPP Reference No 1 of 2019* [2020] VSCA 181; *DPP Reference No 1 of 2019* [2021] HCA 26).

17. The accused him/herself must have been aware that his/her conduct would probably cause injury. It is not sufficient that a reasonable person in the accused's circumstances would have realised that their conduct would be likely to injure the complainant (*R v Sofa* Vic CA 15/10/1990; c.f. *R v Nuri* [1990] VR 641).

18. When explaining this element, judges may tell the jury that the accused must have been aware that his or her conduct would probably cause injury, but decided to go ahead anyway. The words "but decided to go ahead anyway" do not make proof that the accused was indifferent to the consequences of his or her conduct an element of the offence. Instead, the purpose of the words is to distinguish recklessness from intention. Judges may modify or omit the words "but decided to go ahead anyway" if the words could mislead or confuse the jury (see *Ignatova v R* [2010] VSCA 263; *R v Crabbe* (1985) 156 CLR 464; *R v Sofa* Vic CA 15/10/1990; *R v Nuri* [1990] VR 641; *R v Campbell* [1997] 2 VR 585; *R v Wilson* [2005] VSCA 78).

19. It is not appropriate to invite the jury to apply their normal understanding of the meaning of "recklessness". Conventional understanding of the term may include conduct that is negligent (*Banditt v The Queen* (2005) 224 CLR 262).

Without Lawful Excuse

20. The prosecution must disprove any defences which are open on the evidence.

Last updated: 27 October 2022

7.4.6.1 Charge: Recklessly Causing Injury (From 1/7/13)

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This charge should be given if the offence was allegedly committed on or after 1 July 2013. If the offence was allegedly committed before 1 July 2013, use 7.4.6.3 Charge: Recklessly Causing Injury (Pre-1/7/13).

This charge is designed for cases where the injury is one which endangers life or is substantial and protracted. If the injury involves the destruction of a foetus, the charge will need to be modified.

I must now direct you about the crime of recklessly causing injury. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the complainant suffered an injury.

Two – the accused caused the complainant's injury.

Three – the accused was aware that his/her acts would probably injure the complainant.

Four – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Injury

The first element that the prosecution must prove is that the complainant suffered an injury.

The law says that injury means a physical injury or harm to mental health, whether temporary or permanent. Physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function. It also includes all the things that you would, as a matter of ordinary experience, call an injury. Harm to mental health includes psychological harm, but not emotional reactions such as distress, grief, fear or anger which do not result in psychological harm.

To prove this element, the prosecution must show that NOC suffered an injury, rather than some superficial or trivial harm.

In this case, the prosecution alleged that NOC suffered an injury because [*insert prosecution evidence and/or arguments*]. The defence denied this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC was injured that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's injury.

[*If causation is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from 7.1.2.1 Charges: Causation should be adapted and inserted here*.]

Recklessness

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he was aware that those acts would probably result in the complainant being injured, but decided to go ahead anyway.[831] That is, NOA knew that NOC was likely to be injured by his/her actions.

It is not sufficient for NOA to have known that it was possible that NOC would be injured. S/he must have known that that consequence was probable.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the probability of NOC's injury. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Inferring states of mind

[*If the jury might infer recklessness by using an objective test, add the following shaded section*.]

In determining whether NOA knew that NOC would probably be injured by his/her actions, you [can/have been asked to] draw an inference from the probability that [you/the reasonable person] would have foreseen such a consequence in the accused's situation.

I must warn you that, although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat this factor as decisive of the issue. It is not enough that you, or any other person, would have had such an awareness in the circumstances. You must be satisfied that NOA him/herself actually knew that it was likely that NOC would be injured if s/he acted in that way.

In this case the prosecution submitted that NOA was aware of the likelihood that NOC would be injured. [*Describe relevant act and describe relevant evidence and/or arguments*.] The defence responded [*insert relevant evidence and/or arguments*].

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

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[831] The words "but decided to go ahead anyway" can be omitted if the judge thinks they are unnecessary or could confuse the jury. See 7.1.3 Recklessness.

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, before you can find NOA guilty of recklessly causing injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA was aware that his/her acts would probably injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing injury.

Last updated: 2 July 2020

7.4.6.2 Checklist: Recklessly Causing Injury (From 1/7/13)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The complainant suffered an injury; and
2. The accused caused the complainant's injury; and
3. The accused knew that his/her acts would probably injure the complainant; and
4. The accused acted without lawful justification or excuse.

Injury

1. Did the complainant suffer an injury?

Consider – Injury means physical injury or harm to mental health, whether temporary or permanent

Consider – Physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function

Consider – Harm to mental health includes psychological harm but does not include an emotional reaction such as distress, grief, fear or anger unless it results in psychological harm

If Yes, then go to 2

If No, then the accused is not guilty of Recklessly Causing Injury

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Causation

2. Did the accused cause the complainant's injury?

*Consider – **Were the accused's actions a substantial or significant cause of the complainant's injury***

If Yes, then go to 3

If No, then the accused is not guilty of Recklessly Causing Injury

Intention

3. Was the accused aware that his/her conduct would probably injure the complainant?

If Yes, then go to 4

If No, then the accused is not guilty of Recklessly Causing Injury

Lawful Justification or Excuse

4. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of Recklessly Causing Injury (as long as you have also answered Yes to questions 1, 2 and 3)

If No, then the accused is not guilty of Recklessly Causing Injury

Last updated: 1 July 2013

7.4.6.3 Charge: Recklessly Causing Injury (Pre-1/7/13)

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This charge should be given if the offence was allegedly committed before 1 July 2013. If the offence was allegedly committed on or after 1 July 2013, use 7.4.6.1 Charge: Recklessly Causing Injury (From 1/7/13).

I must now direct you about the crime of recklessly causing injury. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the complainant suffered an injury.

Two – the accused caused the complainant's injury.

Three – the accused was aware that his/her acts would probably injure the complainant.

Four – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Injury

The first element that the prosecution must prove is that the complainant suffered an injury.

The law defines the word "injury" to include "unconsciousness, hysteria, pain and any substantial impairment of bodily function". It also includes all the things that you would, as a matter of ordinary experience, call an injury.

In this case, the prosecution alleged that NOC suffered an injury because [*insert prosecution evidence and/or arguments*]. The defence denied this, arguing [*insert defence evidence and/or arguments*]. It is only if you are satisfied that NOC was injured that this first element will be met.

Causation

The second element that the prosecution must prove is that the accused caused the complainant's injury.

[*If causation is not in issue, add the following shaded section*.]

In this case it is not disputed that NOA [*insert relevant causal acts*], and that doing so caused NOC's injury. You should therefore have no difficulty finding this element proven.

[*If the cause of the complainant's injury is not disputed, but the accused denies committing the relevant acts, add the following shaded section.*]

In this case it is not disputed that [*insert relevant causal acts*] caused NOC to be injured. However, the defence contends that NOA did not commit those acts. For this element to be met, you must be satisfied, beyond reasonable doubt, that it was NOA who [*insert relevant causal acts*].

[*If causation is in issue for another reason (such as the existence of multiple possible causes, or the intervention of a third party), a relevant charge from* 7.1.2.1 Charges: Causation *should be adapted and inserted here.*]

Recklessness

The third element relates to the accused's state of mind. The prosecution must prove, beyond reasonable doubt, that at the time the accused did the acts that you find caused the complainant's injury, s/he was aware that those acts would probably result in the complainant being injured, but decided to go ahead anyway.[832] That is, NOA knew that NOC was likely to be injured by his/her actions.

It is not sufficient for NOA to have known that it was possible that NOC would be injured. S/he must have known that that consequence was probable.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the probability of NOC's injury. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*]. When you are considering this evidence, you will remember what I told you earlier about drawing inferences.

Inferring states of mind

[*If the jury might infer recklessness by using an objective test, add the following shaded section*.]

In determining whether NOA knew that NOC would probably be injured by his/her actions, you [can/have been asked to] draw an inference from the probability that [you/the reasonable person] would have foreseen such a consequence in the accused's situation.

I must warn you that, although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat this factor as decisive of the issue. It is not enough that you, or any other person, would have had such an awareness in the circumstances. You must be satisfied that NOA him/herself actually knew that it was likely that NOC would be injured if s/he acted in that way.

In this case the prosecution submitted that NOA was aware of the likelihood that NOC would be injured. [*Describe relevant act and describe relevant evidence and/or arguments.*] The defence responded [*insert relevant evidence and/or arguments*].

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[832] The words "but decided to go ahead anyway" can be omitted if the judge thinks they are unnecessary or could confuse the jury. See 7.1.3 Recklessness.

Without Lawful Justification or Excuse

The fourth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

[*If no defences are open on the evidence, add the following shaded section*.]

In this case, there is no issue that [if/when] NOA [*describe relevant acts*], s/he acted without lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, before you can find NOA guilty of recklessly causing injury, the prosecution must prove to you beyond reasonable doubt:

One – That NOC was injured; and

Two – That NOA caused that injury; and

Three – That NOA was aware that his/her acts would probably injure NOC; and

Four – That NOA acted without lawful justification or excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly causing injury.

Last updated: 2 July 2020

7.4.6.4 Checklist: Recklessly Causing Injury (Pre-1/7/13)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The complainant suffered an injury; and
2. The accused caused the complainant's injury; and
3. The accused knew that his/her acts would probably injure the complainant; and
4. The accused acted without lawful justification or excuse.

Injury

1. Did the complainant suffer an injury?

Consider – Injury includes unconsciousness, hysteria, pain and any substantial impairment of bodily function

If Yes, then go to 2

If No, then the accused is not guilty of Recklessly Causing Injury

Causation

2. Did the accused cause the complainant's injury?

Consider – ***Were the accused's actions a substantial or significant cause of the complainant's injury***

If Yes, then go to 3

If No, then the accused is not guilty of Recklessly Causing Injury

Intention

3. Was the accused aware that his/her conduct would probably injure the complainant?

If Yes, then go to 4

If No, then the accused is not guilty of Recklessly Causing Injury

Lawful Justification or Excuse

4. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of Recklessly Causing Injury (as long as you have also answered Yes to questions 1, 2 and 3)

If No, then the accused is not guilty of Recklessly Causing Injury

Last updated: 1 July 2013

7.4.7 Negligently Causing Serious Injury

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1. The offence of negligently causing serious injury is created by *Crimes Act 1958* s 24.
2. The offence punishes conduct that, if the complainant had died, would have constituted manslaughter by criminal negligence (see *R v Shields* [1981] VR 717; *R v De'Zilwa* (2002) 5 VR 408).
3. While the offence mainly operates in relation to injuries inflicted by motor vehicles, that is not its only field of operation (*R v Reid* Vic SC 9/10/1996. See e.g. *R v Peters* [2013] VSCA 222 and *DPP v Weston* [2016] VSCA 243 for cases where the offence could arise in a non-motor vehicle context).

The Elements

4. The offence of negligently causing serious injury has four elements:
   i) The accused owed the complainant a duty of care;
   ii) The accused breached that duty by criminal negligence;
   iii) The act which breached the duty of care was committed consciously, voluntarily and deliberately;
   iv) The accused's breach of the duty caused the complainant to suffer a "serious injury".
5. The prosecution does not need to establish that the accused *intended* to cause serious injury. The test for negligently causing serious injury is objective (*Nydam v R* [1977] VR 430; *R v Shields* [1981] VR 717).

The accused owed a duty of care

6. The first element the prosecution must establish is that the accused owed the complainant a duty of care (*Nydam v R* [1977] VR 430; *R v Shields* [1981] VR 717).

7. Only a legal duty of care can give rise to liability for negligently causing serious injury. Moral duties, such as the obligation to help a stranger in distress or inform emergency services about a fire, are not relevant for this offence (see *R v Taktak* (1988) 34 A Crim R 334).

8. One duty which commonly arises is the duty owed by the driver of a motor vehicle to take reasonable care for the safety of other road users (see, e.g. *Manley v Alexander* (2005) 223 ALR 228).

9. For more information about when the accused will owe a duty of care, and the content of that duty, see 7.2.3 Negligent Manslaughter.

The accused breached the duty by criminal negligence

10. The second element the prosecution must prove is that the accused breached the duty of care by criminal negligence (*Nydam v R* [1977] VR 430; *R v Shields* [1981] VR 717; *Wilson v R* (1992) 174 CLR 313).

11. The Court in *Aston v The Queen* explained how the jury should be directed about this element:

> ...[T]he judge must direct the jury that the required negligence must be of a high order, involving a great falling short of the standard of care which a reasonable person would have exercised in all of the circumstances, and a high risk that death or serious injury would result from the relevant conduct. The judge should also explain that, since the required negligence must be of a high order, and must involve a high risk of death or serious injury, the kind of negligence which might be constituted by momentary inattention or a minor error of judgment, or which might found a simple civil claim for damages, generally would be insufficient to establish the necessary high degree. It will also be necessary for the judge to point to those matters which might constitute a high order of negligence necessary to support a conviction. The judge should bring home to the jury that the offence is not concerned with minor breaches of the expected standard of care, even if they result in someone being hurt. While minor breaches of the standard of care might establish negligence in a civil case, such minor breaches are not sufficient to establish guilt in a criminal case. More is required, in the sense that the conduct must involve a great falling short of the standard of care, and a high risk that death or serious injury would result. Even a substantial departure from the standard of care may not constitute such a great departure sufficient to constitute criminal negligence (*Aston v The Queen* [2019] VSCA 225, [70]).

12. This is the same degree of negligence required to establish culpable driving by gross negligence (*Aston v The Queen* [2019] VSCA 225. See also *Bouch v The Queen* [2017] VSCA 86).

The breach of the duty of care was voluntary

13. The third element that the prosecution must prove is that the act which breached the duty of care was committed consciously, voluntarily and deliberately (see *Ryan v R* (1967) 121 CLR 205; *Nydam v R* [1977] VR 430).

14. While the prosecution does not need to prove that the accused intended to cause serious injury, they must still prove that the relevant act was committed consciously, voluntarily and deliberately (see *R v Haywood* [1971] VR 755; *R v Vollmer* [1996] 1 VR 95).

15. While the law predominantly focuses on the need for an *act* to be voluntary, there may be cases where the defence argues that an omission is involuntary. In such cases, the judge may need to direct the jury on the need to prove that the omission was conscious, voluntary and deliberate. Alternatively, the judge may identify an act within the omission and may instruct the jury to consider whether the accused committed that act consciously, voluntarily and deliberately.

16. For information on voluntariness, see 7.2.1 Intentional or Reckless Murder.

The breach of the duty of care caused serious injury

17. The fourth element that the prosecution must prove is that the breach of the duty of care caused the complainant to suffer a serious injury.

18. As the prosecution must prove that it was the accused's *criminal breach of the duty of care* that caused the injury, it is important that the judge precisely identify the allegedly causal act or omission (see *Cittadini v R* [2009] NSWCCA 302; *Justins v R* (2010) 79 NSWLR 544).

19. Where the evidence reveals more than one possible breach of duty, the judge must decide, based on the factual circumstances, whether the separate breaches may be aggregated into a single breach for the purposes of causation (*R v Pace & Conduit (Ruling No 2)* [2008] VSC 308).

20. For further information about causation, see 7.1.2 Causation and 7.2.1 Intentional or Reckless Murder.

21. For further information about what constitutes a "serious injury" see 7.4.2 Intentionally Causing Serious Injury.

Defences

22. The prosecution must disprove any relevant defences, including self-defence, duress and emergency (*R v Edwards* [2009] SASC 233).

Alternative offences

23. Dangerous driving causing serious injury contrary to *Crimes Act 1958* s 319(1A) is a statutory alternative to negligently causing serious injury (*Crimes Act 1958* s 422A(1A)).

Last updated: 23 October 2019

7.4.7.1 Charge: Negligently Causing Serious Injury (From 1/7/13)

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This charge should be used if the accused is charged with negligently causing serious injury by an act and the offence was allegedly committed on or after 1 July 2013.

The charge will need to be adapted if the accused is charged with negligently causing serious injury by an omission.

I must now direct you about the crime of negligently causing serious injury. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – that the accused owed the complainant a duty of care.

Two – that the accused breached that duty by being criminally negligent.

Three – that the act which breached the duty of care was committed consciously, voluntarily and deliberately.

Four – that the accused's breach of the duty of care caused the complainant to suffer a serious injury.

I will now explain each of these elements in more detail.[833]

Duty of Care

The first element that the prosecution must prove is that the accused owed the complainant a duty of care.

The law imposes a duty [*describe class of persons covered by the duty and the content of the duty,*[834] *e.g.* "on a driver to take ordinary precautions to avoid harming people who are on or near the road"].

[*If this element is not in issue, add the following shaded section.*]

In this case, it is not disputed that NOA owed a duty of care to NOC because [*describe basis for the duty, e.g.* "NOA was driving a motor vehicle and NOC was [on/near] the road"]. You should therefore have no difficulty finding this element proven.

[*If this element is in issue, add the following shaded section.*]

In this case, the prosecution argued that NOA owed NOC a duty because [*describe basis for the duty and summarise prosecution evidence and/or arguments*]. In response, the defence argued that [*summarise relevant defence evidence and/or arguments*].

I direct you as a matter of law that if you are satisfied beyond reasonable doubt that [*describe findings of fact required to establish the duty*], then NOA owed NOC a duty to [*describe content of the duty*]. If you are not satisfied that this was the case, then you must find NOA not guilty of negligently causing serious injury.

Gross Negligence

The second element that the prosecution must prove is that the accused breached the duty of care by being criminally negligent.

A person acts with "criminal negligence" if his/her acts fall greatly short of the standard of care a reasonable person would have exercised and involved a high risk that death or serious injury would result.

This requires you to compare NOA's conduct with the "standard of care" that a reasonable person would have exercised in the circumstances. Precisely what that standard would have been is for you to decide, taking into account all of the circumstances, such as [*describe relevant factors*].

This is an objective test. That means that the prosecution does not need to establish that NOA intended to cause death or really serious injury or that s/he realised that his/her conduct was negligent. What matters is what a reasonable person in his/her situation would have known and done.

For this element to be met, you must find that the reasonable person in the accused's situation would have realised that his/her conduct created a high risk of death or really serious injury.

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[833] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[834] See 7.2.3 Negligent Manslaughter for information concerning the people to whom the accused owes a duty of care and the content of the duty.

In making your determination, you should consider the reasonable person to be the same age as the accused, to have any specialised knowledge and experience the accused had, and to be of ordinary strength of mind. In particular, [*describe characteristics of the accused that are relevant to the reasonable person, including training and experience*].

[*If there are qualities of the accused that are not relevant, add the shaded section below*.]

However, the reasonable person is not [*describe any adverse traits of the accused that are irrelevant, such as intoxication, concussion or carelessness*].

In considering this question, remember that people do not always act perfectly. Even the most careful person can occasionally lose attention for a moment, or make minor mistakes. This offence is not concerned with minor breaches of the expected standard of care, even if they result in someone being hurt. While that might establish negligence in a civil case, it is not sufficient to establish guilt in a criminal case. For a person to be guilty of negligently causing serious injury, more is required – NOA's conduct must have involved a great falling short of the standard of care required and there must have been a high risk that death or serious injury would result. To emphasise the standard required, a substantial departure from the standard of care a reasonable person would exercise may not be enough. There must be a high degree of negligence, involving a great departure from the standard of care required, to constitute criminal negligence.

[*Summarise relevant evidence and/or arguments.*]

Voluntariness

The third element that the prosecution must prove is that the accused's act which breached the duty of care was committed consciously, voluntarily and deliberately. These words each have a special meaning in law, which I will briefly explain.

The term "conscious" excludes the acts of an unconscious person, such as a sleepwalker, or a person rolling over in bed.

The term "voluntary" directs you to the requirement that the act which killed the deceased must be a "willed" act, that is, one resulting from the control by the accused of his/her own actions. This excludes the acts of a person operating in one of a number of rare mental states where the mind loses control of the body's actions.

The term "deliberate" excludes accidental acts, such as the consequences of falling over or fumbling an item.

[*If the case involves an accident and the element is not in issue, add the following shaded section.*]

In this case, you have heard [counsel/witnesses] describe the [*describe relevant event, e.g. 'collision'*] as an accident. For the purpose of this third element, you must look at [*describe relevant voluntary act, e.g.* 'whether the accused took adequate care when driving'], rather than [*describe relevant accident,* 'whether NOA colliding with NOV's car was an accident']. There is no issue that [if/when] NOA [*describe alleged breach of the duty of care*] s/he did so consciously, voluntarily and deliberately, so you should have no difficulty finding this element proven.

[*If this element is not in issue, add the following shaded section*.]

There is no issue that [if/when] NOA [*alleged breach of the duty of care, e.g.* "drove negligently"] s/he did so consciously, voluntarily and deliberately, so you should have no difficulty finding this element proven.

[*If voluntariness is in issue, add the following shaded section*.]

The defence argued[835] that the prosecution has failed to prove that [*describe alleged breach of the duty of care*] was [*select term(s), e.g. conscious, voluntary, deliberate*].

The defence submitted that this breach was committed [*describe and discuss the relevant form of involuntary conduct raised as an issue in the trial, such as reflex acts; physically compelled acts; acts performed in an automatic state*]. The prosecution denied that this was the case. [*Summarise relevant prosecution arguments and/or evidence.*]

It is for the prosecution to prove, beyond reasonable doubt, that the act which breached the duty of care was committed consciously, voluntarily and deliberately. If you are not satisfied that this was the case, then you must find NOA not guilty of negligently causing serious injury.

Causing serious injury

The fourth element that the prosecution must prove is that the accused's breach of the duty of care caused the complainant to suffer a serious injury. There are two parts to this element.

First, the prosecution must prove that NOC suffered a serious injury.

The law defines the word injury to mean physical injury or harm to mental health, whether temporary or permanent. A serious injury is an injury which endangers life or is substantial and protracted.[836]

[*If multiple injuries were inflicted, add the following shaded section*.]

In making your decision, you do not have to look at each of NOC's injuries separately, and decide whether or not any one of them is a serious injury. A person may suffer a serious injury because of the cumulative effect of several injuries.

[*If the physical injuries caused ongoing psychological harm, add the following shaded section*.]

An injury may be substantial and protracted because of the combined effect of the immediate physical injuries and prolonged psychological injuries.

In this case, the prosecution alleges that NOC's injuries were serious, because [*insert prosecution evidence and/or arguments*]. The defence denies this, arguing [*insert defence evidence and/or arguments*].

The second part of this element requires the prosecution to prove that it was the accused's criminal negligence that caused NOC's injuries.

For this part of the element to be met, you do not need to find that NOA's negligence was the only cause, or the direct or immediate cause, of NOC's injuries. However, you must find that it was a substantial or significant cause.

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

[*Summarise any evidence and/or arguments concerning causation.*]

It is only if you are satisfied that NOC's injuries were sufficiently grave to be classified as "serious", and that they were caused by NOA's criminal negligence, that this fourth element will be met.

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[835] If the defence did not raise the issue of voluntariness, but it arises on the evidence, this section will need to be modified accordingly.

[836] The judge should consider including an example of a serious injury, such as brain damage, or a stabbing which causes significant blood loss.

Summary

To summarise, before you can find NOA guilty of negligently causing serious injury the prosecution must prove to you beyond reasonable doubt:

One – that NOA owed NOC a duty of care; and

Two – that NOA breached that duty of care by being criminally negligent; and

Three – that the act which breached the duty of care was committed consciously, voluntarily and deliberately; and

Four – that NOA's breach of the duty caused NOC to suffer a serious injury.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of negligently causing serious injury.

Last updated: 23 October 2019

7.4.7.2 Checklist: Negligently Causing Serious Injury (From 1/7/13)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused owed the complainant a duty of care; and
2. The accused breached the duty of care by being criminally negligent; and
3. The act which breached the duty of care was committed consciously, voluntarily and deliberately; and
4. The accused's breach of the duty of care caused the complainant to suffer a serious injury.

Duty of Care

1. Did the accused owe the complainant a duty of care?

If Yes, then go to 2

If No, then the Accused is not guilty of Negligently Causing Serious Injury

---

Gross Negligence

2. Did the accused breach the duty of care by being criminally negligent?

*Consider – **Did the accused's conduct fall greatly short of the standard of care a reasonable person would have exercised, and involve a high risk of death or serious injury?***

If Yes, then go to 3

If No, then the Accused is not guilty of Negligently Causing Serious Injury

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Conscious and Voluntary

3. Was the accused's act which breached the duty of care committed consciously, voluntarily and deliberately?

If Yes, then go to 4

If No, then the Accused is not guilty of Negligently Causing Serious Injury

Causation

4. Did the accused's criminal negligence cause the complainant to suffer a serious injury?

4.1 Did the complainant suffer a serious injury?

Consider – Injury means physical injury or harm to mental health, whether temporary or permanent

Consider – Serious injury means an injury (including the cumulative effect of several injuries) that

(i) endangers life or

(ii) is substantial and protracted

If Yes, then go to 4.2

If No, then the Accused is not guilty of Negligently Causing Serious Injury

4.2 Did the accused cause the complainant's serious injury?

*Consider – **Was the accused's negligence a substantial or significant cause of the complainant's serious injury?***

If Yes, then the accused is guilty of Negligently Causing Serious Injury (as long as you have also answered Yes to questions 1, 2, 3 and 4.1)

If No, then the Accused is not guilty of Negligently Causing Serious Injury

Last updated: 23 October 2019

7.4.7.3 Charge: Negligently Causing Serious Injury (Pre-1/7/13)

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This charge should be used if the accused is charged with negligently causing serious injury by an act and the offence was allegedly committed before 1 July 2013.

The charge will need to be adapted if the accused is charged with negligently causing serious injury by an omission.

I must now direct you about the crime of negligently causing serious injury. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – that the accused owed the complainant a duty of care.

Two – that the accused breached that duty by being criminally negligent.

Three – that the act which breached the duty of care was committed consciously, voluntarily and deliberately.

Four – that the accused's breach of the duty of care caused the complainant to suffer a serious injury.

I will now explain each of these elements in more detail.[837]

Duty of Care

The first element that the prosecution must prove is that the accused owed the complainant a duty of care.

The law imposes a duty [*describe class of persons covered by the duty and the content of the duty,*[838] e.g. "on a driver to take ordinary precautions to avoid harming people who are on or near the road"].

[*If this element is not in issue, add the following shaded section*.]

In this case, it is not disputed that NOA owed a duty of care to NOC because [*describe basis for the duty, e.g.* "NOA was driving a motor vehicle and NOC was [on/near] the road"]. You should therefore have no difficulty finding this element proven.

[*If this element is in issue, add the following shaded section*.]

In this case, the prosecution argued that NOA owed NOC a duty because [*describe basis for the duty and summarise prosecution evidence and/or arguments*]. In response, the defence argued that [*summarise relevant defence evidence and/or arguments*].

I direct you as a matter of law that if you are satisfied beyond reasonable doubt that [*describe findings of fact required to establish the duty*], then NOA owed NOC a duty to [*describe content of the duty*]. If you are not satisfied that this was the case, then you must find NOA not guilty of negligently causing serious injury.

Gross Negligence

The second element that the prosecution must prove is that the accused breached the duty of care by being criminally negligent.

A person acts with "criminal negligence" if his/her acts fall greatly short of the standard of care a reasonable person would have exercised and involved a high risk that death or serious injury would result.

This requires you to compare NOA's conduct with the "standard of care" that a reasonable person would have exercised in the circumstances. Precisely what that standard would have been is for you to decide, taking into account all of the circumstances, such as [*describe relevant factors*].

This is an objective test. That means that the prosecution does not need to establish that NOA intended to cause death or really serious injury or that s/he realised that his/her conduct was negligent. What matters is what a reasonable person in his/her situation would have known and done.

For this element to be met, you must find that the reasonable person in the accused's situation would have realised that his/her conduct created a high risk of death or really serious injury.

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[837] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[838] See 7.2.3 Negligent Manslaughter for information concerning the people to whom the accused owes a duty of care and the content of the duty.

In making your determination, you should consider the reasonable person to be the same age as the accused, to have any specialised knowledge and experience the accused had, and to be of ordinary strength of mind. In particular, [*describe characteristics of the accused that are relevant to the reasonable person, including training and experience*].

[*If there are qualities of the accused that are not relevant, add the shaded section below*.]

However, the reasonable person is not [*describe any adverse traits of the accused that are irrelevant, such as intoxication, concussion or carelessness*].

In considering this question, remember that people do not always act perfectly. Even the most careful person can occasionally lose attention for a moment, or make minor mistakes. This offence is not concerned with minor breaches of the expected standard of care, even if they result in someone being hurt. While that might establish negligence in a civil case, it is not sufficient to establish guilt in a criminal case. For a person to be guilty of negligently causing serious injury, more is required – NOA's conduct must have involved a great falling short of the standard of care required and there must have been a high risk that death or serious injury would result. To emphasise the standard required, a substantial departure from the standard of care a reasonable person would exercise may not be enough. There must be a high degree of negligence, involving a great departure from the standard of care required, to constitute criminal negligence.

[*Summarise relevant evidence and/or arguments.*]

Voluntariness

The third element that the prosecution must prove is that the accused's act which breached the duty of care was committed consciously, voluntarily and deliberately. These words each have a special meaning in law, which I will briefly explain.

The term "conscious" excludes the acts of an unconscious person, such as a sleepwalker, or a person rolling over in bed.

The term "voluntary" directs you to the requirement that the act which killed the deceased must be a "willed" act, that is, one resulting from the control by the accused of his/her own actions. This excludes the acts of a person operating in one of a number of rare mental states where the mind loses control of the body's actions.

The term "deliberate" excludes accidental acts, such as the consequences of falling over or fumbling an item.

[*If the case involves an accident and the element is not in issue, add the following shaded section*.]

In this case, you have heard [counsel/witnesses] describe the [*describe relevant event, e.g.* 'collision'] as an accident. For the purpose of this third element, you must look at [*describe relevant voluntary act, e.g.* 'whether the accused took adequate care when driving'], rather than [*describe relevant accident,* 'whether NOA colliding with NOV's car was an accident']. There is no issue that [if/when] NOA [*describe alleged breach of the duty of care*] s/he did so consciously, voluntarily and deliberately, so you should have no difficulty finding this element proven.

[*If this element is not in issue, add the following shaded section*.]

There is no issue that [if/when] NOA [*alleged breach of the duty of care, e.g.* "drove negligently"] s/he did so consciously, voluntarily and deliberately, so you should have no difficulty finding this element proven.

[*If voluntariness is in issue, add the following shaded section*.]

The defence argued[839] that the prosecution has failed to prove that [*describe alleged breach of the duty of care*] was [*select term(s), e.g. conscious, voluntary, deliberate*].

The defence submitted that this breach was committed [*describe and discuss the relevant form of involuntary conduct raised as an issue in the trial, such as reflex acts; physically compelled acts; acts performed in an automatic state*]. The prosecution denied that this was the case. [*Summarise relevant prosecution arguments and/or evidence.*]

It is for the prosecution to prove, beyond reasonable doubt, that the act which breached the duty of care was committed consciously, voluntarily and deliberately. If you are not satisfied that this was the case, then you must find NOA not guilty of negligently causing serious injury.

Causing serious injury

The fourth element that the prosecution must prove is that the accused's breach of the duty of care caused the complainant to suffer a serious injury. There are two parts to this element.

First, the prosecution must prove that NOC suffered a serious injury.

It is a matter for you whether the injury that NOC suffered was "serious". This requires a value judgment, comparing NOC's injury with the range of injuries that a person may suffer.

The law defines the word "injury" to include "unconsciousness, hysteria, pain and any substantial impairment of bodily function". It also includes all the things that you would, as a matter of ordinary experience, call an injury.

It is not sufficient for you to find that NOC was injured. For this part of the element to be met, the prosecution must prove that s/he suffered a serious injury.

You may consider NOC's injuries as lying somewhere on a spectrum of injuries. At one end are trivial injuries like a paper cut or a grazed knee. At the other end of the spectrum are life–threatening injuries or permanent brain damage and the like.

It is a matter for you where on that spectrum NOC's injuries lie. In making your determination, you do not have to look at each of NOC's injuries separately, and assess whether or not any one of them is sufficiently "serious". A person may suffer a "serious injury" because of a combination of injuries.

[*Summarise any evidence and/or arguments concerning the seriousness of the complainant's injuries.*]

The second part of this element requires the prosecution to prove that it was the accused's criminal negligence that caused NOC's injuries.

For this part of the element to be met, you do not need to find that NOA's negligence was the only cause, or the direct or immediate cause, of NOC's injuries. However, you must find that it was a substantial or significant cause.

You should approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

[*Summarise any evidence and/or arguments concerning causation.*]

It is only if you are satisfied that NOC's injuries were sufficiently grave to be classified as "serious", and that they were caused by NOA's criminal negligence, that this fourth element will be met.

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[839] If the defence did not raise the issue of voluntariness, but it arises on the evidence, this section will need to be modified accordingly.

Summary

To summarise, before you can find NOA guilty of negligently causing serious injury the prosecution must prove to you beyond reasonable doubt:

One – that NOA owed NOC a duty of care; and

Two – that NOA breached that duty of care by being criminally negligent; and

Three – that the act which breached the duty of care was committed consciously, voluntarily and deliberately; and

Four – that NOA's breach of the duty caused NOC to suffer a serious injury.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of negligently causing serious injury.

Last updated: 23 October 2019

7.4.7.4 Checklist: Negligently Causing Serious Injury (Pre-1/7/13)

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused owed the complainant a duty of care; and
2. The accused breached the duty of care by being criminally negligent; and
3. The act which breached the duty of care was committed consciously, voluntarily and deliberately; and
4. The accused's breach of the duty of care caused the complainant to suffer a serious injury.

Duty of Care

1. Did the accused owe the complainant a duty of care?

If Yes, then go to 2

If No, then the Accused is not guilty of Negligently Causing Serious Injury

Gross Negligence

2. Did the accused breach the duty of care by being grossly negligent?

*Consider – **Did the accused's conduct fall greatly short of the standard of care a reasonable person would have exercised, and involve a high risk of death or serious injury?***

If Yes, then go to 3

If No, then the Accused is not guilty of Negligently Causing Serious Injury

Conscious and Voluntary

3. Was the accused's act which breached the duty of care committed consciously, voluntarily and deliberately?

If Yes, then go to 4

If No, then the Accused is not guilty of Negligently Causing Serious Injury

Causation

4. Did the accused's criminal negligence cause the complainant to suffer a serious injury?

4.1 Did the complainant suffer a serious injury?

Consider – Injury includes unconsciousness, hysteria, pain and any substantial impairment of bodily function; and

Serious injury includes a combination of injuries

If Yes, then go to 4.2

If No, then the Accused is not guilty of Negligently Causing Serious Injury

4.2 Did the accused cause the complainant's serious injury?

*Consider – **Was the accused's negligence a substantial or significant cause of the complainant's** serious injury?*

If Yes, then the accused is guilty of Negligently Causing Serious Injury (as long as you have also answered Yes to questions 1, 2, 3 and 4.1)

If No, then the Accused is not guilty of Negligently Causing Serious Injury

Last updated: 23 October 2019

7.4.8 Common Law Assault

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Introduction

1. Assault is an indictable common law offence in Victoria (*R v Patton* [1998] 1 VR 7).[840]
2. Historically, a distinction was drawn between the offences of assault and battery:
   - An assault required the accused to put the complainant in fear of the use of force, but did not require the application of force;
   - A battery required the actual application of force.
3. This distinction is no longer drawn. The offence of assault now incorporates both situations (which are addressed separately below) (*Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; *Pritchard v R* (1999) 107 A Crim R 88).

[840] In Victoria, a person may also be charged with assault under s 31 of the *Crimes Act 1958.* See 7.4.9 Statutory Assault.

Assault Involving the Application of Force

The elements

4. Assault involving the application of force has three elements:

   i) The accused applied force to the complainant's body;

   ii) The application of force was intentional or reckless; and

   iii) The application of force was without lawful justification or excuse.

The accused applied force to the complainant's body

5. The prosecution must prove that the accused applied force to the complainant's body (*Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439).

6. The force applied need not be violent and may be as slight as a mere touch (*Collins v Wilcock* [1984] 1 WLR 1172).

7. Force may be applied directly or through the medium of a weapon or instrument controlled by the accused (*Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; *Director of Public Prosecutions v K* [1990] 1 WLR 1067; *Pritchard v R* (1999) 107 A Crim R 88; *Darby v DPP (NSW)* (2004) 61 NSWLR 558).[841]

The application of force was intentional or reckless

8. The prosecution must prove that the application of force was intentional or reckless (*Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; *Macpherson v Brown* (1975) 12 SASR 184; *R v Venna* [1976] QB 421; *R v O'Conner* (1980) 146 CLR 6).

9. For the application of force to have been "reckless", the accused must have realised that his or her conduct would *probably* result in force being applied to the complainant's body (*R v Crabbe* (1985) 156 CLR 464; *R v Nuri* [1990] VR 641; *R v Campbell* [1997] 2 VR 585).

10. The accused will not have acted recklessly simply because he or she *ought to have known* that his or her conduct would result in such contact. The accused must have adverted to that likelihood (*Edwards v Police* (1998) 71 SASR 493; *Fisher v Police* (2004) 154 A Crim R 511).

11. For more information on recklessness generally, see 7.1.3 Recklessness.

Lawful Excuse

12. The prosecution must disprove, beyond reasonable doubt, any justifications or excuses that are open on the evidence (*Zecevic v DPP* (1987) 162 CLR 645).

13. The following justifications and excuses are discussed below:

    - Consent;
    - Touching in the course of an ordinary social activity;
    - Exercising a lawful power of arrest;
    - Lawfully correcting a child;
    - Self-defence;

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[841] For example, it has been held that this element has been met where the force was applied via a car (*Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439) or a police dog (*Darby v DPP (NSW)* (2004) 61 NSWLR 558; [2004] NSWCA 431 per Giles JA).

- Ejecting a trespasser.

Consent

14. In some cases, the prosecution may need to prove that the complainant did not consent to the alleged assault (see, e.g. *Neal v R* (2011) 32 VR 454; *R v Stein* (2007) 18 VR 376; *Parish v DPP* (2007) 17 VR 412; [2007] VSC 494; *R v McIntosh* [1999] VSC 358).

15. Whether consent is available as a lawful excuse will depend on:

    - The extent of any harm caused or risked; and
    - The purpose for which the act was committed (*Neal v R* (2011) 32 VR 454).

16. See Consent (Non-Sexual Offences) (topic not yet complete) for further information.

Ordinary Social activities

17. An act which is conducted as part of ordinary social activity will not constitute an assault (*Collins v Wilcock* [1984] 1 WLR 1172).

18. Physical contact that is generally acceptable in the ordinary course of everyday life includes jostling on public transport or in a busy street (*Collins v Wilcock* [1984] 1 WLR 1172).

Arrest

19. A person exercising a lawful power of arrest is entitled to use reasonable force where necessary to effect the arrest (*R v Turner* [1962] VR 30).

20. Resisting unlawful arrest may be a defence to assault. For more information about resisting arrest, see 7.4.9 Statutory Assault.

Lawful correction of children

21. The lawful correction of children will generally not be an assault. However, there are strict limits on the rights of parents (or those *in loco parentis*) to inflict corporal punishment. The punishment must:

    - Be moderate and reasonable;
    - Have a proper relation to the age, physique and mentality of the child; and
    - Be carried out in a reasonable manner (*R v Terry* [1955] VLR 114).

22. Corporal punishment is not permitted in Victorian Government schools (*Education and Training Reform Regulations* (Vic), reg 14).

Self-defence

23. People can use reasonable force to defend themselves from unlawful violence, as long as they believe on reasonable grounds that what they are doing is necessary in self-defence and the other elements of the defence are met. The test differs depending on when the offence was alleged to have been committed. For offences committed on or after 1 November 2014, see 8.1 Statutory Self-defence (From 1/11/14) for further information. For offences committed before 1 November 2014, see 8.3 Common Law Self Defence.

Ejecting a trespasser

24. A householder is entitled to use reasonable force to eject a trespasser. However, where the person who enters is a licensee, he or she must be given reasonable time to leave before force can be used against him or her (*Robson v Hallett* [1967] 2 QB 939; *Kay v Hibbert* [1977] Crim LR 226).

The accused's acts need not be hostile

25. In Victoria, hostility has sometimes been seen to be an element of assault involving the application of force. For example, some cases define assault as "a blow or other intentional application of physical force to the complainant's body in a hostile manner without his [or her] consent and without lawful justification or excuse" (see, e.g. *R v Holzer* [1968] VR 481).

26. However, the High Court has held that hostility or hostile intent is not a necessary requirement of assault. It is simply one of the factors to be taken into account when determining whether or not the force used was unlawful. Hostility may turn an otherwise unobjectionable act into an assault (*Boughey v R* (1986) 161 CLR 10).

27. Thus, the absence of hostility does not, on its own, provide an excuse or justification for an assault (*Boughey v R* (1986) 161 CLR 10).

Assault Not Involving the Application of Force

The Elements

28. Assault not involving the application of force has three elements:

    i) The accused committed an act that caused the complainant to apprehend the immediate application of force to his or her body;

    ii) The accused intended his or her actions to cause such apprehension, or was reckless as to that outcome; and

    iii) The accused had no lawful justification or excuse for causing the complainant to apprehend the application of immediate force.

The accused caused the complainant to apprehend violence

29. The prosecution must prove that accused committed an act that caused the complainant to apprehend the immediate application of force to his or her body (*Knight v R* (1988) 35 A Crim R 314*; Fisher v Police* (2004) 154 A Crim R 511; *ACN 087 528 774 v Chetcuti* (2008) 21 VR 559; *Slaveski v State of Victoria* [2010] VSC 441; *White v State of South Australia* (2010) 106 SASR 521).

30. Although the cases often refer to the accused "fearing" the application of force, the complainant does not need to have been frightened. He or she only needs to have *apprehended* that physical contact would be made without his or her consent (*ACN 087 528 774 v Chetcuti* (2008) 21 VR 559; *Slaveski v State of Victoria* [2010] VSC 441).

31. The contact apprehended by the complainant does not need to be grave. Apprehension of *any* application of force is sufficient (*Macpherson v Brown* (1975) 12 SASR 184; *ACN 087 528 774 v Chetcuti* (2008) 21 VR 559; *Slaveski v State of Victoria* [2010] VSC 441).

32. The complainant does not need to apprehend a specific act. This element will be met where the complainant does not know what the accused is going to do next, but believes that whatever it is, it is likely to be physically violent (*Smith v Chief Superintendent, Woking Police Station* (1983) 76 Cr App R 234; *R v Ireland* [1998] AC 147).

33. The complainant does not need to fear that the accused will apply the force personally. This element will be satisfied if the accused causes the complainant to apprehend the immediate application of force by a third party (*Macpherson v Beath* (1975) 12 SASR 174).

34. This element may be satisfied even though the accused had neither the intention nor the ability to carry out his or her threat (e.g. where the accused points a replica gun at the complainant, but the complainant believes it to be real and apprehends its imminent use) (*Barton v Armstrong* [1969] 2 NSWR 451; *Macpherson v Brown* (1975) 12 SASR 184; *R v Gabriel* (2004) 182 FLR 102).

35. For this element to be satisfied, the complainant must know about the accused's actions (*Pemble v The Queen* (1971) 124 CLR 107).[842]

36. Evidence that the complainant feared immediate violence can be inferred from his or her actions (e.g. fleeing or hiding from the accused) (*R v Mostyn* (2004) 145 A Crim R 304).

The complainant must have feared the "immediate" application of force

37. The complainant must have apprehended or expected the immediate or imminent application of force (*Knight v R* (1988) 35 A Crim R 314; *R v Gabriel* (2004) 182 FLR 102; *ACN 087 528 774 v Chetcuti* (2008) 21 VR 559; *Slaveski v State of Victoria* [2010] VSC 441).

38. Although there has been some confusion about this issue, it now seems clear that the question is *not* whether the complainant *immediately apprehended the application of force* (i.e., felt fear as soon as the threat was made), but whether he or she *apprehended the immediate application of force* (i.e., feared that force would be applied shortly) (*Knight v R* (1988) 35 A Crim R 314; *Zanker v Vartzokas* (1988) 34 A Crim R 11; *R v Gabriel* [2004] ACTSC 30; *ACN 087 528 774 v Chetcuti* (2008) 21 VR 559; *Slaveski v State of Victoria* [2010] VSC 441. Cf *Barton v Armstrong* [1969] 2 NSWR 451; *R v Mostyn* (2004) 145 A Crim R 304).

39. It is therefore not sufficient for the complainant to have immediately feared that force would be applied at some distant point in the future. The complainant must have apprehended that force would be applied immediately after the threat was made (*Knight v R* (1988) 35 A Crim R 314; *R v Gabriel* [2004] ACTSC 30; *ACN 087 528 774 v Chetcuti* (2008) 21 VR 559; *Slaveski v State of Victoria* [2010] VSC 441. Cf *Barton v Armstrong* [1969] 2 NSWR 451; *R v Mostyn* (2004) 145 A Crim R 304).

40. This does not mean that the complainant must apprehend that the force will be applied without delay. It is enough that the complainant apprehend that it will commence 'soon' (i.e., in the immediate future) (*R v Gabriel* (2004) 182 FLR 102).

41. In some cases, while the complainant will fear the application of force, he or she will not be sure if it is likely to be applied immediately or at some more remote time. This element will be met as long as he or she apprehends the possibility of its immediate application (*R v Gabriel* (2004) 182 FLR 102).

Continuing Threats

42. A threat of violence may continue after the relevant words have been uttered (e.g. where the complainant is held prisoner by the accused, who has threatened to harm him or her later) (*Zanker v Vartzokas* (1988) 34 A Crim R 11).

43. It has been held that in such cases, the requirement for "immediacy" will be satisfied if:

    - The accused's actions caused the complainant to apprehend relatively immediate and imminent violence; and
    - The accused remained in a position of dominance, and in a position to carry out the feared violence at some time not too remote, thus keeping the apprehension ever present in the complainant's mind (*Zanker v Vartzokas* (1988) 34 A Crim R 11; *R v Mostyn* (2004) 145 A Crim R 304. But see *R v Gabriel* (2004) 182 FLR 102).

The apprehension may have been caused by words or gestures

44. While there has been some confusion over whether "mere words" can constitute an assault, it seems that they can (as long as they cause the complainant to apprehend the immediate application of force) (*White v State of South Australia* (2010) 106 SASR 521; *Slaveski v State of Victoria* [2010] VSC 441. See also *Zanker v Vartzokas* (1988) A Crim R 11; *R v Ireland* [1998] AC 147; *R v Gabriel* (2004) 182 FLR 102).

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[842] Thus, if the complainant is unaware of that fact that the accused is pointing a gun at the back of his or her head, there will be no assault (*Pemble v The Queen* (1971) 124 CLR 107).

45. A physical gesture may also cause the complainant to apprehend the immediate application of force (*White v State of South Australia* (2010) 106 SASR 521).

Threats from a distance (e.g. telephone threats)

46. There is no rule preventing a threat of violence made from a distance (e.g. a threat made over the telephone or by email) from constituting an assault (*Slaveski v State of Victoria* [2010] VSC 441. See also *Barton v Armstrong* [1969] 2 NSWR 451; *R v Knight* (1988) A Crim R 314; *R v Mostyn* (2004) 145 A Crim R 304).

47. For such conduct to constitute an assault, all of the elements of the offence must be met – including the requirement that the complainant fear the immediate application of force (*Slaveski v State of Victoria* [2010] VSC 441; *R v Knight* (1988) A Crim R 314).

48. Whether or not a threat made from a distance will constitute an assault will depend on the circumstances. For example:

    - If the accused sends the complainant a letter threatening death by shooting, then makes an ominous phone call conveying the impression that he or she has the complainant in the sights of a firearm, there may be an assault.
    - If the accused telephones the complainant and threatens to punch him or her, but it is clear that the threat cannot be carried out immediately (due to the accused's remote location), there will not be an assault (*R v Gabriel* (2004) 182 FLR 102. See also *Barton v Armstrong* [1969] 2 NSWR 451; *Wilson v Kuhl* [1979] VR 315).[843]

49. A silent telephone call may amount to an assault where it causes fear of immediate violence (*R v Ireland* [1998] AC 147).

The apprehension does not need to have been reasonable

50. Although not clear,[844] it seems that the complainant's apprehension does not need to be reasonable (*Macpherson v Beath* (1975) 12 SASR 174; *White v State of South Australia* (2010) 106 SASR 521).

51. Thus, if the accused intentionally puts in fear of immediate violence an exceptionally timid person known to him or her to be timid, the unreasonableness of the complainant's fear may not prevent conviction (*Macpherson v Beath* (1975) 12 SASR 174).

The fear was created intentionally or recklessly

52. The second element the prosecution must prove is that the accused intended to cause the complainant to apprehend the immediate application of force, or was reckless as to that outcome (*Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; *Macpherson v Brown* (1975) 12 SASR 184; *Knight v R* (1988) 35 A Crim R 314; *White v State of South Australia* (2010) 106 SASR 521).

53. In relation to intention, the prosecution only needs to prove that the accused intended to create in the complainant's mind an apprehension that force would be applied. They do not need to prove that he or she intended to actually apply force (*ACN 087 528 774 v Chetcuti* (2008) 21 VR 559; *Slaveski v State of Victoria* [2010] VSC 441; *White v State of South Australia* (2010) 106 SASR 521).

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[843] In such circumstances the accused may be guilty of another offence which does not contain an immediacy requirement, such as making a threat to inflict serious injury (*R v Gabriel* (2004) 182 FLR 102).

[844] In relation to the tort of assault, the apprehension created in the mind of the victim must be objectively reasonable (*ACN 087 528 774 v Chetcuti* (2008) 21 VR 559; *Slaveski v State of Victoria* [2010] VSC 441). However, it seems that this is not a requirement in the criminal law.

54. In relation to recklessness, the prosecution must prove that the accused realised that his or her conduct would *probably* cause the complainant to apprehend the immediate application of force (*R v Crabbe* (1985) 156 CLR 464; *R v Nuri* [1990] VR 641; *R v Campbell* [1997] 2 VR 585).

55. The accused will not have acted recklessly simply because he or she *ought to have known* that his or her conduct would cause the complainant to fear the application of force. The accused must have turned his or her mind to that likelihood (*Edwards v Police* (1998) 71 SASR 493; *Fisher v Police* (2004) 154 A Crim R 511).

56. For more information on recklessness generally, see 7.1.3 Recklessness.

Lawful Justification or Excuse

57. The third element the prosecution must prove is that the accused had no lawful justification or excuse for causing the complainant to apprehend the application of immediate force.

58. See the discussion of lawful justification and excuse above (in relation to assault involving the application of force) for further information about this element.

Last updated: 1 November 2014

7.4.8.1 Charge: Assault Application of Force

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I must now direct you about the crime of assault. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused applied force to the body of the complainant.

Two – the application of force was intentional.[845]

Three – the application of force was without lawful justification or excuse.

I will now explain each of these elements in detail.

Application of force

The first element relates to what the accused did. [He/She] must have applied force to the body of the complainant.

It does not matter how much force is applied or for how long it was applied, and it does not need to have harmed the complainant. Even a slight touch is enough.

In this case, the prosecution alleged that NOA applied force to NOC when [*insert evidence*]. The defence responded [*insert evidence*].

Intention or recklessness

The second element relates to the accused person's state of mind. The prosecution must prove that the application of force was intentional. For you to be satisfied that the accused's actions were intentional, you must be satisfied that NOA deliberately applied force to NOC's body.

[845] It is also possible for this element to be satisfied by recklessness. In relevant cases the charge will need to be amended accordingly (see 7.1.3 Recklessness for assistance).

Lawful justification and excuse

The third element that the prosecution must prove is that the application of force was without lawful [justification/excuse].

[*If any lawful justifications, such as consent, self-defence, arrest, or the lawful correction of children, are open on the evidence, add the following shaded section.*]

In this case, the defence argued that [*insert evidence of lawful justification*]. The prosecution argued [*insert any counter arguments*].

[*If the excuse of ordinary social activity is open on the evidence, add the following shaded section*.]

In this case the defence argued that while NOA did apply force to NOC's body, this was done while [he/she] was carrying out the ordinary social activity of [*insert evidence*]. Under the law, force that is applied in the course of ordinary social activities is excusable. However, this excuse is limited to touching that is reasonable in our daily interactions. If the force that is applied goes beyond that, the accused will not have a lawful excuse.

[*If hostility is in issue, add*: Similarly, if the force is applied with a hostile intention, actions that would otherwise be considered excusable may become unlawful. In this case, the prosecution argued that [*insert relevant evidence*]. The defence responded [*insert relevant evidence*]. It is for you to determine whether NOA did have such a hostile intention, and whether in all of the circumstances this intention made [his/her] acts unlawful].

[*If any lawful justifications or excuses are open on the evidence, add the following shaded section*.]

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the application of force was without lawful [justification/excuse]. NOA does not need to prove that [he/she] had such a [justification/excuse].

[*If no lawful justifications or excuses are open on the evidence, add the following shaded section*.]

In this case, it has not been suggested that there was a lawful justification or excuse for the accused's alleged actions. The main issue[s] for you to determine are [*refer to facts in issue*].

Summary

To summarise, before you can find NOA guilty of assault the prosecution must prove to you beyond reasonable doubt:

One – that NOA applied force to NOC; and

Two – that NOA intended to apply force to NOC; and

Three – that NOA applied force to NOC without a lawful [justification/excuse].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of assault.

Last updated: 3 December 2012

7.4.8.2 Checklist: Application of Force

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This checklist is based on an intentional assault. If recklessness is in issue it will need to be amended as necessary.

Three elements that the prosecution must prove beyond reasonable doubt:

1. The accused applied force to the body of the complainant; and
2. The accused intended to apply force to the body of the complainant; and
3. The accused acted without lawful justification or excuse.

Application of Force

1. Did the accused apply force to the body of the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of assault

Intention

2. Did the accused intend to apply force to the body of the complainant?

If Yes, then go to 3

If No, then the accused is not guilty of assault

Lawful Justification or Excuse

3. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of assault (as long as you have answered yes to Questions 1 and 2)

If No, then the accused is not guilty of assault

Last updated: 2 May 2006

7.4.8.3 Charge: Assault No Application of Force

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I must now direct you about the crime of assault. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused acted in the way alleged.

Two – the accused intended to cause the complainant to apprehend the immediate application of force to their body.[846]

Three – the accused caused the complainant to apprehend the immediate application of force.

Four – the accused had no lawful justification or excuse for their behaviour.

I will now explain each of these elements in detail.

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[846] It is also possible for this element to be satisfied by recklessness. In relevant cases the charge will need to be amended accordingly (see 7.1.3 Recklessness for assistance).

Actions of the accused

The first element relates to what the accused did. In this case the prosecution alleged that NOA [*insert evidence about the accused's threatening behaviour*]. The defence responded [*insert evidence*].

Intention or recklessness

The second element relates to the accused person's state of mind. The prosecution must prove that the accused intended their actions to cause the complainant to apprehend the immediate application of force to their body.

It does not matter whether the accused was able to apply force to the complainant, nor whether they actually intended to apply such force. For this second element to be satisfied, the accused only needs to have intended to create an apprehension in the complainant that force would be applied.

Apprehension of immediate application of force

The third element relates to the effect of the accused's actions on the complainant. The prosecution must prove that the accused's actions caused the complainant to apprehend the immediate application of force to their body.

[*If relevant, add*: The complainant must apprehend that the force is about to occur. Threats of harm occurring some time in the future are not sufficient.]

Again, it does not matter whether the accused was able to apply force to the complainant, nor whether they intended to apply such force. For this third element to be satisfied, the complainant only needs to have apprehended the immediate application of force to their body.

Lawful justification and excuse

The fourth element that the prosecution must prove is that the accused's acts were without lawful [justification/excuse].

[*If any lawful justifications, such as consent, self-defence, arrest, or the lawful correction of children, are open on the evidence, add the following shaded section.*]

In this case, the defence argued that [*insert evidence of lawful justification*]. The prosecution argued [*insert any counter arguments*].

[*If the excuse of ordinary social activity is open on the evidence, add the following shaded section.*]

In this case the defence argued that while NOA did [*insert relevant act*], this was done while [he/she] was carrying out the ordinary social activity of [*insert evidence*]. Under the law, a [*insert relevant act*] that is done in the course of an ordinary social activity is excusable. However, this excuse is limited to [*insert relevant act*] that is reasonable in our daily interactions. If the [*insert relevant act*] goes beyond that, the accused will not have a lawful excuse.

[*If hostility is in issue, add*: Similarly, if the [*insert relevant act*] is done with a hostile intention, actions that would otherwise be considered excusable may become unlawful. In this case, the prosecution argued that [*insert relevant evidence*]. The defence responded [*insert relevant evidence*]. It is for you to determine whether NOA did have such a hostile intention, and whether in all of the circumstances this intention made [his/her] acts unlawful].

[*If any lawful justifications or excuses are open on the evidence, add the following shaded section.*]

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused's behaviour was without lawful [justification/excuse]. NOA does not need to prove that [he/she] had such a

[justification/excuse].

[*If no lawful justifications or excuses are open on the evidence, add the following shaded section.*]

In this case, it has not been suggested that there was a lawful justification or excuse for the accused's alleged actions. The main issue[s] for you to determine are [*refer to facts in issue*].

Summary

To summarise, before you can find NOA guilty of assault the prosecution must prove to you beyond reasonable doubt:

One – that NOA acted in the way alleged; and

Two – that NOA intended to cause NOC to apprehend the immediate application of force; and

Three – that NOA caused NOC to apprehend the immediate application of force; and

Four – that NOA's actions were without lawful [justification/excuse].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of assault.

Last updated: 3 December 2012

7.4.8.4 Checklist: No Application of Force

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This checklist is based on an intentional assault. If recklessness is in issue it will need to be amended as necessary.

Four elements that the prosecution must prove beyond reasonable doubt:

1. The accused acted in the way alleged; and
2. The accused intended to cause the complainant to apprehend the immediate application of force to their body; and
3. The accused's actions caused the complainant to apprehend the immediate application of force; and
4. The accused acted without lawful justification or excuse.

Application of Force

1. Did the accused act in the way alleged by the prosecution?

If Yes, then go to 2

If No, then the accused is not guilty of assault

Intention

2. Did the accused intend to cause the complainant to apprehend the immediate application of force?

If Yes, then go to 3

If No, then the accused is not guilty of assault

Effect on the Complainant

3. Did the accused's actions cause the complainant to apprehend the immediate application of force?

If Yes, go to 4

If No, then the accused is not guilty of assault

Lawful Justification or Excuse

4. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of assault (as long as you have answered yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of assault

Last updated: 2 May 2006

7.4.9 Statutory Assault

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Introduction

1. Although s 31 of the *Crimes Act 1958* contains only 3 subsections, it establishes 5 distinct offences (see, e.g. *R v Galvin (No 2)* [1961] VR 740):

   i) Assaulting or threatening to assault a person with intent to commit an indictable offence – s 31(1)(a).

   ii) Assaulting or threatening to assault an emergency worker, youth justice custodial worker or custodial officer on duty (or person lawfully assisting an emergency worker, youth justice custodial worker or custodial officer on duty) – s 31(1)(b), (ba).

   iii) Resisting an emergency worker, youth justice custodial worker or custodial officer on duty (or person lawfully assisting an emergency worker, youth justice custodial worker or custodial officer on duty) – s 31(1)(b), (ba).

   iv) Obstructing an emergency worker, youth justice custodial worker or custodial officer on duty (or person lawfully assisting an emergency worker, youth justice custodial worker or custodial officer on duty) – s 31(1)(b), (ba).

   v) Assaulting or threatening to assault a person with intent to resist or prevent arrest – s 31(1)(c).

2. There have not been any cases concerning the interpretation of the current provisions in s 31. All of the principles mentioned in this topic have been taken from cases concerning previous statutory provisions or similar common law offences. It is assumed that they apply and provide relevant guidance on the current offences.

Commencement information

3. Prior to 2 November 2014, s 31(b) only covered police officers and protective services officers.

4. Under amendments introduced by the *Sentencing Amendment (Emergency Workers) Act 2014*, the range of workers covered was expanded significantly to include ambulance workers, hospital staff and others. The range was further expanded in relation to custodial officers by the *Crimes Legislation Amendment Act 2016*. On 5 April 2018, the range of workers was further expanded to include youth justice custodial workers by the commencement of Part 8 of the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*. See Emergency workers, youth justice custodial workers and custodial officers, below.

Definition of assault

5. "Assault" is defined in s 31(2) to mean the direct or indirect application of force to the body of, or to the clothing or equipment worn by, a person. "Application of force" is defined in s 31(3) to include the application of heat, light, electric current or any other form of energy, as well as the application of matter in solid, liquid or gaseous form.
6. Unlike common law assault (see 7.4.8 Common Law Assault), an assault under s 31(2) must be done with intent to inflict, or being reckless as to the infliction of, bodily injury, pain, discomfort, damage, insult or deprivation of liberty. The assault must also result in the infliction of one of these consequences, although not necessarily the one intended or foreseen.

Assault with intent to commit an indictable offence – s 31(1)(a)

7. Under s 31(1)(a) it is an offence to assault or threaten to assault another person with intent to commit an indictable offence.
8. Whether or not an offence is indictable is a matter of law to be determined by the judge.

Assaulting, resisting or intentionally obstructing an emergency worker, youth justice custodial worker or custodial officer on duty – s 31(1)(b), (ba)

9. Under s 31(1)(b) it is an offence to assault or threaten to assault, resist or intentionally obstruct an emergency worker, youth justice custodial worker or custodial officer on duty, knowing or being reckless as to whether the person was an emergency worker, youth justice custodial worker or custodial officer.
10. Section 31(1)(ba) creates a corresponding offence of assaulting or threatening to assault, resist or intentionally obstruct a person lawfully assisting an emergency worker, youth justice custodial worker or custodial officer on duty, knowing or being reckless as to whether the person was assisting an emergency worker, youth justice custodial worker or custodial officer.
11. The words "assault", "resist" and "intentionally obstruct" in s 31(1)(b) create three separate offences (*R v Galvin (No 2)* [1961] VR 740).
12. For each of these offences there are two requirements:

    i) The person assaulted, resisted or obstructed must be an emergency worker, youth justice custodial worker or custodial officer, or a person lawfully assisting an emergency worker, youth justice custodial worker or custodial officer; and

    ii) The accused must know or be reckless as to the fact that the person is, or is assisting, an emergency worker, youth justice custodial worker or custodial officer (*R* v *Galvin (No 1)* [1961] VR 733; see also *R* v *Reynhoudt* (1962) 107 CLR 381).

Emergency workers, youth justice custodial workers and custodial officers

13. Under *Crimes Act 1958* s 31, "emergency worker," "youth justice custodial worker" and "custodial officer" have the same meaning as given in *Sentencing Act 1991* s 10AA. That provision contains the following definitions:

Custodial officer means –

(a) a Governor, prison officer, escort officer within the meaning of the *Corrections Act 1986*; or

(b) a police custody officer within the meaning of the *Victoria Police Act 2013*; or

(c) a person authorised under section 9A(1) of the *Corrections Act 1986* to exercise a function or power of a Governor, a prison officer or an escort officer under that Act; or

(d) a person authorised under section 9A(1A) or (1B) of the *Corrections Act 1986* to exercise a function or power referred to in that subsection;

Emergency worker means –

(a) a police officer or protective services officer within the meaning of the *Victoria Police Act 2013*; or

(b) an operational staff member within the meaning of the *Ambulance Services Act 1986*; or

(c) a person employed or engaged to provide, or support the provision of, emergency treatment to patients in a hospital; or

(d) a person employed by the Metropolitan Fire and Emergency Services Board established under the *Metropolitan Fire Brigades Act 1958* or a member of a fire or emergency service unit established under that Act; or

(e) an officer or employee of the Country Fire Authority under the *Country Fire Authority Act 1958*; or

(f) an officer or member of a brigade under the *Country Fire Authority Act 1958*, whether a part-time officer or member, a permanent officer or member or a volunteer officer or member within the meaning of that Act; or

(g) a casual fire-fighter within the meaning of Part V of the *Country Fire Authority Act 1958*; or

(h) a volunteer auxiliary worker appointed under section 17A of the *Country Fire Authority Act 1958*; or

(i) a person employed in the Department of Environment and Primary Industries with emergency response duties; or

(j) a registered member or probationary member within the meaning of the *Victoria State Emergency Service Act 2005* or an employee in the Victoria State Emergency Service; or

(k) a volunteer emergency worker within the meaning of the *Emergency Management Act 1986*; or

(l) any other person or body-

(i) required or permitted under the terms of their employment by, or contract for services with, the Crown or a government agency to respond (within the meaning of the *Emergency Management Act 2013*) to an emergency (within the meaning of that Act); or

(ii) engaged by the Crown or a government agency to provide services or perform work in relation to a particular emergency;

Youth justice custodial worker means a person-

(a) who is employed or engaged by the Secretary to the Department of Justice and Regulation in a remand centre, a youth residential centre or a youth justice centre; and

(b) whose duties include duties in relation to detainees in the custody of the Secretary.

"On duty"

14. Under s 31(1)(b)(i), it is only an offence to assault, resist or obstruct an emergency worker, youth justice custodial worker or custodial officer if they are "on duty".

15. Section 31(2A) states that the phrases "emergency worker on duty," "youth justice custodial worker on duty" and "custodial officer on duty" have the same meaning as in section 10AA of the *Sentencing Act 1991*. Subsections (9) and (10) of that provision state:

(9) For the purposes of this section an emergency worker is on duty if-

(a) in the case of a police officer or protective services officer within the meaning of the *Victoria Police Act 2013*, the officer is performing any duty or exercising any power as such an officer; or

(b) in the case of an operational staff member within the meaning of the *Ambulance Services Act 1986*, the staff member is providing, or attempting to provide, care or treatment to a patient; or

(c) in the case of a person employed or engaged to provide, or support the provision of, emergency treatment to patients in a hospital, the person is providing, or supporting the provision of, or attempting to provide or support the provision of, such treatment; or

(d) in any other case, the person is performing any duty or exercising any power in response to an emergency within the meaning of the *Emergency Management Act 2013*.

(10) For the purposes of this section a custodial officer is on duty if-

(a) in the case of a Governor, prison officer or escort officer within the meaning of the *Corrections Act 1986*, the Governor or officer is exercising a function or power as a Governor, prison officer or escort officer (as the case may be); or

(b) in the case of a police custody officer within the meaning of the *Victoria Police Act 2013*, the officer is exercising a function or power as a police custody officer; or

(c) in the case of a person authorised under section 9A(1) of the *Corrections Act 1986* to exercise a function or power of a Governor, a prison officer or an escort officer under that Act, the person is exercising a function or power specified in the instrument of authorisation; or

(d) in the case of a person authorised under section 9A(1A) or (1B) of the *Corrections Act 1986*, the person is exercising a function or power specified in the instrument of authorisation.

(11) For the purpose of this section, a youth justice custodial worker is on duty at any time when he or she is performing a function or exercising a power as a youth justice custodial worker.

16. Prior to amendments introduced on 2 November 2014 in the *Sentencing Amendment (Emergency Workers) Act 2014*, the equivalent offence applied to a police officer or protective services officer "in the due execution of duty".

17. Given the definitions of the phrases "emergency worker on duty," "youth justice custodial worker on duty" and "custodial officer on duty" in *Sentencing Act 1991* s 10AA(9)–(11), it is likely that principles developed in relation to "execution of duty" continue to apply, and may have been broadened on reflect the wider meaning of the phrase "on duty". In relation to emergency workers, youth justice custodial workers and custodial officers other than police or protective services officers, the court should seek submissions on the operation of section 10AA(9) in the circumstances of the case.

18. Authorities on the phrase "execution of duty" stated that it should be given a broad operation, to protect the performance of all police duties (*R* v *K (DPP's Reference 1993 (ACT))* (1993) 71 A Crim R 115).

19. According to the Federal Court (in relation to the *Federal Police Act 1979* (Cth)), a member of the police force is acting in due execution of their duty:

> from the moment [the member of the police force] embarks upon a lawful task connected with his [or her] functions as a police officer, and continues to act in the execution of that duty for as long as he [or she] is engaged in pursuing the task and until it is completed, providing that he [or she] does not in the course of the task do anything outside the ambit of his [or her] duty so as to cease to be acting therein (*R* v *K (DPP's Reference 1993 (ACT))* (1993) 71 A Crim R 115).

20. The accused did not need to have known that the person was acting in due execution of duty (cf. knowing they were a member of the police force or person acting in aid of a member of the police force) (*R v De Simone* [2008] VSCA 216).

21. Where a member of the police force conducts a search of a person for drugs because they are merely "curious" to see whether or not the accused has any drugs, such a search is illegal and the police officer cannot be said to be acting in the execution of their duty (*Nguyen* v *Elliott* 6/2/1995 SC Vic).

22. Members of the police force who trespass or use excessive force, or who unlawfully detain a person, are acting in excess of their authority and so are not acting in the execution of their duty (*Davis* v *Lisle* [1936] 2 KB 434; *R* v *Galvin* (No 1) [1961] VR 733; *Collins* v *Wilcock* [1984] 1 WLR 1172).

23. However, members of the police force have an implied licence to enter the path or driveway to a house in the absence of any obstruction or notice indicating that such licence has been revoked (*Halliday* v *Neville* (1984) 155 CLR 1).

24. A licence to enter a property may be revoked. If it is, and the member of the police force stays, they will be acting unlawfully and not in the execution of their duty. However, they need to be given time to leave the premises (*Robson* v *Hallett* [1967] 2 QB 939).

25. Members of the police force are permitted to tap a person on the shoulder or put a hand on a person's sleeve to get their attention (*Donnelly* v *Jackman* [1970] 1 WLR 562; *Collins* v *Wilcock* [1984] 1 WLR 1172).

26. Given that the definition of when a police officer or protective services officer is "on duty" requires that the person is "performing any duty or exercising any power as such an officer", it is likely that the principles described above will continue to apply so that a police or protective services officer is not "on duty" when acting beyond his or her authority.

Obstructing an emergency worker, youth justice custodial worker or custodial officer

27. For an accused to have obstructed an emergency worker, youth justice custodial worker or custodial officer on duty, the accused must have:

    - Acted in a way that prevented the emergency worker, youth justice custodial worker or custodial officer from carrying out their duty, or made it more difficult for them to do so; and
    - Known and intended that their conduct would prevent the emergency worker, youth justice custodial worker or custodial officer from carrying out their duty, or make it more difficult to do so (*Lewis* v *Cox* [1985] 1 QB 509; *Goddard* v *Collins* [1984] VR 919).

28. It does not matter whether the accused person's actions were "aimed at" or "hostile" towards the emergency worker, youth justice custodial worker or custodial officer. If the accused prevented the emergency worker, youth justice custodial worker or custodial officer from carrying out their duty, or made it more difficult for them to do so, and the accused intended that the conduct should have that effect then it will be obstruction. The motive of the accused is only relevant to any lawful excuse that might be available (*Lewis v Cox* [1985] 1 QB 509).

29. While obstructing an emergency worker, youth justice custodial worker or custodial officer may involve assaulting them, or threatening to assault them, it need not (*Lewis* v *Cox* [1985] 1 QB 509; *Goddard* v *Collins* [1984] VR 919).

30. Actions which have been held to be obstruction include:

    - Disobeying a member of the police force without lawful justification (*Duncan* v *Jones* [1936] 1 KB 218);
    - Giving false information to the police (*Rice* v *Connolly* [1966] 2 QB 414);
    - Opening the door of a police vehicle so that the police cannot drive away (*Lewis* v *Cox* [1985] 1 QB 509);
    - Preventing a member of the police force from entering a premises in pursuit of a suspect (*Swales* v *Cox* [1981] 1 QB 849);
    - Warning an offender that they are about to be arrested (*Terbutt* v *Holmes* (1935) 52 WN (NSW) 223).

31. The law in relation to obstruction draws a distinction between actions and omissions. In general, the offence only applies to actions that obstruct the emergency worker. However, this distinction must be applied in a common sense manner, as deliberately remaining at a place, contrary to a lawful direction by an emergency worker, can amount to obstructing (compare *O'Hair v Killian* (1971) 1 SASR 1; *Towse v Bradley* (1985) 60 ACTR 1).

Knowledge or recklessness

32. The mens rea for this offence is that the accused knew or was reckless as to whether the person was, or was assisting, an emergency worker, youth justice custodial worker or custodial officer (Crimes Act 1958 ss 31(1)(b), (ba)).

33. Consistent with other offences in the Crimes Act 1958, recklessness means acting while aware that it is probable that the person was an emergency worker youth justice custodial worker or custodial officer (see 7.1.3 Recklessness).

34. In accordance with general principles of criminal responsibility, it is likely open to the defence to argue for exculpation on the basis of an honest and reasonable belief that the person was not, or was not assisting, an emergency worker, youth justice custodial worker or custodial officer "on duty" (see CTM v R (2007) 236 CLR 440).

35. However, under earlier similar legislation, courts held that a mistaken belief that a police officer (or a person assisting them) did not have the powers they were exercising (e.g. a mistaken belief that a warrant did not give the right to immediate detention) did not provide a defence, as that was a mistake of law and not a mistake of fact (*Towse v Bradley* (1985) 60 ACTR 1).

36. Where relevant, the court will therefore need to determine whether an asserted belief that the person was not "an emergency worker on duty" is a mistake of fact claim or a mistake of law claim.

Assault with intent to resist or prevent arrest – s 31(1)(c)

37. Under s 31(1)(c) it is an offence to assault or threaten to assault another person with intent to resist or prevent the lawful apprehension or detention of a person.

38. A person can only be found guilty under this sub-section if the apprehension or detention was, or would have been, lawful (*R* v *Wilson* [1955] 1 All ER 744; *R* v *Galvin (No 1)* [1961] VR 733).

39. If an attempted arrest is not lawful, or a police officer is not acting in the execution of their duty, a person is entitled to use reasonable force in self-defence. Such resistance is lawful, and will be a defence to a charge (*Kenlin* v *Gardiner* [1967] 2 QB 510; *Bales* v *Parmeter* (1935) 35 SR (NSW) 182; *Nguyen* v *Elliott* 6/2/1995 SC Vic; *Zecevic* v *DPP* (1987) 162 CLR 645).

40. The accused can submit that he/she/they acted in self-defence due to an honest but mistaken belief that the arrest was unlawful (*R* v *Thomas* (1992) 65 A Crim R 269; *R v Mark* [1961] Crim LR 173; *Kenlin* v *Gardiner* [1967] 2 QB 510; *Blackburn* v *Bowering* [1994] 1 WLR 1324. But cf. *R v Fennel* [1971] 1 QB 428; *De Moor v Davies* [1999] VSC 416. For more information, see 8.1 Statutory Self-Defence (From 1/11/14)).

Last updated: 5 June 2018

7.4.9.1 Charge: Assault with Intent to Commit an Indictable Offence (s 31(1)(a))

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I must now direct you about the crime of assault. Under the law, there are a number of different types of assault that a person can be charged with. In this case, the accused has been charged with assault with intent to commit an indictable offence. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused [applied force to the body[847] of the complainant/threatened to apply force to the body of the complainant].

Two – the accused [applied force/threatened to apply force], to the complainant's body with an intention to [*insert one or more of the following as relevant:* injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty].[848]

Three – the accused's actions resulted in the complainant being [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, caused damage, insulted *or* deprived of liberty].

Four – the accused's actions were done with an intention to commit an indictable offence.

Five – the accused's actions were without lawful excuse.

I will now explain each of these elements in detail.

Application of force

The first element relates to what the accused did. The accused must have [applied force to the body of the complainant/threatened to apply force to the body of the complainant].

It does not matter [how the force was applied/what type of force was threatened]. It could involve any type of physical contact, [*if relevant, add*: such as kicking or punching, pushing or hitting with an object].

[*If relevant, add*: The application of force could also involve an application of heat, light or electric current to the body of the complainant, or the application of any substance, including liquids or gases.]

It also does not matter how much force was [applied/threatened]. Even a slight touch is enough for this element to be satisfied.

In this case, the prosecution argued that NOA [applied force/threatened to apply force] to NOC when [*insert evidence*]. The defence responded [*insert evidence*].

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[847] Section 31(2) of the *Crimes Act 1958* provides that the application of force can also be to clothes or equipment worn by the complainant. In cases involving such an application of force, the wording of the charge will need to be modified accordingly.

[848] It is also possible for this element to be satisfied by recklessness. In relevant cases the charge will need to be amended accordingly (see 7.1.3 Recklessness for assistance).

Intention or recklessness

The second element relates to the accused's state of mind. The prosecution must prove that the accused [applied force/threatened to apply force] to the complainant's body with an intention to [*insert one or more of the following as relevant:* injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty]. That is, when NOA [touched/threatened to touch] NOC, [he/she] intended or meant to cause one of these consequences.

Result of the accused's acts

The third element relates to the results of the accused's actions. The prosecution must prove that the accused's actions [*insert one or more of the following as relevant:* injured the complainant, inflicted pain, caused discomfort, caused damage, caused insult *or* deprived the complainant of liberty].

It is not necessary that the accused intended to cause the particular outcome that resulted from their actions. This element may still be met even if the result of their actions differs from what was intended. What is necessary is that the complainant was [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty].

Intention to commit an indictable offence

The fourth element once again relates to the accused's state of mind. The accused must have acted with an intention to commit an indictable offence.

An "indictable offence" is a particular kind of serious crime. The law sets out clearly what is and is not an indictable offence. In this case the prosecution say that NOA intended to [*insert relevant indictable offence*]. This is an indictable offence. The elements of this offence are [*insert elements of relevant offence*].

So for this fourth element to be met, you must be satisfied, beyond reasonable doubt, that when NOA [applied force/threatened to apply force] to NOC, [he/she] intended to commit the offence of [*insert relevant indictable offence*].

Lawful excuse

The fifth element that the prosecution must prove is that the accused's actions were without lawful excuse.

[*If any lawful excuses, such as self-defence, are open on the evidence, add:* In this case, the defence argued that [*insert evidence of lawful excuse*]. The prosecution argued [*insert any counter arguments*].]

[*If no lawful excuses are open on the evidence, add:* In this case, it has not been suggested that there was a lawful excuse for the accused's alleged actions. The main issue[s] for you to determine are [*refer to facts in issue*].]

Summary

To summarise, before you can find NOA guilty of assault the prosecution must prove to you beyond reasonable doubt:

One – that NOA [applied force/threatened to apply force] to NOC's body; and

Two – that NOA [applied/threatened to apply] that force with the intention to [*insert one or more of the following as relevant:* injure NOC, inflict pain, cause discomfort, cause damage, cause insult *or* deprive NOC of liberty]; and

Three – that NOA's actions resulted in NOC being [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty]; and

Four – that NOA acted with an intention to commit an indictable offence, in this case [*insert relevant offence*]; and

Five – that NOA acted without lawful excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of assault.

Last updated: 3 December 2012

7.4.9.2 Checklist: Assault with Intent to Commit an Indictable Offence

Click here to obtain a Word version of this document for adaptation

This checklist is based on an intentional assault involving the application of force. If the assault in issue involved a threat to apply force, or the reckless application of force, it will need to be amended as necessary.

Five elements that the prosecution must prove beyond reasonable doubt:

1. The accused applied force to the body of the complainant; and
2. The accused intended to [*insert one or more of the following:* injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty]; and
3. The accused's actions resulted in the complainant being [*insert one or more of the following:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty]; and
4. The accused acted with an intention to commit the indictable offence of [*insert offence*]; and
5. The accused acted without lawful excuse.

Application of Force

1. Did the accused apply force to the body of the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of assault

Intention

2. Did the accused intend to [*insert one or more of the following:* injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty]?

If Yes, then go to 3

If No, then the accused is not guilty of assault

Result of Accused's Actions

3. Did the actions of the accused result in the complainant being [*insert one or more of the following:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty]?

If Yes then go to 4

If No, then the accused is not guilty of assault

Indictable Offence

4. Did the accused act with an intention to commit the indictable offence of [*insert offence*]?

If Yes, go to 5

If No, then the accused is not guilty of assault

Lawful Excuse

5. Did the accused act without lawful excuse?

If Yes, then the accused is guilty of assault (as long as you have answered yes to Questions 1, 2, 3 and 4)

If No, then the accused is not guilty of assault

Last updated: 2 May 2006

7.4.9.3 Charge: Assaulting an Emergency Worker, Youth Justice Custodial Worker or Custodial Officer on Duty (Police Officer) (s 31(1)(b))

Click here to obtain a Word version of this document for adaptation

This charge is designed for cases where the complainant is a police officer. The charge must be adapted where the complainant is a different type of emergency worker, youth justice custodial worker or custodial officer. See 7.4.9 Statutory Assault for guidance on the types of workers covered by the offence.

This charge must also be adapted if the complainant is a person who was lawfully assisting an emergency worker, youth justice custodial worker or custodial officer.

I must now direct you about the crime of assault. Under the law, there are a number of different types of assault that a person can be charged with. In this case, the accused has been charged with assaulting a police officer in the due execution of duty. To prove this crime, the prosecution must prove the following 7 elements beyond reasonable doubt:

One – the complainant was a police officer.

Two – the complainant was "on duty".

Three – the accused knew that the complainant was a police officer, or knew that the complainant was probably a police officer.

Four – the accused applied force to the body[849] of the complainant.[850]

[849] Section 31(2) of the *Crimes Act 1958* provides that the application of force can also be to clothes or equipment worn by the complainant. In cases involving such an application of force, the wording of the charge will need to be modified accordingly.

[850] It is also possible for this element to be satisfied if the accused threatened to apply force to the body of the complainant. In relevant cases, the charge will need to be amended accordingly.

Five – the accused applied force to the complainant's body with an intention to [*insert one or more of the following as relevant*: injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty][851]

Six – the accused's actions resulted in the complainant being [*insert one or more of the following as relevant*: injured, caused pain, caused discomfort, caused damage, insulted *or* deprived of liberty].

Seven – the application of force was without lawful excuse.

I will now explain each of these elements in detail.

Police officer[852]

The first element that the prosecution must prove is that the complainant was a police officer. In this case [*insert relevant evidence*].

On duty[853]

The second element that the prosecution must prove is that the complainant was on duty at the time the force was applied. This means that they must have been acting lawfully, performing the duties or exercising the powers of a police officer.

[*If there is an issue regarding whether the police officer was acting outside the scope of his or her duties, add suitable directions on the scope of duties. See* 7.4.9 Statutory Assault *for guidance.*]

In this case, the prosecution argued that [*insert evidence*]. The defence responded [*insert evidence*]. It is for you to determine whether NOC was actually performing [his/her] duties when NOA [*insert evidence*].

Knowledge or recklessness that complainant was police officer[854]

The third element relates to what the accused knew. The prosecution must prove that at the time the accused applied force to the complainant's body, he/she/they knew that the complainant was a police officer, or knew that the complainant was probably a police officer.

In this case, the prosecution argued that [*insert evidence*]. The defence responded [*insert evidence*].

Application of force

The fourth element relates to what the accused did. The accused must have applied force to the body of the complainant.

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[851] It is also possible for this element to be satisfied by recklessness. In relevant cases the charge will need to be amended accordingly (see 7.1.3 Recklessness for assistance).

[852] This part of the direction must be modified if the complainant is not a police officer, or if the complainant is a person lawfully assisting an emergency worker, youth justice custodial worker or custodial officer.

[853] This part of the direction must be modified if the complainant is not a police officer, or if the complainant is a person lawfully assisting an emergency worker, youth justice custodial worker or custodial officer.

[854] This part of the direction must be modified if the complainant is not a police officer, or if the complainant is a person lawfully assisting an emergency worker, youth justice custodial worker or custodial officer.

It does not matter how the force was applied. It could involve any type of physical contact, [*if relevant, add*: such as kicking or punching, pushing or hitting with an object].

[*If relevant, add*: The application of force could also involve an application of heat, light or electric current to the body of the complainant, or the application of any substance, including liquids or gases.]

It also does not matter how much force was applied. Even a slight touch is enough for this element to be satisfied.

In this case, the prosecution argued that NOA applied force to NOC when [*insert evidence*]. The defence responded [*insert evidence*].

Intention

The fifth element relates to the accused's state of mind. The prosecution must prove that the accused applied force to the complainant's body with an intention to [*insert one or more of the following as relevant:* injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty]. That is, when NOA touched NOC, [he/she] intended or meant to cause one of these consequences.

Result of the accused's acts

The sixth element relates to the results of the accused's actions. The prosecution must prove that the accused's actions [*insert one or more of the following as relevant:* injured the complainant, inflicted pain, caused discomfort, caused damage, caused insult *or* deprived the complainant of liberty].

It is not necessary that the accused intended to cause the particular outcome that resulted from their actions. This element may still be met even if the result of their actions differs from what was intended. What is necessary is that the complainant was [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty].

Lawful excuse

The seventh element that the prosecution must prove is that the accused's actions were without lawful excuse.

[*If any lawful excuses, such as self-defence, are open on the evidence, add:* In this case, the defence argued that [*insert evidence of lawful excuse*]. The prosecution argued [*insert any counter arguments*].]

[*If no lawful excuses are open on the evidence, add:* In this case, it has not been suggested that there was a lawful excuse for the accused's alleged actions. The main issue[s] for you to determine are [*refer to facts in issue*].]

Summary

To summarise, before you can find NOA guilty of assault the prosecution must prove to you beyond reasonable doubt:

One – that NOC was a police officer; and

Two – that NOC was on duty; and

Three – that NOA knew that NOC was a police officer or knew that NOC was probably a police officer; and

Four – that NOA applied force to NOC's body; and

Five – that NOA applied that force with the intention to [*insert one or more of the following as relevant:* injure NOC, inflict pain, cause discomfort, cause damage, cause insult *or* deprive NOC of liberty]; and

Six – that NOA's actions resulted in NOC being [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty]; and

Seven – that NOA acted without lawful excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of assault.

Last updated: 5 June 2018

7.4.9.4 Checklist: Assaulting a Member of the Police Force

Click here to obtain a Word version of this document for adaptation

This checklist is based on an intentional assault of a police officer involving the application of force. If the assault in issue involved a threat to apply force, the reckless application of force, or an assault on a person acting in aid of a police officer, it will need to be amended as necessary.

Seven elements that the prosecution must prove beyond reasonable doubt:

1. The accused applied force to the body of the complainant; and
2. The accused intended to [*insert one or more of the following:* injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty]; and
3. The accused's actions resulted in the complainant being [*insert one or more of the following:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty]; and
4. The complainant was a member of the police force; and
5. The complainant was acting in the due execution of duty; and
6. The accused knew that the complainant was a member of the police force; and
7. The actions of the accused were without lawful excuse.

Application of Force

1. Did the accused apply force to the body of the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of assault

Intention

2. Did the accused intend to [*insert one or more of the following:* injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty]?

If Yes, then go to 3

If No, then the accused is not guilty of assault

Result of the Accused's Actions

3. Did the actions of the accused result in the complainant being [*insert one or more of the following:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty].

If Yes, then go to 4

If No, then the accused is not guilty of assault

Member of the Police Force

4. Was the complainant a member of the police force?

If Yes, go to 5

If No, then the accused is not guilty of assault

Due execution of Duty

5. Was the complainant acting in the due execution of duty?

If Yes, then go to 6

If No, then the accused is not guilty of assault

Knowledge of the Accused

6. Did the accused know that the complainant was a member of the police force?

If Yes, then go to 7

If No, then the accused is not guilty of assault

Without Lawful Excuse

7. Was the accused acting without lawful excuse?

If Yes, then the accused is guilty of assault (as long as you have answered yes to 1, 2, 3, 4, 5 and 6)

If No, then the accused is not guilty of assault

Last updated: 2 May 2006

7.4.9.5 Charge: Resisting/Obstructing an Emergency Worker, Youth Justice Custodial Worker or Custodial Officer on Duty (Police Officer) (s 31(1)(b))

Click here to obtain a Word version of this document for adaptation

This charge is designed for cases where the complainant is a police officer. The charge must be adapted where the complainant is a different type of emergency worker, youth justice custodial worker or custodial officer. See 7.4.9 Statutory Assault for guidance on the types of workers covered by the offence.

This charge must also be adapted if the complainant is a person who was lawfully assisting an emergency worker, youth justice custodial worker or custodial officer.

I must now direct you about the crime of assault. Under the law, there are a number of different types of assault that a person can be charged with. In this case the accused has been charged with [resisting/obstructing] a police officer in the due execution of duty. Although it may seem strange, according to the law this is a type of assault. To prove this crime, the prosecution must prove the following 6 elements beyond reasonable doubt:

One – the complainant was a police officer.[855]

Two – the complainant was "on duty".[856]

Three – the accused knew that the complainant was a police officer, or knew that the complainant was probably a police officer.

Four – the accused [resisted/obstructed] the complainant.

Five – the accused intended to [resist/obstruct] the complainant.

Six – the accused's actions were without lawful excuse.

I will now explain each of these elements in detail.

Police officer

The first element that the prosecution must prove is that the complainant was a police officer. In this case [*insert relevant evidence*].

On Duty

The second element that the prosecution must prove is that the complainant was on duty at the time the accused [resisted/obstructed] them. This means that they must have been acting lawfully, performing the duties or exercising the powers of a police officer.

[*If there is an issue regarding whether the police officer was acting outside the scope of his or her duties, add suitable directions on the scope of duties. See* 7.4.9 Statutory Assault *for guidance.*]

In this case, the prosecution argued that [*insert evidence*]. The defence responded [*insert evidence*]. It is for you to determine whether NOC was actually performing [his/her] duties when NOA [*insert evidence*].

Knowledge

The third element relates to what the accused knew. The prosecution must prove that at the time NOA [resisted/obstructed] NOC, [he/she/they] knew that NOC was a police officer, or knew that the complainant was probably a police officer.

In this case, the prosecution argued that [*insert evidence*]. The defence responded [*insert evidence*].

Resist/Obstruct

The fourth element relates to what the accused did. The accused must have [resisted/obstructed] the complainant.

[*In resistance cases add the following:* "Resists" is an ordinary English word. It is up to you to determine

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[855] This element will also be satisfied if the accused resists or obstructs a person acting in aid of a police officer. In relevant cases, this element will need to be modified accordingly.

[856] Where the complainant is a person acting in aid of a police officer, this element will need to be amended to reflect that it is the police officer who must have been on duty.

whether NOA's acts amounted to "resistance", in light of all of the circumstances in the case.]

[*In obstruction cases add the following:* To find that NOA obstructed NOC in the course of [his/her] duty, you must find that [he/she] acted in a way that prevented NOC from carrying out [his/her] functions as a police officer, or made it more difficult for [him/her] to do so.]

In this case, the prosecution argued that NOA [resisted/obstructed] NOC when [he/she] [*insert evidence*]. The defence responded [*insert evidence*].

Intention

The fifth element relates to the accused's state of mind. The prosecution must prove that the accused intentionally [obstructed/resisted] the complainant.

[*In resistance cases, add:* That is, NOA deliberately meant to resist NOC.]

[*In obstruction cases, add:* That is, NOA must have known and intended that [his/her] actions would prevent NOC from carrying out [his/her] duties or make it more difficult for [him/her] to do so.]

Lawful excuse

The sixth element that the prosecution must prove is that the accused's actions were without lawful excuse.

[*If any lawful excuses, such as self-defence, are open on the evidence, add:* In this case, the defence argued that [*insert evidence of lawful excuse*]. The prosecution argued [*insert any counter arguments*].]

[*If no lawful excuses are open on the evidence, add:* In this case, it has not been suggested that there was a lawful excuse for the accused's alleged actions. The main issue[s] for you to determine are [*refer to facts in issue*].]

Summary

To summarise, before you can find NOA guilty of assault the prosecution must prove to you beyond reasonable doubt:

One – that NOC was a police officer; and

Two – that NOC was "on duty"; and

Three – that NOA knew that NOC was a police officer or knew that NOC was probably a police officer; and

Four – that NOA [resisted/obstructed] NOC; and

Five – that NOA intended to [obstruct/resist] NOC; and

Six – that NOA acted without lawful excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of assault.

Last updated: 5 June 2018

7.4.9.6 Checklist: Resisting a Member of the Police Force

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This checklist is based on resisting a member of the police force. If the complainant was a person acting in aid of a member of the police force it will need to be modified as necessary.

Six elements that the prosecution must prove beyond reasonable doubt:

1. The complainant was a member of the police force at the time of the alleged crime; and
2. The complainant was acting in the due execution of their duty; and
3. The accused resisted the complainant in the execution of their duty; and
4. The accused knew that the complainant was a member of the police force; and
5. The accused intended to resist the complainant in the execution of their duty; and
6. The actions of the accused were without lawful excuse.

Member of the Police Force

1. Was the complainant a member of the police force at the time of the alleged crime?

If Yes, then go to 2

If No, then the accused is not guilty of assault

Due Execution of Duty

2. Was the complainant acting in the due execution of their duty at the time of the alleged crime?

If Yes, then go to 3

If No, then the accused is not guilty of assault

Resistance

3. Did the accused resist the complainant in the execution of their duty?

If Yes, then go to 4

If No, then the accused is not guilty of assault

Knowledge of the Accused

4. Did the accused know that the complainant was a member of the police force?

If Yes, then go to 5

If No, then the accused is not guilty of assault

Intention

5. Did the accused intend to resist the complainant in the due exercise of their duty?

If Yes, then go to 6

If No, then the accused is not guilty of assault

Without Lawful Excuse

6. Was the accused acting without lawful excuse?

If Yes, then the accused is guilty of assault (as long as you have answered yes to 1, 2, 3, 4 and 5)

If No, then the accused is not guilty of assault

Last updated: 2 May 2006

7.4.9.7 Checklist: Obstructing a Member of the Police Force

Click here to obtain a Word version of this document for adaptation

This checklist is based on obstructing a member of the police force. If the complainant was a person acting in aid of a member of the police force it will need to be modified as necessary.

Six elements that prosecution must prove beyond reasonable doubt:

1. The complainant was a member of the police force at the time of the alleged crime; and
2. The complainant was acting in the due execution of their duty; and
3. The accused obstructed the complainant in the execution of their duty; and
4. The accused knew that the complainant was a member of the police force; and
5. The accused intended to obstruct the complainant in the execution of their duty; and
6. The actions of the accused were without lawful excuse.

Member of the Police Force

1. Was the complainant a member of the police force at the time of the alleged crime?

If Yes, then go to 2

If No, then the accused is not guilty of assault

Due Execution of Duty

2. Was the complainant acting in the due execution of their duty at the time of the alleged crime?

If Yes, then go to 3

If No, then the accused is not guilty of assault

Obstruction

3. Did the accused obstruct the complainant in the execution of their duty?

*Consider – **did the accused's actions prevent the complainant from carrying out their functions as a** member of the police force or make it more difficult for them to carry out those functions?*

If Yes, then go to 4

If No, then the accused is not guilty of assault

Knowledge of the Accused

4. Did the accused know that the complainant was a member of the police force?

If Yes, then go to 5

If No, then the accused is not guilty of assault

Intention

5. Did the accused intend to obstruct the complainant in the due exercise of their duty?

If Yes, then go to 6

If No, then the accused is not guilty of assault

Without Lawful Excuse

6. Was the accused acting without lawful excuse?

If Yes, then the accused is guilty of assault (as long as you have answered yes to 1, 2, 3, 4 and 5)

If No, then the accused is not guilty of assault

Last updated: 2 May 2006

7.4.9.8 Charge: Resisting Arrest (s 31(1)(c))

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I must now direct you about the crime of assault. Under the law, there are a number of different types of assault that a person can be charged with. In this case the accused has been charged with assaulting a person with the intention of resisting or preventing their arrest.[857] To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused applied force to the body[858] of the complainant.[859]

Two – the accused applied force to the complainant's body with an intention to [*insert one or more of the following as relevant:* injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty].[860]

Three – the accused's actions resulted in the complainant being [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, caused damage, insulted *or* deprived of liberty].

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[857] Section 31(1)(c) can apply to resisting or preventing any lawful apprehension or detention of a person, not just the arrest of the accused. In relevant cases, this charge will need to be amended accordingly.

[858] Section 31(2) of the *Crimes Act 1958* provides that the application of force can also be to clothes or equipment worn by the complainant. In cases involving such an application of force, the wording of the charge will need to be modified accordingly.

[859] It is also possible for this element to be satisfied if the accused threatened to apply force to the body of the complainant. In relevant cases, the charge will need to be amended accordingly.

[860] It is also possible for this element to be satisfied by recklessness. In relevant cases the charge will need to be amended accordingly (see 7.1.3 Recklessness for assistance).

Four – the accused's actions were done with an intention to resist their lawful arrest.

Five – the accused's actions were without lawful excuse.

I will now explain each of these elements in detail.

Application of force

The first element relates to what the accused did. The accused must have applied force to the body of the complainant.

It does not matter how the force was applied. It could involve any type of physical contact, [*if relevant, add*: such as kicking or punching, pushing or hitting with an object].

[*If relevant, add*: The application of force could also involve an application of heat, light or electric current to the body of the complainant, or the application of any substance, including liquids or gases.]

It also does not matter how much force was applied. Even a slight touch is enough for this element to be satisfied.

In this case, the prosecution argued that NOA applied force to NOC when [*insert evidence*]. The defence responded [*insert evidence*].

Intention or recklessness

The second element relates to the accused's state of mind. The prosecution must prove that the accused applied force to the complainant's body with an intention to [*insert one or more of the following as relevant:* injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty]. That is, when NOA touched NOC, [he/she] intended or meant to cause one of these consequences.

Result of the accused's acts

The third element relates to the results of the accused's actions. The prosecution must prove that the accused's actions [*insert one or more of the following as relevant:* injured the complainant, inflicted pain, caused discomfort, caused damage, caused insult *or* deprived the complainant of liberty].

It is not necessary that the accused intended to cause the particular outcome that resulted from their actions. This element may still be met even if the result of their actions differs from what was intended. What is necessary is that the complainant was [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty].

Intention to resist lawful arrest or detention

The fourth element also relates to the accused's state of mind. The prosecution must prove that the accused acted with an intention to resist their lawful arrest. "Resists" is an ordinary English word. It is up to you to determine whether NOA's acts amounted to "resistance", in light of all of the circumstances in the case.

In this case, the prosecution argued that NOA resisted NOC when [he/she] [*insert evidence*]. The defence responded [*insert evidence*].

Lawful excuse

The fifth element that the prosecution must prove is that the accused's actions were without lawful excuse.

[*If any lawful excuses, such as self-defence, are open on the evidence, add:* In this case, the defence argued that

[*insert evidence of lawful excuse*]. The prosecution argued [*insert any counter arguments*].]

[*If no lawful excuses are open on the evidence, add:* In this case, it has not been suggested that there was a lawful excuse for the accused's alleged actions. The main issue[s] for you to determine are [*refer to facts in issue*].]

Summary

To summarise, before you can find NOA guilty of assault the prosecution must prove to you beyond reasonable doubt:

One – that NOA applied force to NOC's body; and

Two – that NOA applied that force with the intention to [*insert one or more of the following as relevant:* injure NOC, inflict pain, cause discomfort, cause damage, cause insult *or* deprive NOC of liberty]; and

Three – that NOA's actions resulted in NOC being [*insert one or more of the following as relevant:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty]; and

Four – that NOA acted with an intention to resist [his/her] lawful arrest; and

Five – that NOA acted without lawful excuse.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of assault.

Last updated: 3 December 2012

7.4.9.9 Checklist: Resisting Arrest

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This checklist is based on an intentional assault involving the application of force, in order to resist arrest. If the assault in issue involved a threat to apply force, the reckless application of force, or another type of apprehension or detention, it will need to be amended as necessary.

Five elements that prosecution must prove beyond reasonable doubt:

1. The accused applied force to the body of the complainant; and
2. The accused intended to [*insert one or more of the following:* injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty]; and
3. The accused's actions resulted in the complainant being [*insert one or more of the following:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty]; and
4. The accused acted with an intention to resist lawful arrest; and
5. The accused acted without lawful excuse.

Application of Force

1. Did the accused apply force to the body of the complainant?

If Yes, then go to 2

If No, then the accused is not guilty of assault

Intention

2. Did the accused intend to [*insert one or more of the following:* injure the complainant, inflict pain, cause discomfort, cause damage, cause insult *or* deprive the complainant of liberty]?

If Yes, then go to 3

If No, then the accused is not guilty of assault

Result of Accused's Actions

3. Did the actions of the accused result in the complainant being [*insert one or more of the following:* injured, caused pain, caused discomfort, damaged, insulted *or* deprived of liberty].

If Yes then go to 4

If No, then the accused is not guilty of assault

Resisting Lawful Arrest

4. Did the accused act with an intention to resist lawful arrest?

If Yes, go to 5

If No, then the accused is not guilty of assault

Lawful Excuse

5. Did the accused act without lawful excuse?

If Yes, then the accused is guilty of assault (as long as you have answered yes to 1, 2, 3 and 4)

If No, then the accused is not guilty

Last updated: 2 May 2006

7.4.10 Threats to Kill

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Overview

1. Making a threat to kill is an offence under the *Crimes Act 1958* s 20.
2. The offence has the following three elements that the prosecution must prove beyond reasonable doubt:
   (a) The accused made a threat to the complainant to kill either the complainant or another person;
   (b) The accused either:
      i) intended the complainant to fear that the threat would be carried out; or
      ii) was reckless as to whether or not the complainant would fear that the threat would be carried out; and
   (c) The threat was made without lawful excuse.

Threats to Kill

3. The first element is that:

   i) The accused must have declared his or her intention to kill either the complainant or another person;

   ii) That declaration must have been made to the complainant.

Nature of the Threat

4. The Act recognises that a person may make a threat to A, even if the threat is to kill B (*Crimes Act 1958* s 20).

5. In most cases, this will raise the question of whether A received the threat. However, in some cases, it may not be necessary to show the threat was received and that it is, instead, sufficient that the threat was made with the intention that it be communicated to A and in circumstances apt to achieve that end (see, e.g. *Austin v The Queen* (1989) 166 CLR 669; *Treacy v DPP* [1971] AC 537; *R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448; *Linney v The Queen* [2013] NSWCCA 251, [57]).

6. It is not necessary that the complainant have any particular relationship with the person threatened. This element will be satisfied even if the accused threatens to kill someone that the complainant does not know (*R v Solanke* [1970] 1 WLR 1; *R v Syme* (1911) 6 Cr App R 257).

7. The threat must be to kill. Threats to cause serious injury or any lesser harm are not sufficient (*R v Leece* (1995) 125 ACTR 1).

8. It is not necessary that the accused threaten to personally kill the complainant or other person. The threat may be to have someone else carry out the killing (*Barbaro v Quilty* [1999] ACTSC 119).

9. A threat can be conditional on the occurrence of a future event. It is not necessary that the accused have the immediate capacity or intention to carry out the threat (*R v Leece* (1995) 125 ACTR 1; *Barbaro v Quilty* [1999] ACTSC 119).

How Can a Threat be Made?

10. A threat can be made by words or conduct or both (*R v Rich* Vic CA 17/12/1997).

11. A threat can be made in writing and delivered or left with another person. The threat does not have to be received at the same time that it is made (*R v Jones* (1851) 5 Cox CC 226).

12. It is not necessary for the prosecution or the judge to identify the precise words or conduct that constituted the threat. Where the accused acted in a continuously threatening and abusive manner, the jury may consider whether his or her conduct as a whole amounted to a threat (*R v Rich* CA Vic 17/12/1997).

Impact of the Threat

13. It not necessary for the prosecution to prove that the complainant feared that the threat would be carried out, nor is it sufficient for the prosecution to prove that the complainant did feel such fear. (*R v Rich* Vic CA 17/12/1997; *R v Alexander* [2007] VSCA 178).

14. In making its determination, the jury must consider the relationship between the accused and the complainant. Violent or colourful language that may appear threatening at first sight, may in fact not be a "threat" when the relationship is taken into account. For example, it may be clear, in the context of the parties' relationship, that the accused did not intend to move beyond heated words and gestures (*Barbaro v Quilty* [1999] ACTSC 119).

The Accused's State of Mind

15. The second element requires the accused to have either:

i) Intended the complainant to fear that the threat would be carried out; or

ii) Been reckless as to whether or not the complainant would fear that the threat would be carried out (*Crimes Act 1958* s 20).

Intention

16. It is not necessary for the accused to have intended to carry out the threat. The only issue is whether the accused intended the complainant to believe that the threat would be carried out (*R v Alexander* [2007] VSCA 178; *Barbaro v Quilty* [1999] ACTSC 119).

17. The motive for making the threat is irrelevant (*R v Solanke* [1970] 1 WLR 1).

18. To establish the requisite intention, all of the circumstances of the statement or conduct must be considered (*R v Leece* (1995) 125 ACTR 1; *R v Alexander* [2007] VSCA 178).

Recklessness

19. To have been reckless as to whether or not the victim would fear that the threat would be carried out, the accused must have been aware, when s/he made the threat, that it was *probable* that the complainant would fear that it would be carried out (see *DPP Reference No 1 of 2019* [2021] HCA 26; *DPP Reference No 1 of 2019* [2020] VSCA 181; *R v Campbell* [1997] 2 VR 585).

20. The accused must have been aware that it was "probable" or "likely" that the complainant would fear that the threat would be carried out. It is not sufficient for him/her to have been aware that this fear was merely "possible" or "might" result (*R v Crabbe* (1985) 156 CLR 464; *R v Campbell* [1997] 2 VR 585; *R v Nuri* [1990] VR 641; *Ignatova v R* [2010] VSCA 263; *Paton v R* [2011] VSCA 72; *DPP Reference No 1 of 2019* [2020] VSCA 181; *DPP Reference No 1 of 2019* [2021] HCA 26).

21. The accused him/herself must have been aware that the complainant would probably fear that the threat would be carried out. It is not sufficient that a reasonable person in the accused's circumstances would have realised that the complainant would probably fear the threat (*R v Sofa* Vic CA 15/10/1990; c.f. *R v Nuri* [1990] VR 641).

22. When explaining this element, judges may tell the jury that the accused must have been aware that the victim would probably fear the threat would be carried out, but decided to go ahead anyway. The words "but decided to go ahead anyway" do not make proof that the accused was indifferent to the consequences of his or her conduct an element of the offence. Instead, the purpose of the words is to distinguish recklessness from intention. Judges may modify or omit the words "but decided to go ahead anyway" if the words could mislead or confuse the jury (see *Ignatova v R* [2010] VSCA 263; *R v Crabbe* (1985) 156 CLR 464; *R v Sofa* Vic CA 15/10/1990; *R v Nuri* [1990] VR 641; *R v Campbell* [1997] 2 VR 585; *R v Wilson* [2005] VSCA 78).

23. It is not appropriate to invite the jury to apply their normal understanding of the meaning of "recklessness". Conventional understanding of the term may include conduct that is negligent (*Banditt v The Queen* (2005) 224 CLR 262).

Threat Made Without Lawful Excuse

24. The threat to kill must have been made without any lawful justification or excuse (*Crimes Act 1958* s 20).

25. Self-defence and prevention of crime are common forms of justification in this area (*R v Cousins* [1982] 1 QB 526). See 8.1 Statutory Self–Defence (From 1/11/14).

26. A person may justifiably make a threat to kill in circumstances where it would not be reasonable to carry out that threat. A threat is a lesser form of harm than the execution of the threat (*R v Cousins* [1982] 1 QB 526).

Last updated: 28 October 2022

7.4.10.1 Charge: Threat to Kill

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I must now direct you about the crime of threatening to kill another person. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused made a threat to kill.

Two – the accused either intended the complainant to fear that the threat would be carried out, or knew that the complainant would probably fear that it would be carried out.

Three – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Making the Threat

The first element that the prosecution must prove is that the accused made a threat to kill.

A threat to kill is made by declaring to another person the intention to kill someone. In this case the prosecution must prove that NOA declared to NOC his/her intention to kill [NOC/NO3P[861]].

[*Add any of the directions from the following list that is relevant to the case.*]

- This element can be satisfied by a spoken statement, by a written declaration, by conduct, or by a combination of these forms of communication.
- This element will not be satisfied if you consider that the accused's declaration was only a threat to injure [NOC/NO3P].
- The accused does not need to have threatened to immediately kill [NOC/NO3P]. This element will be satisfied as long as the accused threatened to kill [NOC/NO3P], even if that threat was not to be carried out for some time.
- The threat to kill does not need to have been unconditional. This element will be satisfied even if the accused made his/her threat dependent on something else happening first.
- The accused does not need to have threatened to personally kill [NOC/NO3P]. This element will be satisfied if the accused threatened to have another person kill [NOC/NO3P].

In determining whether the accused has made a threat to kill, you must take into account all of the circumstances of the alleged threat [*if relevant add*: including the relationship between NOA and NOC].

It is important to note that you do not need to determine whether or not NOC himself/herself thought that NOA would carry out the threat. The test is whether a reasonable person would have feared that the threat would be carried out.

Similarly, you do not need to determine whether NOA intended to carry out the threat.

In this case, the prosecution alleged that NOA made a threat to kill by [*describe relevant prosecution evidence and/or arguments*]. The defence denied this, arguing [*describe relevant defence evidence and/or arguments*]. It is only if you are satisfied, beyond reasonable doubt, that the accused made a threat to kill in the sense that I have described that this first element will be satisfied.

---

[861] Name of the third party who was allegedly threatened by the accused.

Accused's Mental State

The second element that the prosecution must prove is that the accused either:

- Intended the complainant to fear that the threat would be carried out; or
- Knew, when s/he made the threat, that the complainant would probably fear that it would be carried out.

The two mental states I just mentioned are alternatives. This element will be satisfied as long as the prosecution can prove one of them beyond reasonable doubt. I will now examine each in turn.

Intention

This element will be satisfied if the prosecution can prove that the accused intended NOC to fear that his/her threat to kill [him/her/NO3P] would be carried out.

In this case the prosecution submitted that this was the case. [*Insert relevant evidence and/or arguments.*] The defence responded [*insert relevant evidence and/or arguments*].

It is for you to decide whether the prosecution has proven, beyond reasonable doubt, that the accused had this intention. If s/he did, then this second element will be met.

Knowledge that the Complainant Would Probably Feel Fear

A second way this element can be satisfied is by proving that NOA made the threat to kill knowing that it was probable that NOC would fear that it would be carried out. That is, NOA knew that NOC was likely to believe that s/he was going to kill [him/her/NO3P].

It is not sufficient for NOA to have known that it was possible that NOC would feel such fear. S/he must have known that that consequence was probable.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the probability of NOC's fear. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*].

Inferring states of mind

[*If proof of the accused's mental state depends on the drawing of inferences, add the following shaded section.*]

As I have stated, the prosecution contends that you should infer from the evidence that NOA had the appropriate state of mind at the relevant time.

A person's intention at the time s/he commits an offence may be inferred from what s/he said and did, and also from what s/he failed to say and do. You should look at all of NOA's proven actions before, at the time of, and after the alleged offence. All of these things may help you to determine what NOA's intention was when s/he made the alleged threat to kill.

In particular, the prosecution has asked you to consider [*describe evidence*]. The defence has asked you to consider [*describe evidence*].

You will remember what I told you about inferences earlier.[862] In this context, those directions mean that you may only infer that NOA intended NOC to fear that the threat would be carried out, or that s/he knew that such a consequence was probable, if you are satisfied beyond reasonable doubt that that is the only inference open from the facts you have found. If any evidence causes you to have reservations about drawing such an inference, the benefit of your doubts should go to the accused.

[*If the jury might infer recklessness by using an objective test, add the following shaded section*.]

In determining whether NOA knew that NOC would probably fear that s/he would carry out his/her threat, you [can/have been asked to] draw an inference from the probability that [you/the reasonable person] would have foreseen such a consequence in the accused's situation.

I must warn you that, although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat this factor as decisive of the issue. It is not enough that you, or any other person, would have had such an awareness in the circumstances. You must be satisfied that NOA him/herself actually knew that it was likely that NOC would fear that s/he would carry out his/her threat.

The Accused Need Not Have Intended to Carry Out Threat

As with the first element, this element may be satisfied even if NOA never intended to carry out the threat. All that is required is that NOA intended NOC to fear that the threat would be carried out, or knew that it was probable that NOC would feel such fear.

In this case, the prosecution alleged that [*describe relevant prosecution evidence and/or arguments*]. The defence responded that [*describe relevant defence evidence and/or arguments*].

Lawful Justification and Excuse

The third element that the prosecution must prove is that there was no lawful justification or excuse for the accused making the threat.

[*If no defences are raised, add the following shaded section*.]

In this case, there is no suggestion that NOA acted with any lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences).*]

Summary

To summarise, before you can find NOA guilty of making a threat to kill, the prosecution must prove to you, beyond reasonable doubt:

One – That NOA made a threat to kill; and

Two – That NOA either:

(a) intended NOC to fear that the threat would be carried out; or

(b) knew that NOC would probably fear that it would be carried out; and

Three – That NOA had no lawful justification or excuse for making that threat.

---

[862] This charge is based on the assumption that the judge has already instructed the jury about inferences. It will need to be modified if that has not been done.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of making a threat to kill.

Last updated: 2 July 2020

7.4.10.2 Checklist: Threatening to Kill

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused made a threat to kill; and
2. The accused either:
   (a) Intended the complainant to fear that the threat would be carried out; or
   (b) Knew that the complainant would probably fear that the threat would be carried out; and
3. The accused acted without lawful justification or excuse.

Making a Threat to Kill

1. Did the accused make a threat to kill?

1.1 Did the accused make a threat to the complainant?

If Yes, then go to 1.2

If No, then the accused is not guilty of Threatening to Kill

1.2 Was it a threat to kill [the complainant/another person]?

If Yes, then go to 1.3

If No, then the accused is not guilty of Threatening to Kill

1.3 Would a reasonable person who was informed about all of the circumstances have feared that the threat would be carried out?

Consider – The complainant does not need to have feared that the threat would be carried out; and

The accused does not need to have intended to carry out the threat.

If Yes, then go to 2.1

If No, then the accused is not guilty of Threatening to Kill

Accused's State of Mind

2.1 Did the accused intend the complainant to fear that the threat to kill would be carried out?

Consider – The accused does not need to have intended to carry out the threat.

If Yes, then go to 3

If No, then go to 2.2

2.2 Was the accused aware that the complainant would probably fear that the threat to kill would be carried out?

Consider – What did the accused think the likely result of his/her actions would be?

If Yes, then go to 3

If No, then the accused is not guilty of Threatening to Kill

Lawful Justification or Excuse

3. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of Threatening to Kill (as long as you have also answered Yes to questions 1.1, 1.2, 1.3 and either 2.1 or 2.2)

If No, then the accused is not guilty of Threatening to Kill

Last updated: 14 August 2018

7.4.11 Threats to Inflict Serious Injury

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Overview

1. Making a threat to inflict serious injury is an offence under the *Crimes Act 1958* s 21.
2. The offence has the following three elements that the prosecution must prove beyond reasonable doubt:
   (a) The accused made a threat to the complainant to inflict serious injury upon either the complainant or another person;
   (b) The accused either:
      i) intended the complainant to fear that the threat would be carried out; or
      ii) was reckless as to whether or not the complainant would fear that the threat would be carried out; and
   (c) The threat was made without lawful excuse.

Threats to Inflict Serious Injury

3. The first element is that:
   i) The accused must have declared his or her intention to inflict serious injury upon either the complainant or another person;
   ii) That declaration must have been made to the complainant.

Nature of the Threat

4. The threat must be to inflict serious injury upon either the complainant or another person.
5. For information on the meaning of the term "serious injury", see 7.4.2 Intentionally Causing Serious Injury.
6. As the threat must be to "inflict" serious injury rather than "cause" serious injury, it is unclear whether a threat to cause serious injury will always be covered by this offence. "Cause" is generally thought to be a wider term, that includes "inflict" (see *R v Salisbury* [1976] VR 452; *R v Mandair* [1995] 1 AC 208; *R v Ireland & Burstow* [1998] AC 147).
7. While the prosecution must prove that the complainant received the threat, s/he need not be the person threatened. The accused may have threatened to inflict serious injury upon another person (*Crimes Act 1958* s 21).
8. It is not necessary that the complainant have any particular relationship with the person threatened. This element will be satisfied even if the accused threatens to inflict serious injury upon someone that the complainant does not know (*R v Solanke* [1970] 1 WLR 1; *R v Syme* (1911) 6 Cr App R 257).
9. It is not necessary that the accused threaten to personally injure the complainant or other person. The threat may be to have someone else carry out the assault (*Barbaro v Quilty* [1999] ACTSC 119).
10. A threat can be conditional on the occurrence of a future event. It is not necessary that the accused have the immediate capacity or intention to carry out the threat (*R v Leece* (1995) 125 ACTR 1; *Barbaro v Quilty* [1999] ACTSC 119).

How Can a Threat be Made?

11. A threat can be made by words or conduct or both (*R v Rich* Vic CA 17/12/1997).
12. A threat can be made in writing and delivered or left with another person. The threat does not have to be received at the same time that it is made (*R v Jones* (1851) 5 Cox CC 226).
13. It is not necessary for the prosecution or the judge to identify the precise words or conduct that constituted the threat. Where the accused acted in a continuously threatening and abusive manner, the jury may consider whether his or her conduct as a whole amounted to a threat (*R v Rich* Vic CA 17/12/1997).

Impact of the Threat

14. It not necessary for the prosecution to prove that the complainant feared that the threat would be carried out, nor is it sufficient for the prosecution to prove that the complainant did feel such fear. (*R v Rich* Vic CA 17/12/1997; *R v Alexander* [2007] VSCA 178).
15. In making its determination, the jury must consider the relationship between the accused and the complainant. Violent or colourful language that may appear threatening at first sight, may in fact not be a "threat" when the relationship is taken into account. For example, it may be clear, in the context of the parties' relationship, that the accused did not intend to move beyond heated words and gestures (*Barbaro v Quilty* [1999] ACTSC 119).

The Accused's State of Mind

16. The second element requires the accused to have either:

    i) Intended the complainant to fear that the threat would be carried out; or

    ii) Been reckless as to whether or not the complainant would fear that the threat would be carried out (*Crimes Act 1958* s 21).

Intention

17. It is not necessary for the accused to have intended to carry out the threat. The only issue is whether the accused intended the complainant to believe that the threat would be carried out (*R v Alexander* [2007] VSCA 178; *Barbaro v Quilty* [1999] ACTSC 119).
18. The motive for making the threat is irrelevant (*R v Solanke* [1970] 1 WLR 1).
19. To establish the requisite intention, all of the circumstances of the statement or conduct must be considered (*R v Leece* (1995) 125 ACTR 1; *R v Alexander* [2007] VSCA 178).

Recklessness

20. To have been reckless as to whether or not the victim would fear that the threat would be carried out, the accused must have been aware, when s/he made the threat, that it was *probable* that the complainant would fear that it would be carried out (*R v Crabbe* (1985) 156 CLR 464; *R v Sofa* Vic CA 15/10/1990).
21. The accused must have been aware that it was "probable" or "likely" that the complainant would fear that the threat would be carried out. It is not sufficient for him/her to have been aware that this fear was merely "possible" or "might" result (*R v Crabbe* (1985) 156 CLR 464; *R v Campbell* [1997] 2 VR 585; *R v Nuri* [1990] VR 641).
22. The accused him/herself must have been aware that the complainant would probably fear that the threat would be carried out. It is not sufficient that a reasonable person in the accused's circumstances would have realised that the complainant would probably fear the threat (*R v Sofa* Vic CA 15/10/1990; c.f. *R v Nuri* [1990] VR 641).
23. It is not appropriate to invite the jury to apply their normal understanding of the meaning of "recklessness". Conventional understanding of the term may include conduct that is negligent (*Banditt v The Queen* (2005) 224 CLR 262).
24. When explaining recklessness to the jury, it is common for judges to require them to also find that the accused was indifferent to the consequences of his or her conduct (see, e.g. *R v Sofa* Vic CA 15/10/1990; *R v Nuri* [1990] VR 641; *R v Campbell* [1997] 2 VR 585; *R v Wilson* [2005] VSCA 78).
25. While the abovementioned authorities suggest that an indifference to consequences is an independent element of recklessness at common law, there is strong authority for the proposition that an awareness of the probable consequences of conduct is all that is required (*R v Crabbe* (1985) 156 CLR 464).

Threat Made Without Lawful Excuse

26. The threat to inflict serious injury must have been made without any lawful justification or excuse (*Crimes Act 1958* s 21).
27. Self-defence and prevention of crime are common forms of justification in this area (*R v Cousins* [1982] 1 QB 526).
28. A person acts in self defence when s/he believes, on reasonable grounds, that his/her actions are necessary (*Zecevic v DPP (Vic)* (1987) 162 CLR 645. See 8.3 Common Law Self-defence).
29. A person may justifiably make a threat to inflict serious injury in circumstances where it would not be reasonable to carry out that threat. A threat is a lesser form of harm than the execution of the threat (*R v Cousins* [1982] 1 QB 526).

Last updated: 30 November 2015

7.4.11.1 Charge: Threat to Inflict Serious Injury

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This charge is for conduct occurring on or after 1 July 2013. For conduct before that date, the charge must be adapted.

I must now direct you about the crime of threatening to inflict serious injury upon another person. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused made a threat to inflict serious injury.

Two – the accused either intended the complainant to fear that the threat would be carried out, or knew that the complainant would probably fear that it would be carried out.

Three – the accused acted without lawful justification or excuse.

I will now explain each of these elements in more detail.

Making the Threat

The first element that the prosecution must prove is that the accused made a threat to inflict serious injury.

A threat to inflict serious injury is made by declaring to another person the intention to seriously injure someone. In this case the prosecution must prove that NOA declared to NOC his/her intention to seriously injure [NOC/NO3P].[863]

The law defines the word injury to mean physical injury or harm to mental health, whether temporary or permanent. A serious injury is an injury which endangers life or is substantial and protracted.[864]

[*If there was a risk of multiple injuries, add the following shaded section*.]

In making your decision, you do not have to look at each of the threatened injuries individually, and decide whether or not any one of them is a serious injury. An injury may be a "serious injury" because of the cumulative effect of several injuries.

For this element to be met, the prosecution must prove that the accused threatened to inflict not only an injury, but a "serious injury".

[*Add any of the directions from the following list that is relevant to the case*.]

- This element can be satisfied by a spoken statement, by a written declaration, by conduct, or by a combination of these forms of communication.
- The accused does not need to have threatened to immediately inflict serious injury on [NOC/NO3P]. This element will be satisfied as long as the accused threatened to seriously injure [NOC/NO3P], even if that threat was not to be carried out for some time.
- The threat to inflict serious injury does not need to have been unconditional. This element will be satisfied even if the accused made his/her threat dependent on something else happening first.
- The accused does not need to have threatened to personally inflict serious injury on [NOC/NO3P]. This element will be satisfied if the accused threatened to have another person seriously injure [NOC/NO3P].

In determining whether the accused has made a threat to inflict serious injury, you must take into account all of the circumstances of the alleged threat [*if relevant add*: including the relationship between NOA and NOC].

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[863] Name of the third party who was allegedly threatened by the accused.

[864] The judge should consider including an example of a serious injury, such as brain damage, or a stabbing which causes significant blood loss.

It is important to note that you do not need to determine whether or not NOC himself/herself thought that NOA would carry out the threat. The test is whether a reasonable person would have feared that the threat would be carried out.

Similarly, you do not need to determine whether NOA intended to carry out the threat.

In this case, the prosecution alleged that NOA made a threat to inflict serious injury by [*describe relevant prosecution evidence and/or arguments*]. The defence denied this, arguing [*describe relevant defence evidence and/or arguments*]. This first element will only be satisfied if you are satisfied, beyond reasonable doubt, that the accused made a threat to inflict serious injury, which is an injury which endangers life or is substantial and protracted.

Accused's Mental State

The second element that the prosecution must prove is that the accused either:

- Intended the complainant to fear that the threat would be carried out; or
- Knew, when s/he made the threat, that the complainant would probably fear that it would be carried out.

The two mental states I just mentioned are alternatives. This element will be satisfied as long as the prosecution can prove one of them beyond reasonable doubt. I will now examine each in turn.

Intention

This element will be satisfied if the prosecution can prove that the accused intended NOC to fear that his/her threat to seriously injure [him/her/NO3P] would be carried out.

In this case the prosecution submitted that this was the case. [*Insert relevant evidence and/or arguments.*] The defence responded [*insert relevant evidence and/or arguments*].

It is for you to decide whether the prosecution has proven, beyond reasonable doubt, that the accused had this intention. If s/he did, then this second element will be met.

Knowledge that the Complainant Would Probably Feel Fear

A second way this element can be satisfied is by proving that NOA made the threat to inflict serious injury knowing that it was probable that NOC would fear that it would be carried out. That is, NOA knew that NOC was likely to believe that s/he was going to seriously injure [him/her/NO3P].

It is not sufficient for NOA to have known that it was possible that NOC would feel such fear. S/he must have known that that consequence was probable.

In determining this part of the test, you must be satisfied that NOA him/herself actually knew of the probability of NOC's fear. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*].

Inferring states of mind

[*If proof of the accused's mental state depends on the drawing of inferences, add the following shaded section.*]

As I have stated, the prosecution contends that you should conclude from the evidence that NOA had the appropriate state of mind at the relevant time.

A person's intention at the time s/he commits an offence may be identified from what s/he said and did, and also from what s/he failed to say and do. You should look at all of NOA's proven actions before, at the time of, and after the alleged offence. All of these things may help you to determine what NOA's intention was when s/he made the alleged threat to inflict serious injury.

In particular, the prosecution has asked you to consider [*describe evidence*]. The defence has asked you to consider [*describe evidence*].

You will remember what I told you about drawing conclusions earlier.[865] In this context, those directions mean that you may only conclude that NOA intended NOC to fear that the threat would be carried out, or that s/he knew that such a consequence was probable, if you are satisfied beyond reasonable doubt that that is the only conclusion open from the facts you have found. If any evidence causes you to have reservations about drawing such a conclusion, the benefit of your doubts must go to the accused.

[*If the jury might infer recklessness by using an objective test, add the following shaded section.*]

In determining whether NOA knew that NOC would probably fear that s/he would carry out his/her threat, you [can/have been asked to] draw a conclusion from the probability that [you/the reasonable person] would have foreseen such a consequence in the accused's situation.

I must warn you that, although this is a legitimate step in reasoning towards a conclusion about NOA's state of mind, you must not treat this factor as decisive of the issue. It is not enough that you, or any other person, would have had such an awareness in the circumstances. You must be satisfied that NOA him/herself actually knew that it was likely that NOC would fear that s/he would carry out his/her threat.

The Accused Need Not Have Intended to Carry Out Threat

As with the first element, this element may be satisfied even if NOA never intended to carry out the threat. All that is required is that NOA intended NOC to fear that the threat would be carried out, or knew that it was probable that NOC would feel such fear.

In this case, the prosecution alleged that [*describe relevant prosecution evidence and/or arguments*]. The defence responded that [*describe relevant defence evidence and/or arguments*].

Lawful Justification and Excuse

The third element that the prosecution must prove is that there was no lawful justification or excuse for the accused making the threat.

[*If no defences are raised, add the following shaded section.*]

In this case, there is no suggestion that NOA acted with any lawful justification or excuse. You should therefore have no difficulty finding this element proven.

[*If any defences are open on the evidence, insert directions from the relevant topics here (see Part 8: Victorian Defences.*]

Summary

To summarise, before you can find NOA guilty of making a threat to inflict serious injury, the prosecution must prove to you, beyond reasonable doubt:

One – That NOA made a threat to inflict serious injury; and

Two – That NOA either:

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[865] This charge is based on the assumption that the judge has already instructed the jury about circumstantial evidence. It will need to be modified if that has not been done.

(a) intended NOC to fear that the threat would be carried out; or

(b) knew that NOC would probably fear that it would be carried out; and

Three – That NOA had no lawful justification or excuse for making that threat.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of making a threat to inflict serious injury.

Last updated: 2 July 2020

7.4.11.2 Checklist: Threatening Serious Injury

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This checklist is for conduct occurring on or after 1 July 2013. It must be adapted for conduct before that date.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused made a threat to inflict serious injury; and
2. The accused either:
   (a) Intended the complainant to fear that the threat would be carried out; or
   (b) Knew that the complainant would probably fear that the threat would be carried out; and
3. The accused acted without lawful justification or excuse.

Making a Threat to Inflict Serious Injury

1. Did the accused make a threat to inflict serious injury?

1.1. Did the accused make a threat to the complainant?

If Yes, then go to 1.2

If No, then the accused is not guilty of Threatening Serious Injury

1.2. Was it a threat to inflict serious injury upon [the complainant/another person]?

Consider – A serious injury is an injury which endangers life or is substantial and protracted

If Yes, then go to 1.3

If No, then the accused is not guilty of Threatening Serious Injury

1.3. Would a reasonable person who was informed about all of the circumstances have feared that the threat would be carried out?

Consider – The complainant does not need to have feared that the threat would be carried out; and

Consider – The accused does not need to have intended to carry out the threat.

If Yes, then go to 2.1

If No, then the accused is not guilty of Threatening Serious Injury

Accused's State of Mind

2.1 Did the accused intend the complainant to fear that the threat to inflict serious injury would be carried out?

Consider – The accused does not need to have intended to carry out the threat.

If Yes, then go to 3

If No, then go to 2.2

2.2 Was the accused aware that the complainant would probably fear that the threat to inflict serious injury would be carried out?

Consider – What did the accused think the likely result of his/her actions would be?

If Yes, then go to 3

If No, then the accused is not guilty of Threatening Serious Injury

Lawful Justification or Excuse

3. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of Threatening Serious Injury (as long as you have also answered Yes to questions 1.1, 1.2, 1.3 and either 2.1 or 2.2)

If No, then the accused is not guilty of Threatening Serious Injury

Last updated: 30 November 2015

7.4.12 Stalking (From 7/6/11)

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Operation of Section 21A

1. The offence of stalking is created by *Crimes Act 1958* s 21A.
2. The offence was substantially amended in 2003 by the *Crimes (Stalking) Act*, to achieve the following:
   i) Cover acts of cyberstalking;
   ii) Remove the requirement for proof about the effect the conduct had on the victim, in cases where the accused had the appropriate subjective intention;
   iii) Add the defence of lack of malice; and
   iv) Explicitly allow for extra-territorial operation.
3. The offence was further amended in 2011 by the *Crimes Amendment (Bullying) Act 2011*, which:
   i) Expanded the definition of stalking to cover threats and abusive or offensive words or

actions;

ii) Covers acts of stalking intended to cause psychological harm, suicidal thoughts or self-harm.

4. The new provisions apply to offences alleged to have been committed on or after 7 June 2011 (*Crimes Act 1958* s 617(1)).

5. If any of the conduct is alleged to have been committed by the accused occurred prior to 7 June 2011, the offence is alleged to have been committed under the previous provisions (*Crimes Act 1958* s 617(2)).

6. This topic addresses offences committed after 7 June 2011. For offences committed before that date, references to self-harm and the expanded definition of psychological harm do not apply.

Elements

7. The offence has the following two elements:

   i) The accused intentionally engaged in a "course of conduct" that included conduct of the type described in ss 21A(2)(a)–(g); and

   ii) The accused either:

   - Committed that course of conduct with the intention of causing physical or mental harm to the victim, including self-harm or of arousing apprehension or fear in the victim for his or her own safety or that of any other person; or
   - Knew that engaging in a course of conduct of that kind would be likely to cause such harm, or arouse such apprehension or fear; or
   - Ought to have understood that engaging in a course of conduct of that kind would be likely to cause such harm, or arouse such apprehension or fear, and it actually did have that result.

A Relevant Course of Conduct

8. There are three aspects to the first element:

   i) The accused must have engaged in a "course of conduct";

   ii) The course of conduct must have included conduct of the type or nature described in ss 21A(2)(a)–(g); and

   iii) The accused must have committed those acts intentionally (*R v Anders* (2009) 20 VR 596).

"Course of Conduct"

9. For the accused's acts to have constituted a "course of conduct", they must have amounted to a pattern of conduct that showed a "continuity of purpose" in relation to the victim (*Berlyn v Brouskos* (2002) 134 A Crim R 111; *Nadarajamoorthy v Moreton* [2003] VSC 283; *Thomas v Campbell* (2003) 9 VR 136; *R v Hoang* (2007) 16 VR 369; *R v Anders* (2009) 20 VR 596).

10. At the minimum, this requires the acts to have been committed on more than one occasion, or to have been protracted in nature (e.g. an extended act of surveillance) (*Gunes v Pearson* (1996) 89 A Crim R 297; *Berlyn v Brouskos* (2002) 134 A Crim R 111; *Nadarajamoorthy v Moreton* [2003] VSC 283; *Thomas v Campbell* (2003) 9 VR 136; *R v Hoang* (2007) 16 VR 369).

11. However, conduct which was committed on more than one occasion, or which was protracted, will not always constitute a pattern of conduct evidencing a continuity of purpose. Something additional about the conduct or surrounding circumstances must be shown before it can be said of the conduct that it amounts to such a pattern (*Berlyn v Brouskos* (2002) 134 A Crim R 111; *Nadarajamoorthy v Moreton* [2003] VSC 283).

12. The continuity of purpose must have been in relation to the particular victim. It is not sufficient for the victim to have coincidentally been the subject of actions which were not specifically targeted at him or her personally (*R v Anders* (2009) 20 VR 596).[866]

13. The course of conduct may be spread out over a period of years (see, e.g. *R v Hoang* (2007) 16 VR 369).

14. An episode of harassment of short duration does not constitute a course of conduct evidencing a continuity of purpose (*Nadarajamoorthy v Moreton* [2003] VSC 283).

15. If the alleged acts were not premeditated, there cannot have been a continuity of purpose (*Thomas v Campbell* (2003) 9 VR 136).

Relevant Types of Conduct

16. The course of conduct must have been comprised of one or more of the types of conduct specified in s 21A(2) (*DPP v Sutcliffe* [2001] VSC 43; *R v Orgill* [2007] VSCA 236).

17. While ss 21A(2)(a)–(f) identify particular forms or types of conduct, s 21(2)(g) is a 'catch-all' provision, aimed at all other types of conduct which have the effect of arousing apprehension or fear in the victim for his or her own safety or that of any other person (*DPP v Sutcliffe* [2001] VSC 43).

18. The matters set out in s 21A(2) are not necessarily unlawful. It is the confluence of these actions in a course of conduct directed to a person with a specific intent which constitutes the criminality (*Nadarajamoorthy v Moreton* [2003] VSC 283).

Following the Victim

19. Section 21A(2)(a) refers to "following the victim or any other person".

20. This requires some motion by the accused and the victim from place to place, or within different areas of the same place (such as a shopping centre or a building) (*Slaveski v State of Victoria and Others* [2010] VSC 441).

21. The accused will therefore not fall within the scope of s 21A(2)(a) if he or she stands or sits still and stares at the victim as the victim walks past. Following someone with one's eyes is not sufficient (*Slaveski v State of Victoria and Others* [2010] VSC 441).

22. To "follow" the victim, the accused does not need to physically remain behind the victim (*Slaveski v State of Victoria and Others* [2010] VSC 441).

23. Thus, an accused who is aware of the victim's daily routine, and is able to anticipate his or her movements, may "follow" the victim by being present outside the victim's home before the victim leaves for work in the morning, and then preceding the victim to various locations throughout the day (e.g. the victim's train station, workplace, place where the victim does his or her shopping) (*Slaveski v State of Victoria and Others* [2010] VSC 441).

Loitering

24. Section 21A(2)(c) refers to "entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person".

25. "Loitering" involves more than simply being and remaining at a place. It conveys a concept of idleness, lack of purpose or indolence (*Nadarajamoorthy v Moreton* [2003] VSC 283).

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[866] For example, it will not be sufficient to prove that the accused was undertaking surveillance of a particular location, and coincidentally happened to photograph the same person on more than one occasion. The accused must have intended to target the particular victim (*R v Anders* (2009) 20 VR 596).

26. The accused must have been and remained at or near the relevant place for the purpose of causing physical or mental harm to the victim, or of arousing apprehension or fear in the victim for his or her safety or that of any other person (*Nadarajamoorthy v Moreton* [2003] VSC 283).

27. A person may therefore not fall within the scope of s 21A(2)(c) if, at the relevant time, he or she was engaged in other activities which render the description of "loitering" inapt in the circumstances, such as handing out brochures for a political protest (see, e.g. *Nadarajamoorthy v Moreton* [2003] VSC 283).

28. Where there is an issue about whether or not the accused was "loitering", the jury will need to exclude all reasonable hypotheses consistent with the accused not having been "loitering" beyond reasonable doubt (*Nadarajamoorthy v Moreton* [2003] VSC 283).

Surveillance

29. Section 21A(2)(f) refers to "keeping the victim or any other person under surveillance".

30. "Surveillance" includes the use of cameras and other electrical equipment that enables the accused to keep watch over the victim by recording the victim's movements or activity (*R v Anders* (2009) 20 VR 596).

31. The accused can commit stalking by surveillance by photographing the victim on a number of occasions (*R v Anders* (2009) 20 VR 596).[867]

32. Stalking by surveillance may also be made out by keeping watch over a location with the intent of observing or recording a specific victim's movements (*R v Anders* (2009) 20 VR 596).

33. There is no separate legal test to distinguish between acts of monitoring or observation that amount to "surveillance", and those that do not. Instead, where stalking by surveillance is alleged, the issue remains whether or not the conduct in question meets the "course of conduct" requirements of stalking (*R v Anders* (2009) 20 VR 596).

Causing an Unauthorised Computer Function

34. Section 21A(2)(bb) refers to causing an "unauthorised computer function". This term is defined in *Crimes Act 1958* s 247A(1) to mean any of the following:

    (a) any unauthorised access to data held in a computer; or

    (b) any unauthorised modification of data held in a computer; or

    (c) any unauthorised impairment of electronic communication to or from a computer.

35. This definition of "unauthorised computer function" incorporates a number of terms which are also defined in s 247A(1), such as "access", "data", "impairment" and "modification".

Prosecution Must Particularise Relevant Acts

36. The prosecution must particularise the acts said to constitute the course of conduct. If the prosecution wishes to rely upon acts which have not been particularised to establish the course of conduct, they must amend the charge accordingly (*Thomas v Campbell* (2003) 9 VR 136).[868]

37. While the dates on which the course of conduct is alleged to have begun and ended should be specified in the presentment, it is not essential for the prosecution to prove that the course of conduct continued precisely between those dates (*Thomas v Campbell* (2003) 9 VR 136).

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[867] This must occur on a sufficient number of occasions to evidence a continuity of purpose (see above), and must involve the necessary intent in relation to the victim (see below) (*R v Anders* (2009) 20 VR 596).

[868] The prosecution may, however, use uncharged acts to establish a motive or relationship (*Thomas v Campbell* (2003) 9 VR 136). See Other forms of other misconduct evidence for further information.

38. Thus, the fact that, in the course of the trial, the prosecution confined its allegations to a shorter period than that specified in the presentment does not preclude the possibility of conviction (*Thomas v Campbell* (2003) 9 VR 136).

Unanimity

39. The jury does not need to be unanimous about the particular acts which constituted the course of conduct. The requirement for unanimity will be met as long as the jury unanimously agrees that the accused engaged in a course of conduct which included any of the matters set out in s 21A (*R v Hoang* (2007) 16 VR 369; *Worsnop v R* (2010) 28 VR 187).

Accused's Mental State

40. The second element requires the prosecution to prove that, when the accused committed the course of conduct, he or she intended to cause physical or mental harm to the victim, including self-harm, or to arouse apprehension or fear in the victim for his or her own safety or that of any other person (*Crimes Act 1958* s 21A(2)).

41. There are three ways in which the prosecution can prove that the accused had the necessary intent:

    - By proving that he or she *actually intended* to cause such harm, or arouse such apprehension or fear (s 21A(2)); or
    - By proving that he or she *knew* that engaging in a course of conduct of that kind would be likely to cause such harm, or arouse such apprehension or fear (s 21A(3)(a)); or
    - By proving that he or she *ought to have understood*, in all the particular circumstances, that engaging in a course of conduct of that kind would be likely to cause such harm, or arouse such apprehension or fear, and it *actually did have that result* (s 21A(3)(b)).

42. The first two of these alternatives look *solely* at the accused's subjective state of mind. If the accused him or herself intended to cause harm, fear or apprehension, or knew that such effects were likely to result from his or her actions, then this element will be met, regardless of whether or not his or her actions actually did cause such harm, fear or apprehension (*R v Hoang* (2007) 16 VR 369; *Georgiou v The King* [2022] VSCA 220, [24]).

43. By contrast, the final alternative is an objective test. It focuses both on what the accused should have understood in the particular circumstances in which the course of conduct occurred, as well as on what effect the accused's actions actually had on the victim (*R v Hoang* (2007) 16 VR 369).

44. The prosecution does not need to prove that the alleged victim was aware of every act committed within the relevant course of conduct. Even for the third alternative, it is sufficient that the overall conduct caused harm or aroused apprehension or fear (*Georgiou v The King* [2022] VSCA 220, [25]).

45. If the jury is satisfied that either of the two subjective states of mind have been proven, they do not need to consider the objective element (*Gunes v Pearson* (1996) 89 A Crim R 297; *R v Hoang* (2007) 16 VR 369).

46. The prosecution does not need to prove that the accused committed each of the individual stalking actions with the necessary intention. It is the "course of conduct" that must have been committed with that intention (*Gunes v Pearson* (1996) 89 A Crim R 297; *Worsnop v R* (2010) 28 VR 187).While the jury must unanimously find that the accused committed the course of conduct with one of the specified forms of intention, the jury does not need to be unanimous about which form of intention has been proven (*Worsnop v R* (2010) 28 VR 187).

47. "Mental harm" is defined to include psychological harm and suicidal thoughts (*Crimes Act 1958* s 21A(8)).

48. It is for the jury to determine the meaning of the term "mental harm", giving the words their ordinary English meaning. It is not limited to medically diagnosed psychological illnesses (*RR v R* [2013] VSCA 147).

49. It does not matter if the accused was only using the victim to make a political point, and did not intend to cause him or her harm, fear or apprehension. If the accused knew that engaging in a course of conduct of that kind would be likely to have such an effect, this element will be satisfied (*R v Abbott* [2006] VSCA 100).

50. Due to the objective test, it is possible that the accused may be found guilty of stalking even if he or she was so intoxicated that he or she was unable to form the necessary subjective intent (see *Berlyn v Brouskos* (2002) 134 A Crim R 111).

Performance of Official Duties

51. Section 21A(4) states that the "section does not apply" to conduct engaged in by a person performing official duties for the purpose of enforcing the criminal law, administering an Act, enforcing a law imposing a pecuniary penalty, executing a warrant, or protecting public revenue.

52. While this section has not yet been the subject of judicial interpretation, it seems likely that, where in issue, it will be a matter for the prosecution to disprove beyond reasonable doubt.

53. It is possible that this defence will not be disproved if the accused held a reasonable belief that the alleged acts were part of his or her official duties, even if this was not actually the case. In relevant cases it may be necessary to instruct the jury on this point.

Lack of Malice

54. Section 21A(4A) states that it is a defence to the charge for the accused to prove that the course of conduct was engaged in without malice in the normal course of a lawful business, trade profession or enterprise; for the purpose of an industrial dispute; or for the purpose of engaging in political activities or discussion or communicating with respect to public affairs.

55. The provision places the burden of proof on the accused, without specifying the required standard of proof. It seems highly likely that the standard will be the balance of probabilities.

Extra-Territorial Effect

56. Section 21A has extra-territorial effect where the accused is amenable to Victorian process, and where some of the circumstances which constitute an element of the offence occurred in Victoria (*DPP v Sutcliffe* [2001] VSC 43).

57. The extra-territorial effect of s 21A was made explicit by the amendments in 2003 (see ss 21A(6) and (7)).

Duplicity

58. In some cases the accused will be charged with a separate offence relating to the acts which constitute the stalking, in addition to the offence of stalking. This will not be duplicitous, as long as the elements of the offences are not identical, and the elements of one of the offences are not wholly included in the other (*Thomas v Campbell* (2003) 9 VR 136; *R v Orgill* [2007] VSCA 236).

59. The elements of stalking are not the same as the elements of assault, and not all of the elements of either offence are included in the other. This means that an accused can be convicted of stalking and assault, even where the acts which are relied upon as establishing the course of conduct amounting to stalking are also relied upon as establishing the assault (*Thomas v Campbell* (2003) 9 VR 136).

60. A person may similarly be convicted of stalking and burglary, even though the burglary constitutes part of the alleged course of conduct for the stalking offence (*R v Orgill* [2007] VSCA 236).

61. In such cases, care must be taken when sentencing the accused, to ensure that he or she is not punished twice for the commission of elements which are common to the relevant offences (*Thomas v Campbell* (2003) 9 VR 136; *R v Orgill* [2007] VSCA 236).

Last updated: 22 March 2023

7.4.12.1 Charge: Stalking (From 7/6/11)

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This charge should be used in cases in which all of the alleged stalking acts were committed on or after 7 June 2011.

Elements

I must now direct you about the crime of stalking. That crime has the following two elements:

One – the accused intentionally engaged in a course of conduct that included particular types of actions.

Two – The accused either:

- Intended that his/her course of conduct harm NOC, or make NOC feel frightened or apprehensive about his/her own safety or about the safety of someone else; or
- Knew that his/her course of conduct would be likely to harm NOC, or to make him/her feel frightened or apprehensive about his/her own safety or about the safety of someone else; or
- Ought to have understood that his/her actions would be likely to harm or frighten NOC, or to make him/her feel apprehensive about his/her own safety or about the safety of someone else, and his/her conduct actually did have that effect.

Before you can find NOA guilty of stalking, you must be satisfied that the prosecution has proven both of these elements beyond reasonable doubt.

I will now explain each of these elements in more detail.

Stalking Acts

The first element that the prosecution must prove is that the accused intentionally engaged in a course of conduct that included one or more of the following acts:

[*Select relevant conduct from the list provided in Crimes Act 1958 s 21A, applying to the evidence and explaining as necessary*:

(a) following the victim or any other person;

(b) contacting the victim or any other person by post, telephone, fax, text message, e–mail or other electronic communication or by any other means whatsoever;

(ba) publishing on the Internet or by an e–mail or other electronic communication to any person a statement or other material-

(i) relating to the victim or any other person; or

(ii) purporting to relate to, or to originate from, the victim or any other person;

(bb) causing an unauthorised computer function (within the meaning of Subdivision (6) of Division 3) in a computer owned or used by the victim or any other person;

(bc) tracing the victim's or any other person's use of the Internet or of e–mail or other electronic communications;

(c) entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person;

(d) interfering with property in the victim's or any other person's possession (whether or not the offender has an interest in the property);

(da) making threats to the victim;

(db) using abusive or offensive words to or in the presence of the victim;

(dc) performing abusive or offensive acts in the presence of the victim;

(dd) directing abusive or offensive acts towards the victim;

(e) giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;

(f) keeping the victim or any other person under surveillance;

(g) acting in any other way that could reasonably be expected to

(i) to cause physical or mental harm to the victim, including self-harm; or

(ii) to arouse apprehension or fear in the victim for his or her own safety or that of any other person.]

[*If the term "following" requires further elaboration, add any relevant paragraphs from the following shaded section*.]

- To have "followed" NOC, NOA must have physically gone from one place where NOC was to another place where NOC was. [*If relevant add*: Those different places could be different locations within the same [*add relevant detail*, e.g. "building"/"shopping complex"/"park".]]
- It is not sufficient to find that NOA "followed" NOC with his/her eyes.
- To find that NOA "followed" NOC, you do not need to find that s/he physically remained behind him/her. A person who knows another person's routine can "follow" that person by going to the places that he or she knows that person will go to, even if he or she arrives there first.

[*If it is alleged that the accused was loitering, add the following shaded section*.]

"Loitering" means more than simply being at a place and remaining there. It means being there with no legitimate purpose. To find that NOA was "loitering", you must be satisfied beyond reasonable doubt that there was no reasonable explanation for his/her presence, other than that s/he wanted to cause physical or mental harm to NOC, or to arouse apprehension or fear in NOC for his/her or someone else's safety.

[*If it is alleged that the accused was keeping someone under surveillance add the following shaded section*.]

A person can keep someone under surveillance in a number of ways. In this case the prosecution alleges that NOA kept NOC under surveillance by [*describe form of surveillance relied on by prosecution,* e.g. "by observing/watching/filming/photographing/recording"] [*describe object of surveillance,* e.g. "him/her/his movements/her activities"].

It is not necessary for you to find that NOA committed all of the acts that I have outlined. For this element to be met you need only be satisfied that NOA intentionally did at least one of the relevant acts.

It is also not necessary for you all to agree about which particular act or acts NOA committed, as long as you all find that s/he intentionally committed at least one of the relevant acts.

However, you must all be satisfied that NOA's acts constituted a "course of conduct".

To be a "course of conduct" the acts must have been committed on more than one occasion, or must have gone on for a prolonged period of time. A short, isolated act cannot constitute a "course of conduct".

However, it is not enough for you simply to find that NOA committed acts on more than one occasion, or committed one prolonged act. You must find that NOA's actions were related in such a way, or had such a "continuity of purpose", that they amounted to a "pattern of behaviour" in relation to NOC. A series of unrelated activities, with no continuity of purpose, will not be a course of conduct.

That course of conduct must have been directed to NOC. This element will not be met if you find that NOC just happened to experience acts which were not specifically targeted at him/her.

It is only if you find that NOA engaged in a "course of conduct" in relation to NOC, that included one or more of the types of acts that I have mentioned, that this first element will be met.

[*Insert relevant evidence and/or arguments*.]

Accused's Mental State

The second element relates to the accused's state of mind and the circumstances in which the course of conduct was committed. This element can be met in three different ways.

First, it can be met if you find that the accused intended to harm NOC – either physically or mentally – or intended to cause NOC to be frightened or apprehensive about his/her own safety, or about the safety of someone else.

[*Where mental harm is relevant, add the following shaded section.*]

The law says that mental harm includes, but is not limited to, psychological harm and suicidal thoughts. It is a matter for you whether the accused intended to cause "mental harm", giving that phrase its ordinary meaning, as you understand it.

[*Where the relevant harm is self-harm, add the following shaded section.*]

The law says that, for the purpose of this element, harm includes causing NOC to engage in self-harm.

Second, this element can be met if you decide that the accused knew that his/her conduct would be likely to cause NOC such harm, fear or apprehension.

The third way in which this element can be met is if you find:

- That the accused ought to have understood that his/her course of conduct would have been likely, in the circumstances, to cause NOC such harm, fear or apprehension; and
- That the accused's conduct actually did have that effect.

This is a two part test. In the first part, you decide what the accused ought to have understood. Ought s/he have understood that his/her actions would be likely to cause NOC to suffer physical or mental harm, including self-harm, or to become frightened or apprehensive? This is no longer a question of what the accused actually knew or intended. Instead, it is a question of what the accused ought to have understood when s/he acted in the way that s/he did.

When deciding whether NOA ought to have understood the likely consequences of his/her course of conduct, you should consider what a reasonable person ought to have understood in the same circumstances.[869] Ought a reasonable person, in those circumstances, have understood that if s/he acted in the way that NOA did, s/he would be likely to cause NOC harm, or to make him/her feel frightened or apprehensive about his/her own safety or about the safety of someone else? If so, then NOA also ought to have understood that his/her acts would be likely to have that effect.

But it is not enough to decide that the accused ought to have understood that such harm, fear or apprehension would be the likely result of his/her actions. Under the second part of this test, you must also find that the accused's acts actually physically or mentally harmed NOC, or made NOC feel frightened or apprehensive about his/her own safety or about the safety of someone else.

It is only if you find that NOA both ought to have understood that his/her conduct would have been likely, in the circumstances, to cause NOC harm, fear or apprehension, and that his/her actions actually had that result, that this third way of proving this element will be met.

It is important to remember that these three ways of satisfying this element of the offence are alternatives. You therefore do not need to even consider the question of whether NOA ought to have understood the likely effects of his conduct, and the actual effect his/her conduct had on NOC, if you are satisfied that s/he intended to harm NOC or cause him/her to be frightened or apprehensive, or knew that such harm, fear or apprehension was likely. You only need to be satisfied that one of these three ways of satisfying this element have been proven.

In addition, you do not all need to agree about the particular way in which this element has been satisfied, as long as you all find that it has been proven beyond reasonable doubt.

Remember, though, that if you do rely on the fact that NOA "ought to have understood" that his acts would have been likely to cause NOC harm, fear or apprehension, then you must also find that his/her acts actually had that effect.

[*Insert relevant evidence and/or arguments.*]

Defence: Official Duties

[*If the performance of official duties is in issue, add the following shaded section*.]

Even if you find that the prosecution has proved each of the elements of this offence, the accused has a defence to this offence if he/she acted while performing official duties for the purpose of [enforcing the criminal law/administering a law/enforcing a law that imposes a fine/executing a warrant/protecting the public revenue].

In this case, the defence argued that when NOA [*insert relevant conduct*], s/he was not stalking NOC, but

[869] The precise nature of this objective test has not been judicially determined. This paragraph of the charge is based on the assumption that it is appropriate to consider what the reasonable person in the circumstances of the accused ought to have understood.

was simply doing what his/her job of [*insert relevant ground*] required him/her to do.

It is for the prosecution to prove to you, beyond reasonable doubt, that this was not the case. They can do this in two ways.

Firstly, they can prove that the accused's acts were not part of his/her "official duties". That is, s/he was acting in a way that went beyond what s/he was required to do by his/her job.[870]

Alternatively, the prosecution can prove that the accused did not perform the acts "for the purpose of" [*insert relevant ground*]. In other words, while in some circumstances the accused may be authorised to act in the way that s/he did, in this particular case the accused was actually acting for reasons other than simply doing his/her job.

In this case, the prosecution argued [*summarise prosecution evidence and/or arguments*]. The defence responded [*summarise defence evidence and/or arguments*.]

If you are not satisfied that the prosecution has proved either of these matters, then this defence will be successful and you must find NOA not guilty of stalking. However, if you are satisfied that the accused's acts were not part of his/her "official duties", or that the accused did not perform the acts "for the purpose of" [*insert relevant ground*], and you are satisfied of the other elements, then you may find NOA guilty of stalking.

Defence: Lack of Malice

[*If the defence of lack of malice is in issue, add the following shaded section*.]

Even if you find that the prosecution has proven each of the elements of this offence, there are certain circumstances in which a person is allowed to commit acts that would otherwise be called "stalking". That is, s/he has a defence to the charge of stalking.[871]

The law states that it is a defence to the charge of stalking if a person can prove that s/he was acting without malice [in the normal course of a lawful business, trade, profession or enterprise/for the purpose of an industrial dispute/for the purpose of engaging in political activities or discussion or communicating with respect to public affairs].

There are two parts to this defence. First, the accused must prove that s/he was acting without malice. That is, s/he was acting without any spite or ill-will towards NOC, and wasn't intending to cause any harm.

Second, the accused must also prove that s/he was acting [*insert relevant ground*]. In this case, NOA has argued that when s/he [*insert conduct*], s/he was not stalking NOC, but was simply [*insert evidence, linking it to the relevant ground*].

It is NOA who must prove these two matters to you. However, unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – NOA only needs to prove these matters on what is called the "balance of probabilities". That is, s/he needs to prove that it is

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[870] In some circumstances, it may be necessary for the trial judge to direct the jury about whether the accused reasonably believed s/he was performing his/her official duties.

[871] No cases have yet arisen in relation to this defence (s 21A(4A)). This section of the charge is based on the assumption that the accused must prove these matters on the balance of probabilities.

more probable than not that s/he acted without malice and was acting [*insert relevant ground*].

If you are satisfied that it is more probable than not that NOA was acting without malice and was acting [*insert relevant ground*], then this defence will be successful and you must find NOA not guilty of stalking. This will be the case even if you find that each of the elements of the offence have been met.

However, if NOA fails to prove to you either that s/he was acting without malice, or that s/he was acting [*insert relevant ground*], then the defence fails. If you are also satisfied that each of the elements of the offence have been proven, you should find NOA guilty of stalking.

Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, for you to find NOA guilty of stalking, the prosecution must prove to you beyond reasonable doubt:

One – That NOA intentionally engaged in a course of conduct that included at least one of the acts specified by the law; and

Two – That NOA acted with the appropriate state of mind. That is:

- S/he intended to cause NOC mental or physical harm, including self-harm, or to make NOC fearful or apprehensive about his/her own safety or about the safety of someone else; or
- S/he knew that his/her conduct would be likely to cause such harm, fear or apprehension; or
- S/he ought to have understood that his/her course of conduct would have been likely, in the circumstances, to cause NOC harm, or to make him/her feel frightened or apprehensive about his/her own safety or about the safety of someone else, and his/her conduct actually did have that effect.

[*If the defence of official duties is in issue add the following shaded section*.]

However, even if the prosecution has proved both of these elements to you, NOA will not be guilty unless the prosecution has proved that NOA was not performing official duties for the purpose of [*insert relevant ground*].

[*If the defence of acting without malice is in issue, add the following shaded section*.]

However, even if the prosecution has proved both of these elements to you, NOA will not be guilty if s/he has proven that it is more probable than not that s/he acted without malice and acted [*insert relevant ground*].

If you find that either of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of stalking.

Last updated: 24 March 2015

7.4.12.2 Checklist: Stalking (From 7/6/11)

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This checklist should be used in cases in which all of the alleged stalking acts were committed *on or after 7 June 2011*.

If the performance of official duties or the lack of malice defence are in issue this checklist will need to be modified.

Two elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally engaged in a course of conduct that included a relevant act; and

2. The accused either:

- Intended to physically or mentally harm the complainant, or to make him or her feel frightened or apprehensive about his or her own safety or about the safety of someone else; or
- Knew that his or her course of conduct would be likely to harm the complainant, or cause the complainant to be fearful or apprehensive about his or her own safety or the safety of someone else; or
- Ought to have understood that his or her course of conduct would be likely to harm the complainant, or cause the complainant to be fearful or apprehensive about his or her safety or the safety of someone else, and the accused's conduct had that effect.

An Intentional Course of Conduct

1.1 Did the accused intentionally do at least one of the acts specified by the law?

If Yes, then go to 1.2

If No, then the accused is not guilty of stalking

1.2 Did the accused's acts amount to a "course of conduct" in relation to the complainant?

Consider – Were acts committed on more than one occasion, or go on for a protracted period of time?

Consider – Were the acts related in such a way that they amounted to a pattern of behaviour?

Consider – Was the course of conducted directed to the complainant?

If Yes, then go to 2.1

If No, then the accused is not guilty of stalking

The Accused's State of Mind

2.1 Did the accused intend to mentally or physically harm the complainant, or to cause the complainant to be fearful or apprehensive about his or her own safety or the safety of someone else?

If Yes, then the accused is guilty of stalking (as long as you also answered 'Yes' to Questions 1.1 and 1.2)

If No, then go to 2.2

2.2 Did the accused know that his or her course of conduct would be likely to cause the complainant the harm, fear or apprehension referred to in 2.1 above?

If Yes, then the accused is guilty of stalking (as long as you also answered 'Yes' to Questions 1.1 and 1.2)

If No, then go to 2.3

2.3 Ought the accused to have understood that his or her course of conduct would be likely to cause the complainant the harm, fear or apprehension referred to in 2.1 above?

Consider – What ought a reasonable person have understood in the same circumstances?

If Yes, then go to 2.4

If No, then the accused is not guilty of stalking (as long as you also answered 'No' to Questions 2.1 and 2.2)

2.4 Did the accused's course of conduct actually cause the complainant the harm, fear or apprehension referred to in 2.1 above?

If Yes, then the accused is guilty of stalking (as long as you also answered 'Yes' to Questions 1.1, 1.2 and 2.3)

If No, then the accused is not guilty of stalking (as long as you also answered 'No' to Questions 2.1 and 2.2)

Last updated: 24 March 2015

7.4.13 Stalking (10/12/03–6/6/11)

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Operation of Section 21A

1. The offence of stalking is created by *Crimes Act 1958* s 21A.
2. The offence was substantially amended in 2003 by the *Crimes (Stalking) Act*, to achieve the following:
   i) Cover acts of cyberstalking;
   ii) Remove the requirement for proof about the effect the conduct had on the victim, in cases where the accused had the appropriate subjective intention;
   iii) Add the defence of lack of malice; and
   iv) Explicitly allow for extra-territorial operation.
3. These provisions apply to offences alleged to have been committed on or after 10 December 2003 (*Crimes Act 1958* s 598(1)).
4. If any of the conduct alleged to have been committed by the accused occurred prior to this date, the offence is to be dealt with under the previous provisions. This will be the case even if some of the relevant conduct occurred on or after 10 December 2003 (*Crimes Act 1958* s 598(2)).
5. The offence was further amended by the *Crimes Amendment (Bullying) Act 2011*, which only applies to offences committed on or after 7 June 2011. For information on those provisions, see 7.4.12 Stalking (From 7/6/11).

Elements

6. The offence has the following two elements:
   i) The accused intentionally engaged in a "course of conduct" that included conduct of the type described in ss 21A(2)(a)–(g); and

ii) The accused either:

- Committed that course of conduct with the intention of causing physical or mental harm to the victim, or of arousing apprehension or fear in the victim for his or her own safety or that of any other person; or
- Knew that engaging in a course of conduct of that kind would be likely to cause such harm, or arouse such apprehension or fear; or
- Ought to have understood that engaging in a course of conduct of that kind would be likely to cause such harm, or arouse such apprehension or fear, and it actually did have that result.

A Relevant Course of Conduct

7. There are three aspects to the first element:

   i) The accused must have engaged in a "course of conduct";

   ii) The course of conduct must have included conduct of the type or nature described in ss 21A(2)(a)–(g); and

   iii) The accused must have committed those acts intentionally (*R v Anders* (2009) 20 VR 596; [2009] VSCA 7).

"Course of Conduct"

8. For the accused's acts to have constituted a "course of conduct", they must have amounted to a pattern of conduct that showed a "continuity of purpose" in relation to the victim (*Berlyn v Brouskos* (2002) 134 A Crim R 111; *Nadarajamoorthy v Moreton* [2003] VSC 283; *Thomas v Campbell* (2003) 9 VR 136; *R v Hoang* (2007) 16 VR 369; *R v Anders* (2009) 20 VR 596).

9. At the minimum, this requires the acts to have been committed on more than one occasion, or to have been protracted in nature (e.g. an extended act of surveillance) (*Gunes v Pearson* (1996) 89 A Crim R 297; *Berlyn v Brouskos* (2002) 134 A Crim R 111; *Nadarajamoorthy v Moreton* [2003] VSC 283; *Thomas v Campbell* (2003) 9 VR 136; *R v Hoang* (2007) 16 VR 369).

10. However, conduct which was committed on more than one occasion, or which was protracted, will not always constitute a pattern of conduct evidencing a continuity of purpose. Something additional about the conduct or surrounding circumstances must be shown before it can be said of the conduct that it amounts to such a pattern (*Berlyn v Brouskos* (2002) 134 A Crim R 111; *Nadarajamoorthy v Moreton* [2003] VSC 283).

11. The continuity of purpose must have been in relation to the particular victim. It is not sufficient for the victim to have coincidentally been the subject of actions which were not specifically targeted at him or her personally (*R v Anders* (2009) 20 VR 596).[872]

12. The course of conduct may be spread out over a period of years (see, e.g. *R v Hoang* (2007) 16 VR 369).

13. An episode of harassment of short duration does not constitute a course of conduct evidencing a continuity of purpose (*Nadarajamoorthy v Moreton* [2003] VSC 283).

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[872] For example, it will not be sufficient to prove that the accused was undertaking surveillance of a particular location, and coincidentally happened to photograph the same person on more than one occasion. The accused must have intended to target the particular victim (*R v Anders* (2009) 20 VR 596).

14. If the alleged acts were not premeditated, there cannot have been a continuity of purpose (*Thomas v Campbell* (2003) 9 VR 136).

Relevant Types of Conduct

15. The course of conduct must have been comprised of one or more of the types of conduct specified in s 21A(2) (*DPP v Sutcliffe* [2001] VSC 43; *R v Orgill* [2007] VSCA 236).

16. While ss 21A(2)(a)–(f) identify particular forms or types of conduct, s 21(2)(g) is a 'catch-all' provision, aimed at all other types of conduct which have the effect of arousing apprehension or fear in the victim for his or her own safety or that of any other person (*DPP v Sutcliffe* [2001] VSC 43).

17. The matters set out in s 21A(2) are not necessarily unlawful. It is the confluence of these actions in a course of conduct directed to a person with a specific intent which constitutes the criminality (*Nadarajamoorthy v Moreton* [2003] VSC 283).

Following the Victim

18. Section 21A(2)(a) refers to "following the victim or any other person".

19. This requires some motion by the accused and the victim from place to place, or within different areas of the same place (such as a shopping centre or a building) (*Slaveski v State of Victoria and Others* [2010] VSC 441).

20. The accused will therefore not fall within the scope of s 21A(2)(a) if he or she stands or sits still and stares at the victim as the victim walks past. Following someone with one's eyes is not sufficient (*Slaveski v State of Victoria and Others* [2010] VSC 441).

21. To "follow" the victim, the accused does not need to physically remain behind the victim (*Slaveski v State of Victoria and Others* [2010] VSC 441).

22. Thus, an accused who is aware of the victim's daily routine, and is able to anticipate his or her movements, may "follow" the victim by being present outside the victim's home before the victim leaves for work in the morning, and then preceding the victim to various locations throughout the day (e.g. the victim's train station, workplace, place where the victim does his or her shopping) (*Slaveski v State of Victoria and Others* [2010] VSC 441).

Loitering

23. Section 21A(2)(c) refers to "entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person".

24. "Loitering" involves more than simply being and remaining at a place. It conveys a concept of idleness, lack of purpose or indolence (*Nadarajamoorthy v Moreton* [2003] VSC 283).

25. The accused must have been and remained at or near the relevant place for the purpose of causing physical or mental harm to the victim, or of arousing apprehension or fear in the victim for his or her safety or that of any other person (*Nadarajamoorthy v Moreton* [2003] VSC 283).

26. A person may therefore not fall within the scope of s 21A(2)(c) if, at the relevant time, he or she was engaged in other activities which render the description of "loitering" inapt in the circumstances, such as handing out brochures for a political protest (see, e.g. *Nadarajamoorthy v Moreton* [2003] VSC 283).

27. Where there is an issue about whether or not the accused was "loitering", the jury will need to exclude all reasonable hypotheses consistent with the accused not having been "loitering" beyond reasonable doubt (*Nadarajamoorthy v Moreton* [2003] VSC 283).

Surveillance

28. Section 21A(2)(f) refers to "keeping the victim or any other person under surveillance".

29. "Surveillance" includes the use of cameras and other electrical equipment that enables the accused to keep watch over the victim by recording the victim's movements or activity (*R v Anders* (2009) 20 VR 596).

30. The accused can commit stalking by surveillance by photographing the victim on a number of occasions (*R v Anders* (2009) 20 VR 596).[873]

31. Stalking by surveillance may also be made out by keeping watch over a location with the intent of observing or recording a specific victim's movements (*R v Anders* (2009) 20 VR 596).

32. There is no separate legal test to distinguish between acts of monitoring or observation that amount to "surveillance", and those that do not. Instead, where stalking by surveillance is alleged, the issue remains whether or not the conduct in question meets the "course of conduct" requirements of stalking (*R v Anders* (2009) 20 VR 596).

Causing an Unauthorised Computer Function

33. Section 21A(2)(bb) refers to causing an "unauthorised computer function". This term is defined in *Crimes Act 1958* s 247A(1) to mean any of the following:

    (a) any unauthorised access to data held in a computer; or

    (b) any unauthorised modification of data held in a computer; or

    (c) any unauthorised impairment of electronic communication to or from a computer.

34. This definition of "unauthorised computer function" incorporates a number of terms which are also defined in s 247A(1), such as "access", "data", "impairment" and "modification".

Prosecution Must Particularise Relevant Acts

35. The prosecution must particularise the acts said to constitute the course of conduct. If the prosecution wishes to rely upon acts which have not been particularised to establish the course of conduct, they must amend the charge accordingly (*Thomas v Campbell* (2003) 9 VR 136).[874]

36. While the dates on which the course of conduct is alleged to have begun and ended should be specified in the presentment, it is not essential for the prosecution to prove that the course of conduct continued precisely between those dates (*Thomas v Campbell* (2003) 9 VR 136).

37. Thus, the fact that, in the course of the trial, the prosecution confined its allegations to a shorter period than that specified in the presentment does not preclude the possibility of conviction (*Thomas v Campbell* (2003) 9 VR 136).

Unanimity

38. The jury does not need to be unanimous about the particular acts which constituted the course of conduct. The requirement for unanimity will be met as long as the jury unanimously agrees that the accused engaged in a course of conduct which included any of the matters set out in s 21A (*R v Hoang* (2007) 16 VR 369; *Worsnop v R* (2010) 28 VR 187).

Accused's Mental State

39. The second element requires the prosecution to prove that, when the accused committed the course of conduct, he or she intended to cause physical or mental harm to the victim, or to arouse apprehension or fear in the victim for his or her own safety or that of any other person (*Crimes Act 1958* s 21A(2)).

40. There are three ways in which the prosecution can prove that the accused had the necessary intent:

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[873] This must occur on a sufficient number of occasions to evidence a continuity of purpose (see above), and must involve the necessary intent in relation to the victim (see below) (*R v Anders* (2009) 20 VR 596).

[874] The prosecution may, however, use uncharged acts to establish a motive or relationship (*Thomas v Campbell* (2003) 9 VR 136). See Other forms of other misconduct evidence for further information.

- By proving that he or she *actually intended* to cause such harm, or arouse such apprehension or fear (s 21A(2)); or
- By proving that he or she *knew* that engaging in a course of conduct of that kind would be likely to cause such harm, or arouse such apprehension or fear (s 21A(3)(a)); or
- By proving that he or she *ought to have understood*, in all the particular circumstances, that engaging in a course of conduct of that kind would be likely to cause such harm, or arouse such apprehension or fear, and it *actually did have that result* (s 21A(3)(b)).

41. The first two of these alternatives look *solely* at the accused's subjective state of mind. If the accused him or herself intended to cause harm, fear or apprehension, or knew that such effects were likely to result from his or her actions, then this element will be met, regardless of whether or not his or her actions actually did cause such harm, fear or apprehension (*R v Hoang* (2007) 16 VR 369; *Georgiou v The King* [2022] VSCA 220, [24]).
42. By contrast, the final alternative is an objective test. It focuses both on what the accused should have understood in the particular circumstances in which the course of conduct occurred, as well as on what effect the accused's actions actually had on the victim (*R v Hoang* (2007) 16 VR 369).
43. The prosecution does not need to prove that the alleged victim was aware of every act committed within the relevant course of conduct. Even for the third alternative, it is sufficient that the overall conduct caused harm or aroused apprehension or fear (*Georgiou v The King* [2022] VSCA 220, [25]). If the jury is satisfied that either of the two subjective states of mind have been proven, they do not need to consider the objective element (*Gunes v Pearson* (1996) 89 A Crim R 297; *R v Hoang* (2007) 16 VR 369).
44. The prosecution does not need to prove that the accused committed each of the individual stalking actions with the necessary intention. It is the "course of conduct" that must have been committed with that intention (*Gunes v Pearson* (1996) 89 A Crim R 297; *Worsnop v R* (2010) 28 VR 187). While the jury must unanimously find that the accused committed the course of conduct with one of the specified forms of intention, the jury does not need to be unanimous about which form of intention has been proven (*Worsnop v R* (2010) 28 VR 187).
45. "Mental harm" is not a legal term of art, and there is no requirement to direct the jury about its meaning (*R v Hoang* (2007) 16 VR 369).
46. It is for the jury to determine the meaning of the term "mental harm", giving the words their ordinary English meaning. It is not limited to medically diagnosed psychological illnesses (*RR v R* [2013] VSCA 147).
47. It does not matter if the accused was only using the victim to make a political point, and did not intend to cause him or her harm, fear or apprehension. If the accused knew that engaging in a course of conduct of that kind would be likely to have such an effect, this element will be satisfied (*R v Abbott* [2006] VSCA 100).
48. Due to the objective test, it is possible that the accused may be found guilty of stalking even if he or she was so intoxicated that he or she was unable to form the necessary subjective intent (see *Berlyn v Brouskos* (2002) 134 A Crim R 111).

Performance of Official Duties

49. Section 21A(4) states that the "section does not apply" to conduct engaged in by a person performing official duties for the purpose of enforcing the criminal law, administering an Act, enforcing a law imposing a pecuniary penalty, executing a warrant, or protecting public revenue.
50. While this section has not yet been the subject of judicial interpretation, it seems likely that, where in issue, it will be a matter for the prosecution to disprove beyond reasonable doubt.
51. It is possible that defence will not be disproved if the accused held a reasonable belief that the alleged acts were part of his or her official duties, even if this was not actually the case. In relevant cases it may be necessary to instruct the jury on this point.

Lack of Malice

52. Section 21A(4A) states that it is a defence to the charge for the accused to prove that the course of conduct was engaged in without malice in the normal course of a lawful business, trade profession or enterprise; for the purpose of an industrial dispute; or for the purpose of engaging in political activities or discussion or communicating with respect to public affairs.

53. The provision places the burden of proof on the accused, without specifying the required standard of proof. It seems highly likely that the standard will be the balance of probabilities.

Extra-Territorial Effect

54. Section 21A has extra-territorial effect where the accused is amenable to Victorian process, and where some of the circumstances which constitute an element of the offence occurred in Victoria (*DPP v Sutcliffe* [2001] VSC 43).

55. The extra-territorial effect of s 21A was made explicit by the amendments in 2003 (see ss 21A(6) and (7)).

Duplicity

56. In some cases the accused will be charged with a separate offence relating to the acts which constitute the stalking, in addition to the offence of stalking. This will not be duplicitous, as long as the elements of the offences are not identical, and the elements of one of the offences are not wholly included in the other (*Thomas v Campbell* (2003) 9 VR 136; *R v Orgill* [2007] VSCA 236).

57. The elements of stalking are not the same as the elements of assault, and not all of the elements of either offence are included in the other. This means that an accused can be convicted of stalking and assault, even where the acts which are relied upon as establishing the course of conduct amounting to stalking are also relied upon as establishing the assault (*Thomas v Campbell* (2003) 9 VR 136).

58. A person may similarly be convicted of stalking and burglary, even though the burglary constitutes part of the alleged course of conduct for the stalking offence (*R v Orgill* [2007] VSCA 236).

59. In such cases, care must be taken when sentencing the accused, to ensure that he or she is not punished twice for the commission of elements which are common to the relevant offences (*Thomas v Campbell* (2003) 9 VR 136; *R v Orgill* [2007] VSCA 236).

Last updated: 12 September 2013

7.4.13.1 Charge: Stalking (10/12/03–6/6/11)

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This charge should be used in cases in which all of the alleged stalking acts were committed between 10 December 2003 and 6 June 2011.

Elements

I must now direct you about the crime of stalking. That crime has the following two elements:

One – the accused intentionally engaged in a course of conduct that included particular types of actions.

Two – The accused either:

- Intended that his/her course of conduct harm NOC, or make NOC feel frightened or apprehensive about his/her own safety or about the safety of someone else; or
- Knew that his/her course of conduct would be likely to harm NOC, or to make him/her feel frightened or apprehensive about his/her own safety or about the safety of someone else; or
- Ought to have understood that his/her actions would be likely to harm or frighten NOC, or to make him/her feel apprehensive about his/her own safety or about the safety of someone else, and his/her conduct actually did have that effect.

Before you can find NOA guilty of stalking, you must be satisfied that the prosecution has proven both of these elements beyond reasonable doubt.

I will now explain each of these elements in more detail.

Stalking Acts

The first element that the prosecution must prove is that the accused intentionally engaged in a course of conduct that included one or more of the following acts:

[*Select relevant conduct from the list provided in Crimes Act 1958 s 21A, applying to the evidence and explaining as necessary*:

(a) following the victim or any other person;

(b) contacting the victim or any other person by post, telephone, fax, text message, e–mail or other electronic communication or by any other means whatsoever;

(ba) publishing on the Internet or by an e–mail or other electronic communication to any person a statement or other material-

(i) relating to the victim or any other person; or

(ii) purporting to relate to, or to originate from, the victim or any other person;

(bb) causing an unauthorised computer function (within the meaning of Subdivision (6) of Division 3) in a computer owned or used by the victim or any other person;

(bc) tracing the victim's or any other person's use of the Internet or of e–mail or other electronic communications;

(c) entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person;

(d) interfering with property in the victim's or any other person's possession (whether or not the offender has an interest in the property);

(e) giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;

(f) keeping the victim or any other person under surveillance;

(g) acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of any other person.

[*If the term "following" requires further elaboration, add any relevant paragraphs from the following shaded section*.]

- To have "followed" NOC, NOA must have physically gone from one place where NOC was to another place where NOC was. [*If relevant add*: Those different places could be different locations within the same [*add relevant detail, e.g.* "building"/"shopping complex"/"park"].]

- It is not sufficient to find that NOA "followed" NOC with his/her eyes.
- To find that NOA "followed" NOC, you do not need to find that s/he physically remained behind him/her. A person who knows another person's routine can "follow" that person by going to the places that he or she knows that person will go to, even if he or she arrives there first.

[*If it is alleged that the accused was loitering, add the following shaded section*.]

"Loitering" means more than simply being at a place and remaining there. It means being there with no legitimate purpose. To find that NOA was "loitering", you must be satisfied beyond reasonable doubt that there was no reasonable explanation for his/her presence, other than that s/he wanted to cause physical or mental harm to NOC, or to arouse apprehension or fear in NOC for his/her or someone else's safety.]

[*If it is alleged that the accused was keeping someone under surveillance add the following shaded section*.]

A person can keep someone under surveillance in a number of ways. In this case the prosecution alleges that NOA kept NOC under surveillance by [*describe form of surveillance relied on by prosecution, e.g.* "by observing/watching/filming/photographing/recording"] [*describe object of surveillance, e.g.* "him/her/his movements/her activities"].

It is not necessary for you to find that NOA committed all of the acts that I have outlined. For this element to be met you need only be satisfied that NOA intentionally did at least one of the relevant acts.

It is also not necessary for you all to agree about which particular act or acts that NOA committed, as long as you all find that s/he intentionally committed at least one of the relevant acts.

However, you must all be satisfied that NOA's acts constituted a "course of conduct".

To be a "course of conduct" the acts must have been committed on more than one occasion, or must have gone on for a prolonged period of time. A short, isolated act cannot constitute a "course of conduct".

However, it is not enough for you simply to find that NOA committed acts on more than one occasion, or committed one prolonged act. You must find that NOA's actions were related in such a way, or had such a "continuity of purpose", that they amounted to a "pattern of behaviour" in relation to NOC. A series of unrelated activities, with no continuity of purpose, will not be a course of conduct.

That course of conduct must have been directed to NOC. This element will not be met if you find that NOC just happened to experience acts which were not specifically targeted at him/her.

It is only if you find that NOA engaged in a "course of conduct" in relation to NOC, that included one or more of the types of acts that I have mentioned, that this first element will be met.

[*Insert relevant evidence and/or arguments*.]

Accused's Mental State

The second element relates to the accused's state of mind and the circumstances in which the course of conduct was committed. This element can be met in three different ways.

First, it can be met if you find that the accused intended to harm NOC – either physically or mentally – or intended to cause NOC to be frightened or apprehensive about his/her own safety, or about the safety of someone else.

Second, this element can be met if you decide that the accused knew that his/her conduct would be likely to cause NOC such harm, fear or apprehension.

The third way in which this element can be met is if you find:

- That the accused ought to have understood that his/her course of conduct would have been likely, in the circumstances, to cause NOC such harm, fear or apprehension; and
- That the accused's conduct actually did have that effect.

This is a two part test. In the first part, you decide what the accused ought to have understood. Ought s/he have understood that his/her actions would be likely to cause NOC to suffer physical or mental harm or to become frightened or apprehensive? This is no longer a question of what the accused actually knew or intended. Instead, it is a question of what the accused ought to have understood when s/he acted in the way that s/he did.

When deciding whether NOA ought to have understood the likely consequences of his/her course of conduct, you should consider what a reasonable person ought to have understood in the same circumstances.[875] Ought a reasonable person, in those circumstances, have understood that if s/he acted in the way that NOA did, s/he would be likely to cause NOC harm, or to make him/her feel frightened or apprehensive about his/her own safety or about the safety of someone else? If so, then NOA also ought to have understood that his/her acts would be likely to have that effect.

But it is not enough to decide that the accused ought to have understood that such harm, fear or apprehension would be the likely result of his/her actions. Under the second part of this test, you must also find that the accused's acts actually physically or mentally harmed NOC, or made NOC feel frightened or apprehensive about his/her own safety or about the safety of someone else.

It is only if you find that NOA both ought to have understood that his/her conduct would have been likely, in the circumstances, to cause NOC harm, fear or apprehension, and that his/her actions actually had that result, that this third way of proving this element will be met.

It is important to remember that these three ways of satisfying this element of the offence are alternatives. You therefore do not need to even consider the question of whether NOA ought to have understood the likely effects of his conduct, and the actual effect his/her conduct had on NOC, if you are satisfied that s/he intended to harm NOC or cause him/her to be frightened or apprehensive, or knew that such harm, fear or apprehension was likely. You only need to be satisfied that one of these three ways of satisfying this element have been proven.

In addition, you do not all need to agree about the particular way in which this element has been satisfied, as long as you all find that it has been proven beyond reasonable doubt.

Remember, though, that if you do rely on the fact that NOA "ought to have understood" that his acts would have been likely to cause NOC harm, fear or apprehension, then you must also find that his/her acts actually had that effect.

[*Insert relevant evidence and/or arguments.*]

Defence: Official Duties

[*If the performance of official duties is in issue, add the following shaded section*.]

Even if you find that the prosecution has proved each of the elements of this offence, the accused has a defence to this offence if he/she acted while performing official duties for the purpose of [enforcing the criminal law/administering a law/enforcing a law that imposes a fine/executing a warrant/protecting the public revenue].

In this case, the defence argued that when NOA [*insert relevant conduct*], s/he was not stalking NOC, but was simply doing what his/her job of [*insert relevant ground*] required him/her to do.

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[875] The precise nature of this objective test has not been judicially determined. This paragraph of the charge is based on the assumption that it is appropriate to consider what the reasonable person in the circumstances of the accused ought to have understood.

It is for the prosecution to prove to you, beyond reasonable doubt, that this was not the case. They can do this in two ways.

Firstly, they can prove that the accused's acts were not part of his/her "official duties". That is, s/he was acting in a way that went beyond what s/he was required to do by his/her job.[876]

Alternatively, the prosecution can prove that the accused did not perform the acts "for the purpose of" [*insert relevant ground*]. In other words, while in some circumstances the accused may be authorised to act in the way that s/he did, in this particular case the accused was actually acting for reasons other than simply doing his/her job.

In this case, the prosecution argued [*summarise prosecution evidence and/or arguments*]. The defence responded [*summarise defence evidence and/or arguments*.]

If you are not satisfied that the prosecution has proved either of these matters, then this defence will be successful and you must find NOA not guilty of stalking. However, if you are satisfied that the accused's acts were not part of his/her "official duties", or that the accused did not perform the acts "for the purpose of" [*insert relevant ground*], and you are satisfied of the other elements, then you may find NOA guilty of stalking.

Defence: Lack of Malice

[*If the defence of lack of malice is in issue, add the following shaded section*.]

Even if you find that the prosecution has proven each of the elements of this offence, there are certain circumstances in which a person is allowed to commit acts that would otherwise be called "stalking". That is, s/he has a defence to the charge of stalking.[877]

The law states that it is a defence to the charge of stalking if a person can prove that s/he was acting without malice [in the normal course of a lawful business, trade, profession or enterprise/for the purpose of an industrial dispute/for the purpose of engaging in political activities or discussion or communicating with respect to public affairs].

There are two parts to this defence. First, the accused must prove that s/he was acting without malice. That is, s/he was acting without any spite or ill-will towards NOC, and wasn't intending to cause any harm.

Second, the accused must also prove that s/he was acting [*insert relevant ground*]. In this case, NOA has argued that when s/he [*insert conduct*], s/he was not stalking NOC, but was simply [*insert evidence, linking it to the relevant ground*].

It is NOA who must prove these two matters to you. However, unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – NOA only needs to prove these matters on what is called the "balance of probabilities". That is, s/he needs to prove that it is more probable than not that s/he acted without malice and was acting [*insert relevant ground*].

---

[876] In some circumstances, it may be necessary for the trial judge to direct the jury about whether the accused reasonably believed s/he was performing his/her official duties.

[877] No cases have yet arisen in relation to this defence (s 21A(4A)). This section of the charge is based on the assumption that the accused must prove these matters on the balance of probabilities.

If you are satisfied that it is more probable than not that NOA was acting without malice and was acting [*insert relevant ground*], then this defence will be successful and you must find NOA not guilty of stalking. This will be the case even if you find that each of the elements of the offence have been met.

However, if NOA fails to prove to you either that s/he was acting without malice, or that s/he was acting [*insert relevant ground*], then the defence fails. If you are also satisfied that each of the elements of the offence have been proven, you should find NOA guilty of stalking.

Evidence

[*If not previously done, apply the law to the relevant evidence here*.]

Summary

To summarise, for you to find NOA guilty of stalking, the prosecution must prove to you beyond reasonable doubt:

One – That NOA intentionally engaged in a course of conduct that included at least one of the acts specified by the law; and

Two – That NOA acted with the appropriate state of mind. That is:

- S/he intended to cause NOC mental or physical harm or to make NOC fearful or apprehensive about his/her own safety or about the safety of someone else; or
- S/he knew that his/her conduct would be likely to cause such harm, fear or apprehension; or
- S/he ought to have understood that his/her course of conduct would have been likely, in the circumstances, to cause NOC harm, or to make him/her feel frightened or apprehensive about his/her own safety or about the safety of someone else, and his/her conduct actually did have that effect.

[*If the defence of official duties is in issue add the following shaded section*.]

However, even if the prosecution has proved both of these elements to you, NOA will not be guilty unless the prosecution has proved that NOA was not performing official duties for the purpose of [*insert relevant ground*].

[*If the defence of acting without malice is in issue, add the following shaded section*.]

However, even if the prosecution has proved both of these elements to you, NOA will not be guilty if s/he has proven that it is more probable than not that s/he acted without malice and acted [*insert relevant ground*].

If you find that either of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of stalking.

Last updated: 24 March 2015

7.4.13.2 Checklist: Stalking (10/12/03–6/6/11)

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This checklist should be used in cases in which all of the alleged stalking acts were committed between 10 December 2003 and 6 June 2011.

If the performance of official duties or the lack of malice defence are in issue this checklist will need to be modified.

Two elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally engaged in a course of conduct that included a relevant act; and

2. The accused either:

- Intended to physically or mentally harm the complainant, or to make him or her feel frightened or apprehensive about his or her own safety or about the safety of someone else; or
- Knew that his or her course of conduct would be likely to harm the complainant, or cause the complainant to be fearful or apprehensive about his or her own safety or the safety of someone else; or
- Ought to have understood that his or her course of conduct would be likely to harm the complainant, or cause the complainant to be fearful or apprehensive about his or her safety or the safety of someone else, and the accused's conduct had that effect.

An Intentional Course of Conduct

1.1 Did the accused intentionally do at least one of the acts specified by the law?

If Yes, then go to 1.2

If No, then the accused is not guilty of stalking

1.2 Did the accused's acts amount to a "course of conduct" in relation to the complainant?

Consider – Were acts committed on more than one occasion, or go on for a protracted period of time?

Consider – Were the acts related in such a way that they amounted to a pattern of behaviour?

Consider – Was the course of conducted directed to the complainant?

If Yes, then go to 2.1

If No, then the accused is not guilty of stalking

The Accused's State of Mind

2.1 Did the accused intend to mentally or physically harm the complainant, or to cause the complainant to be fearful or apprehensive about his or her own safety or the safety of someone else?

If Yes, then the accused is guilty of stalking (as long as you also answered 'Yes' to Questions 1.1 and 1.2)

If No, then go to 2.2

2.2 Did the accused know that his or her course of conduct would be likely to cause the complainant the harm, fear or apprehension referred to in 2.1 above?

If Yes, then the accused is guilty of stalking (as long as you also answered 'Yes' to Questions 1.1 and 1.2)

If No, then go to 2.3

2.3 Ought the accused to have understood that his or her course of conduct would be likely to cause the complainant the harm, fear or apprehension referred to in 2.1 above?

Consider – What ought a reasonable person have understood in the same circumstances?

If Yes, then go to 2.4

If No, then the accused is not guilty of stalking (as long as you also answered 'No' to Questions 2.1 and 2.2)

2.4 Did the accused's course of conduct actually cause the complainant the harm, fear or apprehension referred to in 2.1 above?

If Yes, then the accused is guilty of stalking (as long as you also answered 'Yes' to Questions 1.1, 1.2 and 2.3)

If No, then the accused is not guilty of stalking (as long as you also answered 'No' to Questions 2.1 and 2.2)

Last updated: 24 March 2015

7.4.14 Conduct Endangering Life

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Overview

1. A person must not recklessly engage in conduct that places or may place another person in danger of death (*Crimes Act 1958* s 22).
2. This is a general offence of endangerment, which replaced the various specific endangerment offences that existed prior to its enactment (*R v Nuri* [1990] VR 641).
3. Conduct endangering life is an offence against the person. An accused who creates a risk of death to multiple individuals may be charged with multiple counts of conduct endangering life (*R v Bekhazi* (2001) 3 VR 321).
4. The offence has the following 5 elements:
   i) The accused engaged in conduct;
   ii) The accused's conduct was voluntary;
   iii) The accused's conduct endangered another person's life;
   iv) The accused acted recklessly; and
   v) The accused acted without lawful authority or excuse (*R v Nuri* [1990] VR 641; *Filmer v Barclay* [1994] 2 VR 269; *Mutemeri v Cheesman* [1998] 4 VR 484; *R v Wilson* [2005] VSCA 78; *R v Abdul-Rasool* (2008) 18 VR 586; *R v Marijancevic* (2009) 22 VR 576).

Conduct

5. The accused must have engaged in the conduct alleged (*R v Abdul-Rasool* (2008) 18 VR 586).

Voluntariness

6. The accused's conduct must have been voluntary (*R v Abdul-Rasool* (2008) 18 VR 586; *R v Wilson* [2005] VSCA 78; *R v Marijancevic* (2009) 22 VR 576).

7. When explaining this element to the jury, the judge should not use the word "intentional". The terms "intentional" and "voluntary" are not interchangeable (*R v Marijancevic* (2009) 22 VR 576).[878]

8. It is a misdirection to tell the jury that the trial "starts with the proposition that acts are voluntary". It is for the prosecution to prove, beyond reasonable doubt, that the accused's acts are voluntary (*R v Marijancevic* (2009) 22 VR 576).

Endangerment

9. The accused's conduct must have endangered another person's life (*Crimes Act 1958* s 22).

10. For this element to be met, the prosecution must prove that a reasonable person, taking the same actions as the accused, would have realised that his/her conduct:

    - Placed another person in danger of death; or
    - May have placed another person in danger of death (*Crimes Act 1958* s 22; *R v Nuri* [1990] VR 641; *R v Holzer* [1968] VR 481).

11. According to this test, it is not necessary to prove that a person was actually put in danger. It is only necessary to show that the accused's conduct had the potential to place a person in danger of death (*R v Abdul-Rasool* (2008) 18 VR 586).

12. The person it is alleged was put in danger (or potential danger) by the accused's conduct must have been alive at the time the conduct was committed (*R v Anderson* Vic SC 5/12/1997).

Degree of Danger

13. The degree of danger must be an "appreciable risk" of death (*R v B* Vic SC 19/7/1995; *R v Abdul-Rasool* (2008) 18 VR 586; *Mutemeri v Cheesman* [1998] 4 VR 484).

14. An "appreciable risk" means more than a remote or mere possibility of death (*R v B* 19/7/1995 Vic SC; *R v Wilson* [2005] VSCA 78; *R v D* Vic SC 1/5/1996).

15. It is not appropriate to assess the level of dangerousness by reference to a mathematical probability (*R v B* Vic SC 19/7/1995; *R v Boughey* (1986) 161 CLR 10; *R v D* Vic SC 1/5/1996).

16. It is inherent in the notion of risk that the risk may not materialise. However, the risk must be real and not simply hypothetical (*R v Abdul-Rasool* (2008) 18 VR 586; *R v Nuri* [1990] VR 641; *R v Lam* [2006] VSCA 162).

Danger Must Not be Contingent on Other Conduct

17. Conduct endangering life is not a crime of attempt. The conduct of the accused must complete the creation of the risk of death (*R v Abdul-Rasool* (2008) 18 VR 586).

18. The risk of death must therefore not be contingent on some other conduct that has not occurred. The jury may only consider conduct the accused has actually engaged in. They may not consider any possible future acts the accused may have been going to commit (*R v Abdul-Rasool* (2008) 18 VR 586; *R v Lam* [2006] VSCA 162).

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[878] As far as possible, the use of the word "intention" should be limited to expressing the intention to achieve the consequences of a voluntary or willed act (i.e. to achieve some result or consequence, or to fulfil some purpose) (*Timbu Kolian v R* (1968) 119 CLR 47; *R v Marijancevic* (2009) 22 VR 576).

The "Reasonable Person"

19. The reasonable person must be attributed with any knowledge the accused possessed which may have affected his or her assessment of the risk (*R v Abdul-Rasool* (2008) 18 VR 586; *R v Besim (No 2)* (2004) 148 A Crim R 28).

20. The reasonable person does not suffer from any defects of reasoning held by the accused. The accused's emotional or mental state must not be attributed to the reasonable person (*R v Wills* [1983] 2 VR 201; *R v Besim (No 2)* (2004) 148 A Crim R 28).

Recklessness

21. The accused must have endangered another person's life recklessly (*Crimes Act 1958* s 22).

22. This requires the accused to have foreseen that an appreciable risk of death was a probable consequence of his or her conduct (*Mutemeri v Cheesman* [1998] 4 VR 484; *R v Nuri* [1990] VR 641*; R v McCarthy* Vic CA 4/11/1993). See 7.1.3 Recklessness for further information about recklessness.

23. The accused does not need to have foreseen that his or her conduct would *probably cause death*. This element requires the accused to have foreseen that his or her conduct would *probably create an appreciable risk of death* (*R v Toms* [2006] VSCA 101*; R v Lam* [2006] VSCA 162).

24. It is not sufficient for the prosecution to prove that the accused foresaw the likely *physical result* of his or her conduct (e.g. s/he foresaw that if s/he dropped his/her cigarette a fire would probably start). The prosecution must prove that the accused foresaw the *risk of death* created by his/her conduct (e.g. s/he foresaw that there was an appreciable risk that someone would die in the fire created by his/her cigarette) (*Filmer v Barclay* [1994] 2 VR 269).

25. The accused's state of mind must be assessed at the time the conduct was committed. It is not sufficient for the prosecution to prove that the accused later realised that his or her conduct was dangerous (*R v Wilson* [2005] VSCA 78).

26. It is important not to conflate the chance involved in relation to recklessness (i.e., that an appreciable risk of death was *probable*) with the chance involved in relation to dangerousness (i.e. that the risk of death was *appreciable*) (*R v Abdul-Rasool* (2008) 18 VR 586; *Mutemeri v Cheesman* [1998] 4 VR 484).

Lawful Authority or Excuse

27. The prosecution must disprove any defences that are raised on the evidence (*Crimes Act 1958* s 22).

Last updated: 7 February 2014

7.4.14.1 Charge: Conduct Endangering Life

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I must now direct you about the crime of conduct endangering life. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused committed the conduct alleged in the presentment.

Two – the accused committed that conduct voluntarily.

Three – that conduct endangered another person's life.

Four – the accused acted recklessly.

Five – the accused acted without lawful authority or excuse.

I will now explain each of these elements in detail.

Conduct

The first element that the prosecution must prove is that the accused committed the conduct alleged in the presentment. That is, s/he [*describe relevant conduct*].

[*If this element is not in issue, add the following shaded section*.]

In this case, it is not disputed that NOA [*describe relevant conduct*]. You should therefore have no difficulty finding this element proven.

[*If this element is disputed, add the following shaded section*.]

In this case, the prosecution alleged that NOA did [*describe relevant conduct and summarise prosecution evidence and/or arguments*]. The defence denied this, arguing that [*describe relevant defence evidence and/or arguments*].

Voluntariness

The second element the prosecution must prove is that the accused committed the relevant conduct voluntarily. That is, you must be satisfied that NOA [*describe relevant conduct*] deliberately, rather than accidentally.

[*If this element is not in issue, add the following shaded section*.]

This element is not in dispute in this case. You should therefore have no difficulty finding this element proven.

[*If this element is disputed, add the following shaded section*.]

In this case, the prosecution alleged that NOA voluntarily [*describe relevant conduct and summarise prosecution evidence and/or arguments*]. The defence denied this, arguing that [*describe relevant defence evidence and/or arguments*].

Endangerment

The third element the prosecution must prove is that the accused's conduct endangered another person's life.

This requires you to be satisfied that a reasonable person who committed the same conduct as the accused, in the same circumstances, would have realised that s/he was placing another person at risk of death, or may have been placing another person at risk of death.

The risk must have been what the law calls an "appreciable risk" of death. That is, it must have been more than a remote risk or a "mere possibility". The law is only concerned with real risks, and not hypothetical risks.

In this case, the prosecution argued that a reasonable person who was in the same circumstances as the accused – that is, who [*describe relevant circumstances, including any knowledge the accused possessed which may have affected his or her assessment of the risk*] – would have realised that, by [*describe relevant conduct*], s/he was, or may have been, placing another person at risk of death. [*Summarise relevant prosecution arguments and/or evidence*.] The defence denied this, arguing [*summarise relevant defence evidence and/or arguments*].

It is for you to determine, based on all the evidence and using your own knowledge and common sense, whether a reasonable person in the accused's position would have realised the risk s/he was creating. It is only if you are satisfied, beyond reasonable doubt, that s/he would have realised that s/he was placing another person at risk of death, or may have been placing another person at risk of death, that this third element will be met.

Recklessness

The fourth element the prosecution must prove is that the accused acted recklessly.

The law says that NOA will have acted recklessly if, when s/he committed the relevant conduct, s/he foresaw that an appreciable risk of death was a probable consequence of that conduct. That is, s/he knew that his/her actions would probably create a real risk of death.

It is not enough for NOA to have known that it was possible that his/her actions would create an appreciable risk of death. For this element to be satisfied, the prosecution must prove beyond reasonable doubt that NOA knew that an appreciable risk of death would probably result from his/her actions.

Unlike the third element, which focuses on what the reasonable person would have realised in the circumstances, this element focuses on what was in NOA's mind. It will only be met if you are satisfied that NOA him/herself realised, when s/he [*describe relevant conduct*], that his/her actions would probably create an appreciable risk of death.

It is important to note that NOA does not need to have foreseen that his/her conduct would probably cause death. For this element to be met, you only need to be satisfied that NOA foresaw that his/her actions would probably create an appreciable risk of death.

You must assess NOA's state of mind at the time s/he [*describe relevant conduct*]. It is not enough for him/her to have realised later that what s/he had done was dangerous. This element will only be met if s/he realised it was dangerous when s/he performed the act.

The prosecution alleged that this was the case here. [*Describe relevant prosecution evidence and/or arguments.*] The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Lawful Excuse

The fifth element the prosecution must prove is that the accused acted without lawful authority or reasonable excuse.

[*If this element is not in issue, add the following shaded section.*]

This is not in issue in this case. You should therefore have no difficulty finding this element proven.

[*If this element* is in issue*, explain any relevant defences or justifications*.]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of conduct endangering life, the prosecution must prove to you beyond reasonable doubt:

One – That NOA [*describe relevant conduct*]; and

Two – That NOA voluntarily committed that conduct; and

Three – That a reasonable person would have realised that that conduct placed, or may have placed, another person at an appreciable risk of death; and

Four – That NOA acted recklessly, because s/he foresaw that an appreciable risk of death was a probable consequence of that conduct; and

Five – That NOA acted without lawful excuse or authority.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of conduct endangering life.

Last updated: 2 July 2020

7.4.14.2 Checklist: Conduct Endangering Life

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused committed the conduct alleged in the presentment; and
2. The accused committed that conduct voluntarily; and
3. That conduct endangered another person's life; and
4. The accused acted recklessly; and
5. The accused acted without lawful authority or excuse.

Conduct

1. Did the accused commit the conduct alleged in the presentment?

If Yes, then go to Question 2

If No, then the accused is Not Guilty of Conduct Endangering Life

Voluntariness

2. Did the accused voluntarily commit that conduct?

If Yes, then go to Question 3.1

If No, then the accused is Not Guilty of Conduct Endangering Life

Endangerment

3. Did the accused's conduct endanger another person's life?

3.1 Would a reasonable person who committed the same conduct as the accused, in the same circumstances, have realised that s/he was placing another person at an appreciable risk of death?

Consider – There must be more than a remote risk of death.

If Yes, then go to Question 4.1

If No, then go to Question 3.2

3.2 Would a reasonable person who committed the same conduct as the accused, in the same circumstances, have realised that s/he may have been placing another person at an appreciable risk of death?

Consider – There must be more than a remote risk of death.

If Yes, then go to Question 4.1

If No, then the accused is Not Guilty of Conduct Endangering Life

Recklessness

4. Did the accused act recklessly?

4.1 At the time the accused committed the relevant conduct, did s/he foresee that an appreciable risk of death was a probable consequence of his/her actions?

Consider – The risk must have been probable rather than possible.

Consider – The accused does not need to have foreseen that his conduct would probably cause death. S/he must have foreseen that his/her actions would probably create an appreciable risk of death.

If Yes, then go to Question 5

If No, then the accused is Not Guilty of Conduct Endangering Life

Lawful excuse

5. Did the accused act without any lawful authority or excuse?

If Yes, then the accused is Guilty of Conduct Endangering Life (as long as you have also answered Yes to questions 1, 2, 3.1 or 3.2 and 4.1)

If No, then the accused is Not Guilty of Conduct Endangering Life

Last updated: 1 November 2014

7.4.15 Conduct Endangering Persons

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Overview

1. A person must not recklessly engage in conduct that places or may place another person in danger of serious injury (*Crimes Act 1958* s 23).
2. This is a general offence of endangerment, which replaced the various specific endangerment offences that existed prior to its enactment (*R v Nuri* [1990] VR 641).
3. Conduct endangering persons is an offence against the person. An accused who creates a risk of serious injury to multiple individuals may be charged with multiple counts of conduct endangering persons (*R v Bekhazi* (2001) 3 VR 321).
4. The offence has the following 5 elements:

   i) The accused engaged in conduct;

   ii) The accused's conduct was voluntary;

   iii) The accused's conduct endangered another person;

iv) The accused acted recklessly; and

v) The accused acted without lawful authority or excuse (*R v Nuri* [1990] VR 641; *Filmer v Barclay* [1994] 2 VR 269; *Mutemeri v Cheesman* [1998] 4 VR 484; *R v Wilson* [2005] VSCA 78; *R v Abdul-Rasool* (2008) 18 VR 586).

Conduct

5. The accused must have engaged in the conduct alleged (*R v Abdul-Rasool* (2008) 18 VR 586).

Voluntariness

6. The accused's conduct must have been voluntary (*R v Abdul-Rasool* (2008) 18 VR 586; *R v Wilson* [2005] VSCA 78).
7. When explaining this element to the jury, the judge should not use the word "intentional". The terms "intentional" and "voluntary" are not interchangeable (*R v Marijancevic* (2009) 22 VR 576).[879]
8. It is a misdirection to tell the jury that the trial "starts with the proposition that acts are voluntary". It is for the prosecution to prove, beyond reasonable doubt, that the accused's acts are voluntary (*R v Marijancevic* (2009) 22 VR 576).

Endangerment

9. The accused's conduct must have endangered another person (*Crimes Act 1958* s 23).
10. For this element to be met, the prosecution must prove that a reasonable person, taking the same actions as the accused, would have realised that his/her conduct:
    - Placed another person in danger of serious injury; or
    - May have placed another person in danger of serious injury (*Crimes Act 1958* s 23; *R v Nuri* [1990] VR 641; *R v Holzer* [1968] VR 481).
11. According to this test, it is not necessary to prove that a person was actually put in danger. It is only necessary to show that the accused's conduct had the potential to place a person in danger of serious injury (*R v Abdul-Rasool* (2008) 18 VR 586).

Degree of Danger

12. The degree of danger must be an "appreciable risk" of serious injury (*R v B* Vic SC 19/7/1995; *R v Abdul-Rasool* (2008) 18 VR 586; *Mutemeri v Cheesman* [1998] 4 VR 484).
13. An "appreciable risk" means more than a remote or mere possibility of serious injury (*R v B* 19/7/1995 Vic SC; *R v Wilson* [2005] VSCA 78; *R v D* Vic SC 1/5/1996).
14. It is not appropriate to assess the level of dangerousness by reference to a mathematical probability (*R v B* Vic SC 19/7/1995; *R v Boughey* (1986) 161 CLR 10; *R v D* Vic SC 1/5/1996).
15. It is inherent in the notion of risk that the risk may not materialise. However, the risk must be real and not simply hypothetical (*R v Abdul-Rasool* (2008) 18 VR 586; *R v Nuri* [1990] VR 641; *R v Lam* [2006] VSCA 162).

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[879] As far as possible, the use of the word "intention" should be limited to expressing the intention to achieve the consequences of a voluntary or willed act (i.e. to achieve some result or consequence, or to fulfil some purpose) (*Timbu Kolian v R* (1968) 119 CLR 47; *R v Marijancevic* (2009) 22 VR 576).

Content of the Risk

16. The conduct must have placed a person at risk of "serious injury". This is defined in *Crimes Act 1958* s 15 as:

> serious injury means-
>
> (a) an injury (including the cumulative effect of more than one injury) that–
>
> (i) endangers life; or
>
> (ii) is substantial and protracted; or
>
> (b) the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm;

17. This definition was introduced by the *Crimes Amendment (Gross Violence Offences) Act 2013* and commenced operation on 1 July 2013. Prior to that date, the definition of serious injury was:

> serious injury includes-
>
> (a) a combination of injuries; and
>
> (b) the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm;

18. This Charge Book contains separate directions, depending on whether the offence was alleged to have been committed before or after 1 July 2013.

19. More guidance on the meaning of serious injury is provided in 7.4.2 Intentionally Causing Serious Injury.

Danger Must Not be Contingent on Other Conduct

20. Conduct endangering persons is not a crime of attempt. The conduct of the accused must complete the creation of the risk of serious injury (*R v Abdul-Rasool* (2008) 18 VR 586; [2008] VSCA 13).

21. The risk of serious injury must therefore not be contingent on some other conduct that has not occurred. The jury may only consider conduct the accused has actually engaged in. They may not consider any possible future acts the accused may have been going to commit (*R v Abdul-Rasool* (2008) 18 VR 586; *R v Lam* [2006] VSCA 162).

The "Reasonable Person"

22. The reasonable person must be attributed with any knowledge the accused possessed which may have affected his or her assessment of the risk (*R v Abdul-Rasool* (2008) 18 VR 586; *R v Besim (No 2)* (2004) 148 A Crim R 28).

23. The reasonable person does not suffer from any defects of reasoning held by the accused. The accused's emotional or mental state must not be attributed to the reasonable person (*R v Wills* [1983] 2 VR 201; *R v Besim (No 2)* (2004) 148 A Crim R 28).

Recklessness

24. The accused must have acted recklessly (*Crimes Act 1958* s 23).

25. This requires the accused to have foreseen that an appreciable risk of serious injury was a probable consequence of his or her conduct (*Mutemeri v Cheesman* [1998] 4 VR 484; *R v Nuri* [1990] VR 641; *R v McCarthy* Vic CA 4/11/1993). See 7.1.3 Recklessness for further information about recklessness.

26. The accused does not need to have foreseen that his or her conduct would *probably cause serious injury*. This element requires the accused to have foreseen that his or her conduct would *probably create an appreciable risk of serious injury* (*R v Toms* [2006] VSCA 101*; R v Lam* [2006] VSCA 162).

27. It is not sufficient for the prosecution to prove that the accused foresaw the likely *physical result* of his or her conduct (e.g. s/he foresaw that if s/he dropped his/her cigarette a fire would probably start). The prosecution must prove that the accused foresaw the *risk of serious injury* created by his/her conduct (e.g. s/he foresaw that there was an appreciable risk that someone would be seriously injured in the fire created by his/her cigarette) (*Filmer v Barclay* [1994] 2 VR 269).

28. The accused's state of mind must be assessed at the time the conduct was committed. It is not sufficient for the prosecution to prove that the accused later realised that his or her conduct was dangerous (*R v Wilson* [2005] VSCA 78).

29. It is important not to conflate the chance involved in relation to recklessness (i.e., that an appreciable risk of serious injury was *probable*) with the chance involved in relation to dangerousness (i.e. that the risk of serious injury was *appreciable*) (*R v Abdul-Rasool* (2008) 18 VR 586; *Mutemeri v Cheesman* [1998] 4 VR 484).

Lawful Authority or Excuse

30. The prosecution must disprove any defences that are raised on the evidence (*Crimes Act 1958* s 23).

Last updated: 30 November 2015

7.4.15.1 Charge: Conduct Endangering Persons (From 1/7/13)

Click here to obtain a Word version of this document for adaptation

This charge is for cases where the conduct took place on or after 1 July 2013. For offences before that date, use 7.4.15.3 Charge: Conduct Endangering Persons (Pre-1/7/13).

I must now direct you about the crime of conduct endangering persons. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused committed the conduct alleged in the presentment.

Two – the accused committed that conduct voluntarily.

Three – the conduct endangered another person.

Four – the accused acted recklessly.

Five – the accused acted without lawful authority or excuse.

I will now explain each of these elements in detail.

Conduct

The first element that the prosecution must prove is that the accused committed the conduct alleged in the presentment. That is, s/he [*describe relevant conduct*].

[*If this element is not in issue, add the following shaded section.*]

In this case, it is not disputed that NOA [*describe relevant conduct*]. You should therefore have no difficulty finding this element proven.

[*If this element is disputed, add the following shaded section.*]

In this case, the prosecution alleged that NOA did [*describe relevant conduct and summarise prosecution evidence and/or arguments*]. The defence denied this, arguing that [*describe relevant defence evidence and/or arguments*].

Voluntariness

The second element the prosecution must prove is that the accused committed the relevant conduct voluntarily. That is, you must be satisfied that NOA [*describe relevant conduct*] deliberately, rather than accidentally.

[*If this element is not in issue, add the following shaded section.*]

This element is not in dispute in this case. You should therefore have no difficulty finding this element proven.

[*If this element is disputed, add the following shaded section.*]

In this case, the prosecution alleged that NOA voluntarily [*describe relevant conduct and summarise prosecution evidence and/or arguments*]. The defence denied this, arguing that [*describe relevant defence evidence and/or arguments*].

Endangerment

The third element the prosecution must prove is that the accused's conduct endangered another person.

This requires you to be satisfied that a reasonable person who committed the same conduct as the accused, in the same circumstances, would have realised that s/he was placing another person at risk of serious injury, or may have been placing another person at risk of serious injury.

In making your determination, you must consider the likely severity of any injuries that could have been caused by the accused's conduct. For this element to be satisfied, there must have been a risk that someone would be "seriously injured" by that conduct.

The law defines the word injury to mean physical injury or harm to mental health, whether temporary or permanent. A serious injury is an injury which endangers life or is substantial and protracted.[880]

The potential danger must have been what the law calls an "appreciable risk" of serious injury. That is, it must have been more than a remote risk or a "mere possibility". The law is only concerned with real risks, and not hypothetical risks.

[*If there was a risk of multiple injuries, add the following shaded section.*]

In making your decision, you do not have to look at each of the injuries NOV was at risk of sustaining individually, and decide whether or not any one of them is a serious injury. A person may suffer a serious injury because of the cumulative effect of several injuries.

In this case, the prosecution argued that a reasonable person who was in the same circumstances as the accused – that is, who [*describe relevant circumstances, including any knowledge the accused possessed which may have affected his or her assessment of the risk*] – would have realised that, by [*describe relevant conduct*], s/he was, or may have been, placing another person at risk of serious injury. [*Summarise relevant prosecution arguments and/or evidence.*] The defence denied this, arguing [*summarise relevant defence evidence and/or arguments*].

[880] The judge should consider including an example of a serious injury, such as brain damage, or a stabbing which causes significant blood loss.

It is for you to determine, based on all the evidence and using your own knowledge and common sense, whether a reasonable person in the accused's position would have realised the risk s/he was creating. It is only if you are satisfied, beyond reasonable doubt, that s/he would have realised that s/he was placing another person at risk of serious injury, or may have been placing another person at risk of serious injury, that this third element will be met.

Recklessness

The fourth element the prosecution must prove is that the acted recklessly.

The law says that NOA will have acted recklessly if, when s/he committed the relevant conduct, s/he foresaw that an appreciable risk of serious injury was a probable consequence of that conduct. That is, s/he knew that his/her actions would probably create a real risk of serious injury. As I told you in relation to the third element, a serious injury is an injury which endangers life or is substantial and protracted.

It is not enough for NOA to have known that it was possible that his/her actions would create an appreciable risk of serious injury. For this element to be satisfied, the prosecution must prove beyond reasonable doubt that NOA knew that an appreciable risk of serious injury would probably result from his/her actions.

Unlike the third element, which focuses on what the reasonable person would have realised in the circumstances, this element focuses on what was in NOA's mind. It will only be met if you are satisfied that NOA him/herself realised, when s/he [*describe relevant conduct*], that his/her actions would probably create an appreciable risk of serious injury.

It is important to note that NOA does not need to have foreseen that his/her conduct would probably cause serious injury. For this element to be met, you only need to be satisfied that NOA foresaw that his/her actions would probably create an appreciable risk of serious injury.

You must assess NOA's state of mind at the time s/he [*describe relevant conduct*]. It is not enough for him/her to have realised later that what s/he had done was dangerous. This element will only be met if s/he realised it was dangerous when s/he performed the act.

The prosecution alleged that this was the case here. [*Describe relevant prosecution evidence and/or arguments.*] The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Lawful Excuse

The fifth element the prosecution must prove is that the accused acted without lawful authority or reasonable excuse.

[*If this element is not in issue, add the following shaded section.*]

This is not in issue in this case. You should therefore have no difficulty finding this element proven.

[*If this element* is in issue*, explain any relevant defences or justifications*.]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of conduct endangering persons, the prosecution must prove to you beyond reasonable doubt:

One – That NOA [*describe relevant conduct*]; and

Two – That NOA voluntarily committed that conduct; and

Three – That a reasonable person would have realised that that conduct placed, or may have placed, another person at an appreciable risk of serious injury; and

Four – That NOA acted recklessly, because s/he foresaw that an appreciable risk of serious injury was a probable consequence of that conduct; and

Five – That NOA acted without lawful excuse or authority.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of conduct endangering persons.

Last updated: 2 July 2020

7.4.15.2 Checklist: Conduct Endangering Persons (From 1/7/13)

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused committed the conduct alleged in the presentment; and
2. The accused committed that conduct voluntarily; and
3. That conduct endangered another person; and
4. The accused acted recklessly; and
5. The accused acted without lawful authority or excuse.

Conduct

1. Did the accused commit the conduct alleged in the presentment?

If Yes, then go to Question 2

If No, then the accused is Not Guilty of Conduct Endangering Persons

Voluntariness

2. Did the accused voluntarily commit that conduct?

If Yes, then go to Question 3.1

If No, then the accused is Not Guilty of Conduct Endangering Persons

Endangerment

3. Did the accused's conduct endanger another person?

3.1 Would a reasonable person who committed the same conduct as the accused, in the same circumstances, have realised that s/he was placing another person at an appreciable risk of serious injury?

Consider – There must be more than a remote risk of serious injury.

Consider – The risk must be of "serious" injury.

Consider – A serious injury is an injury which endangers life or is substantial and protracted

If Yes, then go to Question 4.1

If No, then go to Question 3.2

3.2 Would a reasonable person who committed the same conduct as the accused, in the same circumstances, have realised that s/he may have been placing another person at an appreciable risk of serious injury?

Consider – There must be more than a remote risk of serious injury.

Consider – The risk must be of "serious" injury.

Consider – A serious injury is an injury which endangers life or is substantial and protracted

If Yes, then go to Question 4.1

If No, then the accused is Not Guilty of Conduct Endangering Persons

Recklessness

4. At the time the accused committed the relevant conduct, did s/he foresee that an appreciable risk of serious injury was a probable consequence of his/her actions?

Consider – The risk must have been probable rather than possible.

Consider – The accused does not need to have foreseen that his conduct would probably cause serious injury. S/he must have foreseen that his/her actions would probably create an appreciable risk of serious injury.

If Yes, then go to Question 5

If No, then the accused is Not Guilty of Conduct Endangering Persons

Lawful excuse

5. Did the accused act without any lawful authority or excuse?

If Yes, then the accused is Guilty of Conduct Endangering Persons (as long as you have also answered Yes to questions 1, 2, 3.1 or 3.2 and 4)

If No, then the accused is Not Guilty of Conduct Endangering Persons

Last updated: 12 September 2019

7.4.15.3 Charge: Conduct Endangering Persons (Pre-1/7/13)

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This charge is for cases where the conduct occurred before 1 July 2013. Otherwise, use Charge: Conduct Endangering Persons (From 1/7/13).

I must now direct you about the crime of conduct endangering persons. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused committed the conduct alleged in the presentment.

Two – the accused committed that conduct voluntarily.

Three – that the conduct endangered another person.

Four – the accused acted recklessly.

Five – the accused acted without lawful authority or excuse.

I will now explain each of these elements in detail.

Conduct

The first element that the prosecution must prove is that the accused committed the conduct alleged in the presentment. That is, s/he [*describe relevant conduct*].

[*If this element is not in issue, add the following shaded section.*]

In this case, it is not disputed that NOA [*describe relevant conduct*]. You should therefore have no difficulty finding this element proven.

[*If this element is disputed, add the following shaded section.*]

In this case, the prosecution alleged that NOA did [*describe relevant conduct and summarise prosecution evidence and/or arguments*]. The defence denied this, arguing that [*describe relevant defence evidence and/or arguments*].

Voluntariness

The second element the prosecution must prove is that the accused committed the relevant conduct voluntarily. That is, you must be satisfied that NOA [*describe relevant conduct*] deliberately, rather than accidentally.

[*If this element is not in issue, add the following shaded section.*]

This element is not in dispute in this case. You should therefore have no difficulty finding this element proven.

[*If this element is disputed, add the following shaded section.*]

In this case, the prosecution alleged that NOA voluntarily [*describe relevant conduct and summarise prosecution evidence and/or arguments*]. The defence denied this, arguing that [*describe relevant defence evidence and/or arguments*].

Endangerment

The third element the prosecution must prove is that the accused's conduct endangered another person.

This requires you to be satisfied that a reasonable person who committed the same conduct as the accused, in the same circumstances, would have realised that s/he was placing another person at risk of serious injury, or may have been placing another person at risk of serious injury.

In making your determination, you must consider the likely severity of any injuries that could have been caused by the accused's conduct. For this element to be satisfied, there must have been a risk that someone would be "seriously" injured by that conduct.

The law does not define what a "serious injury" is. It is for you to determine whether the accused's conduct had the potential to "seriously" injure a person, rather than simply "injuring" them or not harming them at all.

The potential danger must have been what the law calls an "appreciable risk" of serious injury. That is, it must have been more than a remote risk or a "mere possibility". The law is only concerned with real risks, and not hypothetical risks.

In this case, the prosecution argued that a reasonable person who was in the same circumstances as the accused – that is, who [*describe relevant circumstances, including any knowledge the accused possessed which may have affected his or her assessment of the risk*] – would have realised that, by [*describe relevant conduct*], s/he was, or may have been, placing another person at risk of serious injury. [*Summarise relevant prosecution arguments and/or evidence.*] The defence denied this, arguing [*summarise relevant defence evidence and/or arguments*].

It is for you to determine, based on all the evidence and using your own knowledge and common sense, whether a reasonable person in the accused's position would have realised the risk s/he was creating. It is only if you are satisfied, beyond reasonable doubt, that s/he would have realised that s/he was placing another person at risk of serious injury, or may have been placing another person at risk of serious injury, that this third element will be met.

Recklessness

The fourth element the prosecution must prove is that the acted recklessly.

The law says that NOA will have acted recklessly if, when s/he committed the relevant conduct, s/he foresaw that an appreciable risk of serious injury was a probable consequence of that conduct. That is, s/he knew that his/her actions would probably create a real risk of serious injury.

It is not enough for NOA to have known that it was possible that his/her actions would create an appreciable risk of serious injury. For this element to be satisfied, the prosecution must prove beyond reasonable doubt that NOA knew that an appreciable risk of serious injury would probably result from his/her actions.

Unlike the third element, which focuses on what the reasonable person would have realised in the circumstances, this element focuses on what was in NOA's mind. It will only be met if you are satisfied that NOA him/herself realised, when s/he [*describe relevant conduct*], that his/her actions would probably create an appreciable risk of serious injury.

It is important to note that NOA does not need to have foreseen that his/her conduct would probably cause serious injury. For this element to be met, you only need to be satisfied that NOA foresaw that his/her actions would probably create an appreciable risk of serious injury.

You must assess NOA's state of mind at the time s/he [*describe relevant conduct*]. It is not enough for him/her to have realised later that what s/he had done was dangerous. This element will only be met if s/he realised it was dangerous when s/he performed the act.

The prosecution alleged that this was the case here. [*Describe relevant prosecution evidence and/or arguments.*] The defence denied this, arguing [*describe relevant defence evidence and/or arguments*].

Lawful Excuse

The fifth element the prosecution must prove is that the accused acted without lawful authority or reasonable excuse.

[*If this element is not in issue, add the following shaded section.*]

This is not in issue in this case. You should therefore have no difficulty finding this element proven.

[*If this element* is in issue*, explain any relevant defences or justifications*.]

Application of Law to Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of conduct endangering persons, the prosecution must prove to you beyond reasonable doubt:

One – That NOA [*describe relevant conduct*]; and

Two – That NOA voluntarily committed that conduct; and

Three – That a reasonable person would have realised that that conduct placed, or may have placed, another person at an appreciable risk of serious injury; and

Four – That NOA acted recklessly, because s/he foresaw that an appreciable risk of serious injury was a probable consequence of that conduct; and

Five – That NOA acted without lawful excuse or authority.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of conduct endangering persons.

Last updated: 2 July 2020

7.4.15.4 Checklist: Conduct Endangering Persons (Pre-1/7/13)

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused committed the conduct alleged in the presentment; and

2. The conduct was voluntary; and

3. The conduct endangered another person; and

4. The accused acted recklessly; and

5. The accused acted without lawful authority or excuse.

Conduct

1. Did the accused commit the conduct alleged in the presentment?

If Yes, then go to 2

If No, then the accused is not guilty of conduct endangering persons

Voluntariness

2. Did the accused voluntarily commit that conduct?

If Yes, then go to 3.1

If No, then the accused is not guilty of conduct endangering persons

Endangerment

3. Did the accused's conduct endanger another person?

3.1. Would a reasonable person who committed the same conduct as the accused, in the

same circumstances, realised that s/he was placing another person at an appreciable risk of serious injury?

Consider – There must be more than a remote risk of serious injury.

Consider – ***The risk must be of "serious" injury.***

Consider – Injury includes unconsciousness, hysteria, pain and any substantial impairment of bodily function; and

Serious injury includes a combination of injuries.

If Yes, go to 4

If No, go to 3.2

3.2. Would a reasonable person who committed the same conduct as the accused, in the same circumstances, realised that s/he may have been placing another person at an appreciable risk of serious injury?

Consider – There must be more than a remote risk of serious injury.

Consider – ***The risk must be of "serious" injury.***

Consider – Injury includes unconsciousness, hysteria, pain and any substantial impairment of bodily function; and

Serious injury includes a combination of injuries.

If Yes, go to 4

If No, then the accused is not guilty of conduct endangering persons

Recklessness

4. At the time the accused committed the relevant conduct, did s/he foresee that an appreciable risk of serious injury was a probable consequence of his/her actions?

Consider – The risk must have been probable rather than possible.

Consider – The accused does not need to have foreseen that his/her conduct would probably cause serious injury. S/he must have foreseen that his/her actions would probably create an appreciable risk of serious injury.

If Yes, then go to 5

If No, then the accused is not guilty of conduct endangering persons

Lawful excuse

5. Did the accused act without lawful authority or excuse?

If Yes, then the accused is guilty of conduct endangering persons (as long as you answered yes to Questions 1, 2, 3.1 or 3.2 and 4)

If No, then the accused is not guilty of conduct endangering persons

Last updated: 12 September 2019

7.4.16 Extortion

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1. The *Crimes Act 1958* contains two separate extortion offences:
    - Extortion with a threat to kill, injure or endanger life (Crimes Act 1958 s 27); or
    - Extortion with a threat to destroy or endanger property (Crimes Act 1958 s 28).

Extortion with threat to Kill, injure or endanger life

2. Extortion with threat to kill, injure or endanger life is an offence under *Crimes Act 1958* s 27.[881]
3. The offence has the following three elements:
    i) The accused made a demand.
    ii) The demand was accompanied by a threat to:
        (a) Kill or injure a person other than the accused or an accomplice of the accused; or
        (b) Commit an act which would endanger the life of a person other than the accused or an accomplice of the accused.
    iii) The accused intended the recipient of the threat to fear that the threat would be carried out unless the recipient complied with the demand.

Making a demand

4. The first element the prosecution must prove is that the accused made a demand of the victim (*Crimes Act 1958* s 27).
5. The nature of the demand is immaterial. Unlike the offence of blackmail the demand does not need to be made with a view to gain or an intent to cause a loss (compare *Crimes Act 1958* s 87).
6. The demand may be implicit or explicit (*R v Clear* [1968] 1 QB 670; *R v Collister* (1955) 39 Cr App R 100; *R v Lambert* [2010] 1 Cr App R 21; *R v Akhmatov* [2004] EWCA Crim 1004; *R v Studer* (1915) 11 Cr App R 307; *R v Jessen* [1997] 2 Qd R 213).
7. It is for the jury to determine whether, in all the circumstances of the case, there was a demand. The test is whether a reasonable person would have understood that a demand was being made (*R v Collister* (1955) 39 Cr App R 100).
8. In determining this issue, the jury should consider matters such as the accused's demeanour and the circumstances that existed at the time of the alleged demand (*R v Collister* (1955) 39 Cr App R 100).

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[881] Although the heading to s 27 is "Extortion with threat to kill", the offence covers threats to inflict injury or endanger life. We have chosen to use the broader heading "Extortion with threat to kill, injure or endanger life" to reflect this fact.

9. A statement phrased as a request may, in some cases, constitute a demand, such as where it is backed up by a threat (*R v Clear* [1968] 1 QB 670; *R v Collister* (1955) 39 Cr App R 100; *R v Lambert* [2010] 1 Cr App R 21; *R v Akhmatov* [2004] EWCA Crim 1004; *R v Studer* (1915) 11 Cr App R 307; *R v Jessen* [1997] 2 Qd R 213).

10. While the demand must have been made in circumstances in which it was apt to reach the intended recipient, it does not need to have been successfully communicated to the intended recipient (*Austin v The Queen* (1989) 166 CLR 669; *Treacy v DPP* [1971] AC 537; *Bank of Valletta PLC v NCA* [1999] FCA 791).[882]

11. Principles of agency should not be used when analysing or explaining the process of making a demand (*Latorre v R* [2012] VSCA 280). If the prosecution argues that the accused committed the offence in conjunction with another person, the judge should explain the principles of complicity or the doctrine of innocent agency.

12. Where a person is able to recall or rescind a demand before it is received by the recipient, it may not be appropriate to find that the demand has been made. This may occur, for example, when the person uses a courier to deliver a letter and retains control over whether the courier completes the process (see *Austin v The Queen* (1989) 166 CLR 669; *Treacy v DPP* [1971] AC 537).

Threat to Kill, Injure or Endanger Life

13. The second element the prosecution must prove is that the demand was accompanied by a threat to:

    - Kill or injure a person other than the accused or an accomplice of the accused; or
    - Commit an act which would endanger the life of a person other than the accused or an accomplice of the accused (*Crimes Act 1958* s 27).

14. In the latter case, the conduct threatened must be such that it would endanger a person's life. It is not sufficient that the conduct threatened would risk causing injury. See 7.4.14 Conduct Endangering Life for information about when the life of a person is endangered.

How Can a Threat be Made?

15. A threat can be made by words or conduct or both (*R v Rich* Vic CA 17/12/1997).

16. A threat can be made in writing and delivered or left with another person. The threat does not have to be received at the same time that it is made (R v Jones (1851) 5 Cox CC 226).

17. It is not necessary for the prosecution or the judge to identify the precise words or conduct that constituted the threat. Where the accused acted in a continuously threatening and abusive manner, the jury may consider whether his or her conduct as a whole amounted to a threat (*R v Rich* CA Vic 17/12/1997).

18. In determining whether there has been a "threat", the jury must consider the relationship between the accused and the recipient. Violent or colourful language that may appear threatening at first sight, may in fact not be a "threat" when the relationship is taken into account. For example, in the context of the parties' relationship, it may be clear that the accused did not intend to move beyond heated words and gestures (*Barbaro v Quilty* [1999] ACTSC 119).

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[882] It is unlikely that a person can be charged with attempted extortion, as the demand is either made or it is not made (see Austin v The Queen (1989) 166 CLR 669; R v Moran (1952) 36 Cr App R 10). However, some authors have suggested that an attempted demand may arise where the accused is interrupted while making the demand, such as by being stopped while attempting to post a letter.

Nature of the Threat

19. The recipient of the demand need not be the person threatened. The accused may have threatened to harm or endanger any person other than the accused or an accomplice of the accused (*Crimes Act 1958* s 27; *R v Dixon-Jenkins* (1985) 14 A Crim R 372).

20. It is not necessary that the recipient of the threat have any particular relationship with the person threatened. This element will be satisfied even if the accused threatens to harm someone that the recipient does not know (*R v Solanke* [1970] 1 WLR 1; *R v Syme* (1911) 6 Cr App R 257).

21. It is also not necessary that the subject of the threat be a specific person, or that the accused had made arrangements to carry out the threat (*R v Chapple*, VSCFC, 11/11/1980).

22. The accused does not need to state that he or she personally intends to execute the threat. The accused may threaten to have someone else kill, injure or endanger a person's life (*Barbaro v Quilty* [1999] ACTSC 119).

23. A threat can be conditional on the occurrence of a future event. It is not necessary that the accused have the immediate capacity or intention to carry out the threat (*R v Leece* (1995) 125 ACTR 1; *Barbaro v Quilty* [1999] ACTSC 119).

Impact of the Threat

24. It not necessary for the prosecution to prove that the complainant feared that the threat would be carried out, nor is it sufficient for the prosecution to prove that the complainant did feel such fear (*R v Leece* (1995) 125 ACTR 1; *R v Rich* Vic CA 17/12/1997; *R v Alexander* [2007] VSCA 178).

Intention

25. The prosecution must prove that the accused intended the recipient of the threat to fear that the threat would be carried out (*R v Dixon-Jenkins* (1985) 14 A Crim R 372).

26. The prosecution does not need to prove that the accused intended to carry out the threat (*R v Dixon-Jenkins* (1985) 14 A Crim R 372).

Extortion with threat to destroy or endanger property

27. Extortion with threat to destroy or endanger property is an offence under *Crimes Act 1958* s 28.

28. The offence has the following three elements:

    i) The accused made a demand;

    ii) The demand was accompanied by a threat to destroy or endanger a specified type of property; and

    iii) The accused intended the recipient of the threat to fear that the threat would be carried out unless the recipient complied with the demand.

29. The first and third elements of this offence are the same as for the offence of extortion with threat to kill, injure or endanger life (Crimes Act 1958 s 27).

Threat to Destroy or Endanger Property

30. The second element the prosecution must prove is that the demand was accompanied by a threat to destroy or endanger a:

    - Building;
    - Structure in the nature of a building;

- Bridge;
- Mine;
- Aircraft;
- Vessel;
- Motor vehicle;
- Railway engine; or
- Railway carriage.

31. See 7.4.14 Conduct Endangering Life for information concerning the concept of "endangerment".

Last updated: 14 December 2012

7.4.16.1 Charge: Extortion

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This charge is designed for use where it is alleged that the accused committed extortion with a threat to kill (Crimes Act 1958 s 27). It can be adapted for use where the accused is charged with:

• Extortion with a threat to injure (Crimes Act 1958 s 27);

• Extortion with a threat to endanger life (Crimes Act 1958 s 27);

• Extortion with a threat to destroy property (Crimes Act 1958 s 28); or

• Extortion with a threat to endanger property (Crimes Act 1958 s 28).

Elements

I must now direct you about the crime of extortion with a threat to kill. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – The accused made a demand.

Two – The accused reinforced the demand with a threat to kill.

Three – The accused intended the complainant to fear that the threat would be carried out if s/he didn't comply with the demand.

I will now explain each of these elements in more detail.

The Accused Made a Demand

The first element that the prosecution must prove is that the accused made a demand.

The demand does not need to have been clearly spelt out or made explicit. A person can make a demand indirectly or implicitly. This element will be met if a reasonable person would have understood that a demand was being made in the circumstances.

[*Insert relevant evidence and arguments.*]

The Demand was Accompanied by a Threat

The second element that the prosecution must prove is that the accused reinforced the demand with a threat to kill another person. In this case it is alleged that NOA threatened to kill [NOC/NO3P] by [*describe threat*].[883]

[*Add any of the following directions that are relevant to the case*.]

- A threat does not need to be spoken. It can be made in writing, by conduct, or by a combination of these forms of communication.
- This element will not be satisfied if you consider that the accused only threatened to injure [NOC/NO3P].
- The accused does not need to have threatened to immediately kill [NOC/NO3P]. This element will be satisfied even if the threatened action was not to be carried out for some time.
- The threat to kill does not need to have been unconditional. This element will be satisfied even if the accused made his/her threat dependent on something else happening first.
- The accused does not need to have threatened to personally kill [NOC/NO3P]. This element will be satisfied if the accused threatened to have another person kill [NOC/NO3P].
- This element will not be met if NOA threatened to kill him/herself or an accomplice. You must be satisfied that the threat was to kill someone else.

In determining whether the accused has made a threat to kill, you must take into account all of the circumstances of the alleged threat [*if relevant add*: including the relationship between NOA and NOC].

It is important to note that you do not need to find that NOC thought that NOA would carry out the threat. Similarly, you do not need to determine whether NOA intended to carry out the threat. The question is whether or not NOA made a threat to kill.

[*Insert relevant evidence and arguments*.]

It is only if you are satisfied, beyond reasonable doubt, that the accused made a threat to kill in the sense that I have described that this second element will be met.

The Accused Intended to Cause Fear

The third element that the prosecution must prove is that the accused intended the complainant to fear that the threat would be carried out if s/he didn't comply with the demand.

It does not matter whether or not NOC actually felt any alarm or fear. This element only requires proof that the accused intended that NOC would fear that the threat would be carried out.

[*Insert relevant evidence and arguments*.]

Summary

To summarise, before you can find NOA guilty of extortion with threat to kill, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA made a demand; and

Two – that NOA reinforced the demand with a threat to kill another person; and

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[883] This charge must be adapted if the prosecution alleges that the accused threatened to engage in conduct that would endanger the life of another.

Three – that NOA intended NOC to fear that the threat would be carried out if s/he didn't comply with the demand.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of extortion with threat to kill.

Last updated: 4 December 2012

7.4.16.2 Checklist: Extortion

Click here for a word version of this document for adaptation

This checklist is designed for use where it is alleged that the accused committed extortion with a threat to kill (Crimes Act 1958 s 27).

It can be adapted for use where the accused is charged with:

Extortion with a threat to injure (Crimes Act 1958 s 27);

Extortion with a threat to endanger life (Crimes Act 1958 s 27);

Extortion with a threat to destroy property (Crimes Act 1958 s 28); or

Extortion with a threat to endanger property (Crimes Act 1958 s 28)

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused made a demand; and

2. The accused reinforced the demand with a threat to kill; and

3. The accused intended that the complainant would fear that the threat would be carried out if s/he didn't comply with the demand.

Demand

1. Did the accused make a demand?

If yes, go to 2

If no, then the accused is not guilty of Extortion

Threat to kill

2. Did the accused reinforce the demand with a threat to kill?

If yes, go to 3

If no, then the accused is not guilty of Extortion

Intention that complainant fear that threat be carried out

3. Did the accused intend that the complainant would fear that the threat would be carried out if the demand was not met?

If yes, then the accused is guilty of Extortion (as long as you answered yes to questions 1 and 2)

If no, then the accused is not guilty of Extortion

Last updated: 4 December 2012

7.4.17 False Imprisonment

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Elements

1. False imprisonment is a common law offence. It has the following three elements:

   i) The accused deprived another person of his or her liberty;

   ii) The accused intended to deprive the person of his or her liberty; and

   iii) The deprivation of liberty was unlawful (*Macpherson v Brown* (1975) 12 SASR 184; *R v Vollmer* [1996] 1 VR 95; *R v Huynh* [2006] VSCA 213; *R v Busuttil* [2006] SASC 47).

2. There is no need to prove that the imprisonment was imposed "injuriously", or that the accused intended to injure the complainant in any way (*R v Vollmer* [1996] 1 VR 95; *JCS v R* [2006] NSWCCA 221).

Deprivation of Liberty

3. The first element the prosecution must prove is that the accused deprived another person of his or her liberty (*R v Vollmer* [1996] 1 VR 95; *R v Huynh* [2006] VSCA 213; *Macpherson v Brown* (1975) 12 SASR 184; *R v Busuttil* [2006] SASC 47).

4. This requires proof that the accused deprived a person of his or her freedom to move from one place to another (*R v Huynh* [2006] VSCA 213; *R v Rahman* (1985) 81 Cr App R 349).

5. As the offence is concerned with the deprivation of liberty, and not a mere interference with convenience, the complainant's liberty must have been totally obstructed. A partial obstruction is not sufficient (*Bird v Jones* (1845) 7 QB 742; *R v Garrett* (1988) 50 SASR 392; *McFadzean v CFMEU* (2007) 20 VR 250; *Symes v Mahon* (1922) SASR 447).

6. It is a question of fact for the jury whether the accused's conduct has deprived the complainant of his or her liberty. The complainant's personal characteristics (such as age, ethnic origin, knowledge of English, intellectual qualities and physical or mental disabilities) may be relevant to the jury's assessment (*R v Awang* [2004] 2 Qd R 672).

7. A person's liberty may be restrained in various ways, including by physical restraint, by threats of harm to the complainant or another, or by other intimidating conduct (*Homsi v R* [2011] NSWCCA 164; *McFadzean v CFMEU* (2007) 20 VR 250; *R v Garrett* (1988) 50 SASR 392; *Myer Stores Pty Ltd v Soo* [1991] 2 VR 597).

8. A person may be deprived of their liberty by fraud (*Davis v R* [2006] NSWCCA 392; *Go v R* (1990) 73 NTR 1).

9. However, there is no deprivation of liberty where an accused induces another person by fraudulent misrepresentation to go unaccompanied from one place to another (*R v Hendy-Freegard* [2008] QB 57).

"Against the complainant's will"

10. In most cases the prosecution must prove that the deprivation of liberty was against the complainant's will. There is no deprivation of liberty if the complainant, of his or her own free will, agrees to go to or remain in a place nominated by the accused (*McFadzean v CFMEU* (2007) 20 VR 250. See also *Myer Stores Pty Ltd v Soo* [1991] 2 VR 597; *R v Garrett* (1988) 50 SASR 392).

11. It is unclear whether the deprivation of liberty must always be against the complainant's will. While some cases have held that it must be (e.g. *R v Bournewood Community and Mental Health NHS Trust; Ex parte L* [1999] 1 AC 458), others have held that is not the case (see, e.g. *JCS v The Queen* [2006] NSWCCA 221). See *McFadzean v CFMEU* (2007) 20 VR 250 for a discussion of this issue.

12. To prove that the deprivation of liberty was against the complainant's will, the prosecution must prove:

    - That the accused's conduct was of a coercive character; and
    - That the complainant would not have submitted to the deprivation of liberty but for the accused's conduct (i.e., his or her will was overborne) (*McFadzean v CFMEU* (2007) 20 VR 250; *Paton v R* [2011] VSCA 72. Cf *Homsi v R* [2011] NSWCCA 164).

13. Thus, even if the accused has blocked the complainant's ability to leave a location, this element will not be met if the complainant remains at that location for his or her own reasons, uninfluenced by the accused's actions (*McFadzean v CFMEU* (2007) 20 VR 250).

14. A complainant may, in the course of an extended detention, change his or her mind and consent to the detention. From that point in time the accused is no longer depriving the complainant of his or her liberty (*R v Nguyen & Tran* [1998] 4 VR 394).

15. In addition, where a person consents to the imprisonment, it will not be unlawful (*R v Vollmer* [1996] 1 VR 95). See Unlawfulness (below).

16. If the complainant was incapable of consenting to the deprivation of liberty (e.g. a young child), a jury will readily infer that the complainant did not consent (*R v D* [1984] AC 778).

Knowledge of the deprivation

17. It is unclear whether the complainant must know that his or her means of leaving a place have been blocked. While some cases have suggested that false imprisonment may occur without the complainant's knowledge (see, e.g. *JCS v The Queen* [2006] NSWCCA 221; *R v Awang* [2004] 2 Qd R 672; *Go v R* (1990) 73 NTR 1), others have held that the complainant must be aware of the imprisonment (see, e.g. *R v Bournewood Community and Mental Health NHS Trust; Ex parte L* [1999] 1 AC 458. See also *McFadzean v CFMEU* (2007) 20 VR 250).

Conditional deprivation

18. An issue concerning this element may arise where:

    - The complainant voluntarily enters into an arrangement which restricts his or her liberty and makes release contingent on some event;
    - He or she seeks to be released prior to the occurrence of that event; and
    - The accused prevents him or her from leaving (because the condition has not been fulfilled).

19. In such circumstances, the complainant has not been deprived of his or her liberty simply because he or she has been detained. There will only be a deprivation of liberty if the complainant did not consent to being detained in such circumstances (*The Balmain New Ferry Co v Robertson* (1906) 4 CLR 379).

20. To determine if the complainant consented to the deprivation, the jury must examine the terms of the relevant arrangement (*The Balmain New Ferry Co v Robertson* (1906) 4 CLR 379).

21. There will be a deprivation of liberty if the accused does not seek to give effect to the purpose for which the arrangement was entered into, and does not give the complainant a reasonable opportunity to leave (*R v Huynh* [2006] VSCA 213).

Means of escape

22. There is no deprivation of liberty if the complainant had a reasonable means of escape available (*McFadzean v CFMEU* (2007) 20 VR 250).

23. Where there was a reasonable means of escape, it does not matter that the complainant did not make use of it. Its existence is sufficient to negate this element (*McFadzean v CFMEU* (2007) 20 VR 250).

24. The issue is not whether it would have been reasonable for any person to escape. The court must consider a proposed means of escape was reasonable for the complainant. This may depend on factors such as the physical or mental condition of the complainant (*McFadzean v CFMEU* (2007) 20 VR 250).

25. The following factors are also relevant to assessing the reasonableness of a means of escape:

    - Threat or danger to the complainant or other people;
    - Threat or danger to property (including property of others);
    - Distance and time;
    - Legality (*McFadzean v CFMEU* (2007) 20 VR 250. See also *The Balmain New Ferry Co v Robertson* (1906) 4 CLR 379; *Burton v Davies and General Fire Accident and Life Assurance Corporation Ltd* [1953] St R Qd 26).

26. The fact that a means of escape is inconvenient does not make it unreasonable. For example, it has been held to be reasonable for a complainant to have to swim from Circular Quay to the shore, or to journey through the bush for two hours (*McFadzean v CFMEU* (2007) 20 VR 250; *Balmain New Ferry Co v Robertson* (1906) 4 CLR 379).

27. A means of escape may be reasonable even if it requires the complainant to commit a minor trespass (*McFadzean v CFMEU* (2007) 20 VR 250; *Wright v Wilson* (1699) 91 ER 1394).

28. The fact that the complainant could have sought assistance from police to escape does not mean that they had a reasonable means of escape (*McFadzean v CFMEU* (2007) 20 VR 250).

29. Where is person is deprived of his or her liberty by threats, the availability of a means of physical escape which the complainant chooses not to use does not imply consent to the imprisonment (*R v Garrett* (1988) 50 SASR 392; *McFadzean v CFMEU* (2007) 20 VR 250)

30. Where there is a reasonable means of escape, and the complainant hesitates before using it, there is no false imprisonment during the period of hesitation. By contrast, where there is a means of escape which is not reasonable, and the complainant hesitates before using it, there is false imprisonment during the period of hesitation (*McFadzean v CFMEU* (2007) 20 VR 250).

Avoid using the word "compel"

31. As "compelling" a person to remain in a particular place or go to a particular place does not necessarily involve restraint on a person's freedom of movement, judges should avoid using the term "compel" in their directions (*R v Huynh* [2006] VSCA 213).

Intention

32. The second element the prosecution must prove is that the accused intended to deprive the complainant of his or her liberty (*Macpherson v Brown* (1975) 12 SASR 184; *R v Garrett* (1988) 50 SASR 392; *R v Busuttil* [2006] SASC 47; *Paton v R* [2011] VSCA 72).

33. There is no need to prove that the accused intended to arouse fear of violence, or foresaw that the complainant may fear violence (*Macpherson v Brown* (1975) 12 SASR 184; *R v Vollmer* [1996] 1 VR 95).

34. This element will not be met if the accused mistakenly believed that the complainant consented to the deprivation of liberty (*R v Faraj* [2007] 2 Cr App R 25; *Defina v R*, VSC, 3/3/1993; *R v Vollmer* [1996] 1 VR 95).

35. It is not necessary to show that the asserted belief was reasonable. The reasonableness of the belief is relevant only to whether the accused held the belief (*R v Faraj* [2007] 2 Cr App R 25).

36. The judge must determine whether there is an evidentiary basis for a claim of mistaken belief before leaving this issue for the jury (*Defina v R*, VSC, 3/3/1993; *R v Vollmer* [1996] 1 VR 95; *R v Faraj* [2007] 2 Cr App R 25).

Unlawfulness

37. The third element the prosecution must prove is that the deprivation of liberty was unlawful (*R v Vollmer* [1996] 1 VR 95; *R v Huynh* [2006] VSCA 213).

38. It is unlawful to deprive a person of his or her liberty unless the deprivation is authorised (e.g. by a court order, the common law or statutory authority) (*R v Vollmer* [1996] 1 VR 95).

39. This element will be met if a police officer arrests, imprisons or otherwise detains someone in circumstances where they had no lawful authority to do so (*McIntosh v Webster* (1980) 30 ACTR 19; *R v Banner* [1970] VR 240; *Myer Stores Pty Ltd v Soo* [1991] 2 VR 597; *R v Faraj* [2007] 2 Cr App R 25).

40. Parents may lawfully detain their children for the purposes of discipline. However, excessive detention may move beyond the bounds of reasonable parental discipline and render the detention unlawful (*R v Rahman* (1985) 81 Cr App R 349; *JCS v R* [2006] NSWCCA 221).

41. Defence of another or defence of property can provide a lawful basis for detaining a person (*R v Faraj* [2007] 2 Cr App R 25).

Alternative Offences

42. There are some older authorities that suggest that every false imprisonment connotes an assault. However, false imprisonment and assault are now considered to be two distinct crimes (*MacPherson v Brown* (1975) 12 SASR 184; *McFadzean v CFMEU* (2007) 20 VR 250).

43. While assault may be a factual alternative to false imprisonment, this is not necessarily the case (*MacPherson v Brown* (1975) 12 SASR 184; *Zanker v Vartzokas* (1988) 34 A Crim R 11).

44. Judges will need to consider the position of the parties and whether there is a request to leave assault as an alternative offence before directing the jury on that offence (*Jury Directions Act 2015* s 11).

45. The distinction between common law kidnapping and false imprisonment is that in kidnapping, the complainant is taken away from some place. There is no element of taking away in the offence of false imprisonment (*Davis v R* [2006] NSWCCA 392; *R v Wellard* [1978] 3 All ER 161).[884]

Last updated: 29 June 2015

7.4.17.1 Charge: False Imprisonment

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I must now direct you about the crime of false imprisonment. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – The accused deprived another person of his or her liberty;

Two – The accused intended to deprive that person of his or her liberty; and

[884] The offence of kidnapping under *Crimes Act 1958* s 63A does not require proof that the complainant was taken away (see *Davis v R* [2006] NSWCCA 392).

Three – The deprivation of liberty was unlawful.

I will now explain each element in more detail.[885]

Deprivation of Liberty

The first element that the prosecution must prove is that the accused deprived another person of his or her liberty.

This requires the prosecution to prove that NOA prevented NOC from freely moving from one place to another, against NOC's will.

[*If it is alleged that the complainant was deprived of his/her liberty by* non-physical means*, add the following shaded section*.]

NOA does not need to have physically prevented NOC from moving. A person can be deprived of their liberty by [*insert relevant example*, e.g. "threats or other intimidating conduct".]

[*If the complainant's* consent *is in issue, add the following shaded section*.]

You can only find this first element established if you are satisfied beyond reasonable doubt that NOC did not freely agree to [*describe circumstances of alleged detention*]. S/he will not have been deprived of his/her liberty if s/he agreed to remain at [*identify location*] for his/her own reasons, rather than because s/he was made to do so by NOA.

[*If the reasonableness of any means of* escape *are in issue, add the following shaded section*.]

In deciding whether NOA deprived NOC of his/her liberty, you must consider whether NOC had a reasonable means of escape. A person who has a reasonable means of escape is not unlawfully imprisoned.

To determine whether a means of escape was reasonable, you must consider [*describe factors relevant to the reasonableness of escape, including risks to the victim, risks to property, distance and time required to escape and the legality of the means of escape*].

It is for the prosecution to prove, beyond reasonable doubt, that NOC had no reasonable means of escape. If they are unable to do so, then you must find NOA not guilty of false of imprisonment.

[*Summarise evidence and/or arguments*.]

Intention

The second element that the prosecution must prove is that the accused intended to deprive the complainant of his/her liberty.

[*Summarise evidence and/or arguments*.]

Lawful Excuse

The third element that the prosecution must prove is that the accused's deprivation of the complainant's liberty was unlawful.

As a matter of law, a deprivation of liberty will be unlawful unless it is lawfully justified. The accused has argued his/her conduct was lawfully justified because [*identify lawful excuse*].

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[885] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

As I have told you, the prosecution is responsible for proving each element. The accused does not have to prove anything.

So for this element, the prosecution must prove beyond reasonable doubt that the accused was not [*identify lawful excuse*]. To do this, the prosecution must prove that [*describe facts required to disprove any alleged lawful excuse*].

[*Summarise evidence and/or arguments*.]

Summary

To summarise, before you can find NOA guilty of false imprisonment the prosecution must prove to you beyond reasonable doubt:

One – That NOA deprived NOC of his/her liberty against his/her will;

Two – That NOA intended to deprive NOC of his/her liberty; and

Three – That NOA's deprivation of NOC's liberty was unlawful.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of false imprisonment.

Last updated: 20 May 2022

7.4.17.2 Checklist: False Imprisonment

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused deprived the complainant of his or her liberty; and

2. The accused intended to deprive the complainant of his or her liberty; and

3. The deprivation of liberty was unlawful.

Deprivation of Liberty

1. Did the accused deprive the complainant of his or her liberty?

If Yes, then go to 2.

If No, then the Accused is not guilty of False Imprisonment

Intention

2. Did the accused intend to deprive the complainant of his or her liberty?

If Yes, then go to 3.

If No, then the Accused is not guilty of False Imprisonment

Unlawful

3. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of False Imprisonment (as long as you have also answered Yes to questions 1, 2 and 3).

If No, then the Accused is not guilty of False Imprisonment

Last updated: 18 November 2013

7.4.18 Child Stealing

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Overview

1. Section 63 of the *Crimes Act 1958* creates three discrete offences that may be called 'Child stealing'.
2. The first child stealing offence requires that the prosecution prove the following 5 elements:
   (a) The accused took, decoyed, enticed away or detained a person;
   (b) That person was a child under the age of 16;
   (c) The taking or other conduct was achieved by force or fraud
   (d) The accused intended to:
      i) deprive any parent, guardian or any other person having the lawful care or charge of the child of the possession of the child; or
      ii) steal any item from the child.
   (e) The accused acted without lawful excuse (Crimes Act 1958 s 63(1)).
3. The second child stealing offence requires that the prosecution prove that:
   (a) The accused received or harboured a person;
   (b) That person was a child under the age of 16;
   (c) The accused intended to:
      i) deprive any parent or guardian or any other person having the lawful care or charge of such child of the possession of such child; or
      ii) steal any article upon or about the person of such child;
   (d) The accused knew that the child had been led, taken, decoyed, enticed away or detained by force or fraud (Crimes Act 1958 s 63(1)).
4. The third child stealing offence requires the prosecution to prove that:
   (a) The accused took away, decoyed or enticed away a person;
   (b) The person was a child under the age of 16;
   (c) The accused took the child out of the possession of the child's parent, guardian or other person with lawful care or charge of the person;
   (d) The taking was against the will of the child's parent, guardian or other person with lawful care or charge of the person;
   (e) At the time of his or her conduct, the accused intended to take a child, known or believed to be under the age of 16, from the care of a parent or guardian and that the taking was against the will of the child's parent or guardian; and
   (f) The accused acted without lawful excuse (Crimes Act 1958 s 63(2); Moore v Police (2008) 100 SASR 277).

5. The offence of child stealing is a form of kidnapping of a child under the age of 16 years for one of the particular purposes designated in the section. The existence of this statutory offence does not affect the common law offence of kidnapping (*R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394; *R v McEachran* (2006) 15 VR 615).

6. This topic focuses on the elements of the third form of child stealing identified above. 7.4.19 Kidnapping (Common Law) provides some assistance on aspects of the first and second forms of child stealing.

Taking away

7. The first element the prosecution must prove is that the accused took a person away (*Crimes Act 1958* s 63).

8. This element requires the prosecution to establish a causal relationship between the conduct of the accused and the departure of the person from his or her parents or guardians (*R v Stanton* (1981) 3 A Crim R 294; *James v R* [2013] VSCA 177; Jac*kson v R* (1999) 113 A Crim R 299).

9. The accused must be an effective cause of the person leaving, rather than being inconsequential or peripheral to the person's departure. However, it is not necessary to show that the accused's conduct was the sole cause (*R v A* [2000] 1 WLR 189; *Moore v Police* (2008) 100 SASR 277; *R v Stanton* (1981) 3 A Crim R 294; *R v Mackney* (1903) 29 VLR 22).

10. This requires the prosecution to show that the accused took an active part in the person's departure, such as by offering inducements or persuasion (*R v Jarvis* (1903) 20 Cox CC 249).

11. The consent of the child does not provide a defence. A jury may find that the accused took the child away even if the child consented (*R v A* [2000] 1 WLR 1879; *R v Olifer* (1866) 10 Cox CC 402; *R v Mackney* (1903) 29 VLR 22).

12. It is not necessary to show that the accused used force or fraud to take the child away. This is only an element of the first two forms of child stealing identified at the start of this topic (compare *Crimes Act 1958* s 63(1) and (2); *R v Mejac* [1954] Tas SR 26).

Taking Away and Absconding Children

13. When a child leaves home and goes to the accused, there may be a moral obligation on the accused to report the child's whereabouts to the parents. However, there is no legal obligation and failure to notify the child's parents does not constitute taking away the child (*James v R* [2013] VSCA 177; *Moore v Police* (2008) 100 SASR 277; *R v Olifer* (1866) 10 Cox CC 402; *R v Henkers* (1887) 16 Cox CC 257).

14. This element is not established where the child independently decided to leave his or her parents and the accused passively harboured the child and offered no inducement to the child (see *James v R* [2013] VSCA 177; *R v Jackson* [1999] NSWCCA 387; *R v Jarvis* (1903) 20 Cox CC 249; *R v Mejac* [1954] Tas SR 26; *R v Charman* (1910) 10 SR 540; *R v Macney* (1903) 29 VLR 22; *R v Olifer* (1866) 10 Cox CC 402; *Moore v Police* (2008) 100 SASR 277; *R v Stanton* (1981) 3 A Crim R 294).

15. However, where the child leaves home without a plan and then jointly formulates a plan with the accused, or where the accused actively assists the child, then the first element may be proved. The accused can also take a child away where the child instigates a plan to leave his or her parents due to the accused's previous suggestions or influence (compare *R v Mejac* [1954] Tas SR 26 and *R v Jackson* [1999] NSWCCA 387. See also *R v Jarvis* (1903) 20 Cox CC 249; *James v R* [2013] VSCA 177).

Out of Possession

16. The prosecution must prove that the accused took the child out of the possession of the parent or guardian. This requires a substantial interference with the possessory relationship of parent and child (see *R v Jones* [1973] Crim LR 621; *Moore v Police* (2008) 100 SASR 277).

17. It is not necessary to show an intention to take the child permanently. A temporary taking is sufficient (*R v Baille* (1859) 8 Cox CC 238. But c.f. R v Jones [1973] Crim LR 621).

18. Possession for the purpose of s 63 refers to both the parent or guardian's right to exercise care, custody and control of a child and the actual exercise of that right (*Moore v Police* (2008) 100 SASR 277).

19. The exercise of the right of care, custody and control of a child is not limited to situations in which a child is in physical proximity to a parent or guardian. It extends to situations where a child is acting under the direction or with the consent of a parent or guardian, such as by travelling unsupervised to a park (*Moore v Police* (2008) 100 SASR 277; *R v Leather* (1993) 98 Cr App R 179; *R v Charman* (1910) 10 SR (NSW) 540; *James v R* [2013] VSCA 177).

20. Where the evidence raises it as an issue, the jury must be satisfied beyond reasonable doubt that the child had not voluntarily left the possession of the parent or guardian prior to the accused's conduct (*R v Jackson* [1999] NSWCCA 387; *R v Stanton* (1981) 3 A Crim R 294; *R v Henkers* (1887) 16 Cox CC 257; *Foster v DPP* [2005] 1 WLR 1400).

21. For information on whether the action of the accused took the child out of the possession of the parent or guardian, or whether the child's own actions did so, see Taking Away and Absconding Children (above).

Against the Will

22. The fourth element requires the prosecution to prove that the taking was against the will of the child's parent or guardian.

23. Others who take care, custody and control of a child, such as school teachers, carers or relatives may take possession of a child from time to time, where the taking is not 'against the will' of the parent or guardian (*Moore v Police* (2008) 100 SASR 277).

Intention of accused

24. There are conflicting authorities on whether the prosecution must prove that the accused knew that the child was under 16, or alternatively, whether an honest and reasonable belief that the child was over 16 would provide a defence. Judges will need to consider this issue in a case where it is relevant (compare *Foster v DPP* [2005] 1 WLR 1400 and *R v Olifer* (1866) 10 Cox CC 402; *R v Stanton* (1981) 3 A Crim R 294 (Brinsden J); *Moore v Police* (2008) 100 SASR 277; *R v Mousir* [1987] Crim LR 561).

25. In accordance with general principles of criminal responsibility, this Charge Book assumes that the prosecution must prove that the accused intended to take a child, known or believed to be under the age of 16, out of the possession and against the will of the parent or guardian (see *He Kaw Teh v R* (1985) 157 CLR 523).

Without lawful excuse

26. The sixth element is that the taking was without lawful excuse.

27. The word "unlawfully" in s 63 means "without lawful excuse" (*R v Austin* (1981) 72 Cr App R 104).

28. It is beyond the scope of this topic to identify all possible bases of lawful excuse. Judges will need to direct on this element when it arises as an issue.

Claim of right

29. Section 63 provides a statutory bar to prosecutions where the accused raises a claim of right to a charge of child stealing. The following people may not be prosecuted for taking a child out of the possession of a person having the lawful care or charge of the child:

    - The mother of the child;

- A person who has claimed to be the father of an illegitimate child;
- A person who has claimed any right to the possession of the child.

30. This statutory prohibition on prosecution is not the same as a statutory defence. The provision operates only to prohibit proceedings against any of the three classes of people for an offence under s 63. However, the prosecution may bring proceedings for a conspiracy to commit child stealing, or against accessories who assist a person described in s 63 to commit an act of child stealing. The fact that the prosecution cannot bring proceedings against an exempt person does not prevent the prosecution, in the trial of an accessory, from proving that an exempt person committed the crime of child stealing (*R v Burns* (1984) 79 Cr App R 173; *R v Austin* (1981) 72 Cr App R 104).
31. The class of exempt persons is very limited. According to UK authority on equivalent provisions, it consists only of the mother and father of the child, a guardian appointed by a testamentary document or an order conferring the status of guardianship, or a person who is the subject of an order conferring a form of care, control, custody or access (*R v Austin* (1981) 72 Cr App R 104).

Last updated: 2 December 2013

7.4.18.1 Charge: Child Stealing

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I must now direct you about the crime of child stealing. That crime has the following six elements:

One – The accused took away, decoyed, or enticed away a person

Two – That person was a child under the age of 16

Three – The accused took the child out of the possession of the person with lawful care of the child

Four – The taking was against the will of the person with lawful care of the child

Five – The accused intended to take a child, known or believed to be under the age of 16, out of the possession and against the will of the person with lawful care of the child.

Six – The accused acted without lawful excuse

I will now explain each of these elements in more detail.

Taking away

The first element the prosecution must prove is that NOA took away, decoyed or enticed away NOC.

To establish this element, the prosecution must show that NOA was an active and effective cause of NOC leaving NOG.[886] The prosecution say that NOA did this by [*describe alleged manner of taking*].

[*Where the child may have left the possession of the parent or guardian without the accused's influence, add the following shaded section*.]

In this case, one issue you must consider is whether NOC had already left the possession of NOG at the time the prosecution say that NOA committed this offence. In other words, you must consider whether NOC took himself/herself away, or whether NOA took him/her away. You can only find this first element proved if the prosecution establishes that NOA caused NOC to leave NOG.

[886] Name of parent, guardian or other person with lawful care or charge of the child.

To prove this offence, it is not enough to say that NOA was under a moral duty to return NOC to NOG. The prosecution must prove that NOA took NOC away, and not merely found him/her after s/he left his/her parents/guardian.

For this offence, it does not matter whether NOC freely agreed to go with NOA.[887]

[*Summarise competing prosecution and defence evidence and arguments.*]

Child

The second element the prosecution must prove is that NOC is under the age of 16. You have heard evidence that NOC was born on [*insert date of birth*] and was aged [*insert age*] on [*insert date of offence*]. You should not have any difficulty finding this element proven.

Out of possession

The third element the prosecution must prove is that NOA took NOC out of the possession of [*describe relevant person with lawful care of the child and the basis of that lawful relationship, e.g.* "his/her parents, Mr and Mrs Smith"].

This element requires the prosecution to show that NOA interfered in a substantial manner with NOG's right to exercise care, custody and control of NOC or NOG's ability to exercise of that right.

[*Summarise competing prosecution and defence evidence and arguments.*]

Against the will

The fourth element the prosecution must prove is that the taking was against the will of NOG.

[*Summarise competing prosecution and defence evidence and arguments.*]

Intention

The fifth element that the prosecution must prove is that NOA intended to take a child, known or believed to be under the age of 16, out of the possession and against the will of NOG.

This element looks at the accused's state of mind. You must consider what s/he knew and what s/he intended at the time that [*describe factual basis for offence*]. In order to prove this element, the prosecution must establish the following three matters:

One – That NOA knew or believed that NOC was aged under 16;

Two – That NOA intended to take NOC out of the possession of the person with lawful care of him/her;

Three – That NOA knew that this was against the will of the person with lawful care of the NOC.

If you are not satisfied that NOA had these three states of mind at the time that [*describe factual basis for offence*], then this element is not established and you must find NOA not guilty of child stealing.

[*Summarise competing prosecution and defence evidence and arguments.*]

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[887] Where there is a dispute over whether the child left his or her parents or guardians without the influence of the accused, the judge should give the jury additional guidance on when the accused's conduct is an active taking or a passive receiving. See 7.4.18 Child Stealing for guidance.

Without lawful excuse

The sixth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

This means that the prosecution must prove that [*describe facts required to disprove any alleged lawful excuse*].

[*Summarise competing prosecution and defence evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of child stealing, the prosecution must prove to you beyond reasonable doubt:

One – That NOA took away, decoyed, or enticed away NOC;

Two – That NOC was a child under the age of 16;

Three – That NOA took NOC out of the possession of NOG;

Four – That this taking was against the will of NOG;

Five – That NOA intended to take a child, known or believed to be under the age of 16, out of the possession and against the will of the person with lawful care of the child;

Six – That NOA acted without any lawful justification or excuse. If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of child stealing.

Last updated: 2 December 2013

7.4.18.2 Checklist: Child Stealing

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Six elements the prosecution must prove beyond reasonable doubt:

1. The accused took away, decoyed or enticed a person; and

2. The person was a child under the age of 16; and

3. The accused took the child out of the possession of the person with lawful care of the child; and

4. The taking was against the will of the person with lawful care; and

5. The accused intended to take a child, known or believed to be under the age of 16, out of the possession and against the will of the person with lawful care of the child; and

6. The accused acted without lawful excuse

Took away, decoyed or enticed a person

1. Did the accused take away, entice or decoy a person?

Consider – Was the accused the *effective cause* of the person leaving his or her parent or guardian?

If yes, then go to 2

If no, then the accused is not guilty of child stealing

Child

2. Was the person a child under the age of 16?

If yes, then go to 3

If no, then the accused is not guilty of child stealing

Out of the possession

3. Did the accused take the child out of the possession of the person with lawful care of the child?

If yes, then go to 4

If no, then the accused is not guilty of child stealing

Against the will

4. Was the taking against the will of the child's parent or guardian?

If yes, then go to 5.1

If no, then the accused is not guilty of child stealing

Intention

5.1 Did the accused know or believe that the child was under 16?

If yes, then go to 5.2

If no, then the accused is not guilty of child stealing

5.2 Did the accused intend to take the child out of the possession of the child's parent or guardian?

If yes, then go to 5.3

If no, then the accused is not guilty of child stealing

5.3 Did the accused know that the taking was against the will of the parent or guardian?

If yes, then go to 6

If no, then the accused is not guilty of child stealing

Without lawful excuse

6. Did the accused act without lawful excuse?

If yes, then the accused is guilty of child stealing (as long as you also answered yes to questions 1, 2, 3, 4, 5.1, 5.2 and 5.3)

If no, then the accused is not guilty of child stealing

Last updated: 30 May 2014

7.4.19 Kidnapping (Common Law)

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Scope

1. Kidnapping is both an offence under the common law and an offence contrary to *Crimes Act 1958* s 63A.[888]

2. This topic looks at the common law offence.[889] For an examination of the statutory offence see 7.4.20 Kidnapping (Statutory).

Overview

3. Kidnapping at common law has the following five elements:

   (a) The accused took or carried that person away;

   (b) The accused deprived another person of his or her liberty;

   (c) The accused did this by force or fraud;

   (d) The person taken or carried away did not consent to that conduct; and

   (e) The accused acted without lawful justification or excuse (R v D [1984] AC 778; R v Nguyen [1998] 4 VR 394; R v McEachran (2006) 15 VR 615; R v Hendy-Freegard [2008] QB 57; R v Vu [2011] BCCA 112).

4. While it has been suggested that the element of taking or carrying away is the only matter that distinguishes kidnapping from false imprisonment, this Charge Book refers to the traditional elements of kidnapping, rather than treating the offence as an aggravated form of false imprisonment (see *Davis v R* [2006] NSWCCA 392).

5. The elements of the offence are the same regardless of the victim's age (*R v Nguyen* [1998] 4 VR 394; *Evans v His Honour Judge Shelton* [1998] VSCA 29).

6. Kidnapping is a continuing offence that begins when the victim is initially taken away, and ends when the victim is released. It is not necessary to separately charge false imprisonment when the victim taken away and then detained at a fixed location. In addition, a co-offender may be liable for kidnapping by participating in the continued detention of the victim, even if he or she was not involved in initially taking the victim (see *Davis v R* [2006] NSWCCA 392; *R v Vu* [2011] BCCA 112).

Taking or Carrying Away

7. For the first element to be met, the jury must be satisfied that the accused took or carried the victim from one place to another (*R v Wellard* [1978] 1 WLR 921; *R v Reid* [1973] QB 299; *R v Hendy-Freegard* [2008] QB 57; *R v Vu* [2011] BCCA 112; *R v Pollitt* (2007) 97 SASR 332; *R v Fetherston* [2006] VSCA 278).

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[888] The enactment of *Crimes Act 1958* s 63A did not abolish the common law offence (*R v Nguyen* [1998] 4 VR 394; *Evans v His Honour Judge Shelton* [1998] VSCA 29).

[889] For a detailed discussion of the history of the offence of kidnapping see *R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394 at 407–411.

8. For the accused's conduct to amount to "taking away", that conduct must be an effective cause of the victim accompanying the accused to another place. It is not necessary to prove that the accused physically "carried away" or otherwise physically "removed" the victim (*R v Wellard* [1978] 1 WLR 921; *Davis v R* [2006] NSWCCA 392; *R v Fetherston* [2006] VSCA 278).

9. This can also be expressed as a requirement that the victim was taken away from the place s/he wished to be (*R v Wellard* [1978] 1 WLR 921).

10. The victim does not have to be taken away any great distance, but there must be sufficient movement from where the victim wished to be for the conduct to amount to a "carrying away". Where in issue, the sufficiency of the distance travelled is a jury question and to be decided on the facts of each case (*R v Wellard* [1978] 1 WLR 921; *Davis v R* [2006] NSWCCA 392; *R v Campbell and Brennan* [1981] Qd R 516).

11. The offence is committed when accused takes the victim away from the place the victim wished to be. It is not necessary to show that the victim was taken to the place the kidnapper intended (*R v Wellard* [1978] 1 WLR 921).

Deprivation of Liberty

12. For the second element to be met, the jury must be satisfied that the accused deprived the victim of his or her liberty (*R v Hendy-Freegard* [2008] QB 57; *R v Tremblay* (1997) 117 CCC (3d) 86. See also *R v D* [1984] AC 778; *R v Wellard* [1978] 1 WLR 921).

13. A misrepresentation to the effect that the accused has lawful authority to direct a person's movements may be sufficient to deprive the person of their liberty. However a misrepresentation that induces the other person to choose to go to or stay at a particular place will not establish this element (*R v Hendy-Freegard* [2008] QB 57).

14. For information on the meaning of deprivation of liberty, see 7.4.17 False Imprisonment.

By force or by fraud

15. The third element of kidnapping requires the prosecution to prove that the accused committed the conduct constituting the first and second elements "by force or fraud" (*R v Wellard* [1978] 1 WLR 921; *R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394; *R v McEachran* (2006) 15 VR 615; *R v Hendy-Freegard* [2008] QB 57).

16. It has been questioned whether this should be treated as a separate element or simply as part of the fourth element requirement that the "carrying away" be without consent. However, it currently remains a separate element (*R v Nguyen* [1998] 4 VR 394).[890]

Kidnapping by Force

17. Force may be understood to mean "a hostile intent calculated to cause apprehension in the mind of a complainant, together with the acts that caused the complainant to apprehend immediate and unlawful violence" (*R v Pollitt* (2007) 97 SASR 332 at 346).

18. There is no legal standard for the minimum physical contact capable of constituting a "use of force". If placed in issue, it is for the jury to determine whether a particular physical contact amounts to a "use of force" (*R v Dawson & James* (1976) 64 Crim App R 170).

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[890] In the case of very young children, courts may be willing to adopt a wide definition of fraud, due to the risk of a child willingly accompanying a stranger who merely asks the child to do so without any force or fraud (See *R v Gallup* [2002] ABQB 638).

19. It is not necessary to show that the accused physically carried the victim off. For the purpose of kidnapping, force includes a threat of force (*R v Wellard* [1978] 1 WLR 921; *R v Pollitt* (2007) 97 SASR 332).

Kidnapping by Fraud

20. The form of fraud relied upon must be a kind of fraud which vitiates the consent of the victim, as the prosecution must show that the conduct was against the will of the victim (*R v Gallup* [2002] ABQB 638; *Go v R* (1990) 73 NTR 1; *R v Awang* [2004] 2 Qd R 672).

21. Where fraud is relied upon, it must be a positive misrepresentation rather than just the suppression of the truth (*R v Cort* [2003] 3 WLR 1300).

22. Kidnapping by fraud can raise difficult issues associated with other elements of the offence in particular circumstances. Judges will need to consider whether the fraud affects the issue of whether the victim was deprived of his or her liberty and whether the fraud vitiates consent.[891]

Absence of Consent

23. The fourth element of the kidnapping requires that the deprivation of liberty and the taking away were against the will of the victim (*R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394; *R v McEachran* (2006) 15 VR 615; *R v Hendy-Freegard* [2008] QB 57).

24. The prosecution must prove that there was not informed consent which was freely and voluntarily given. Submission, or consent that is vitiated by fraud, does not disprove this element (*R v Gallup* [2002] ABQB 638).

25. Regardless of the age of the *alleged victim*, in all cases the jury must consider whether the alleged victim consented to the kidnapping. Consent of the parent of a child under the age of discretion is relevant only to the extent that it may separately provide a lawful excuse (*R v Hendy-Freegard* [2008] QB 57; *R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394; *Evans v Shelton* [1998] VSCA 29; c.f. *R v Gallup* [2002] ABQB 638).

26. Even if consent is vitiated by fraud, the jury *must* still consider whether the taking away involved a deprivation of liberty. In some cases, a fraudulent ruse that leads someone to go to another place does not involve a deprivation of liberty (*R v Hendy-Freegard* [2008] QB 57).

Consent by children

27. The relevant state of consent is that of the person taken or carried away, even where that person is a very young child. At no point does this element depend upon the consent of a third party, such as the parent or guardian of a child (*R v D* [1984] AC 778).

28. As the element concerns the absence of consent, proof that the victim is incapable of consenting will establish this element. In the case of a very young child, a jury may readily infer that the child was incapable of consenting. For older children, the jury must consider whether the child had sufficient understanding and intelligence in order to consent (*R v D* [1984] AC 778).

29. The absence of consent may be a necessary inference from the age of a child who is very young and does not have the understanding or the intelligence to consent (*R v D* [1984] AC 778).

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[891] For example, a person might, by fraud, induce another person to travel to another location. Depending on the nature of the fraud, this may or may not involve a deprivation of liberty and so that part of the first element might not be met (see *R v Hendy-Freegard* [2008] QB 57).

30. If capacity to consent is in issue (for example, for older children) it is a jury question. If the jury is satisfied that the child does have capacity to consent the jury must then consider whether it is satisfied that the child did in fact give consent. There is no arbitrary "age of discretion" (*R v D* [1984] AC 778).

Without lawful excuse

31. The final element of the offence is that the offender acted without lawful excuse (*R v D* [1984] AC 778).

32. Consent by the lawful guardian of a child may provide a lawful excuse, though there is little clear guidance on when consent of the guardian will be relevant.[892] As the parent of a child may be guilty of kidnapping the child, there are circumstances where consent of the parent is not a lawful excuse (See *R v Hendy-Freegard* [2008] QB 57; *R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394; *Evans v Shelton* [1998] VSCA 29).

33. The relationship of husband and wife does not provide a lawful excuse for kidnapping (*R v Reid* [1973] QB 299; *R v C* (1981) 3 A Crim R 146).

Obsolete Elements of the Offence

34. While it is no longer an element of the offence that the victim is taken to a place outside the "country" (or jurisdiction), such conduct may be an aggravating feature for the purpose of sentencing (*R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394).

35. "Secreting" the person is also no longer a further or alternative element of the offence (*R v D* [1984] AC 778; *R v Reid* [1973] QB 299).

Last updated: 18 November 2013

7.4.19.1 Charge: Kidnapping (Common Law)

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This charge can be used when the accused is charged with kidnapping at common law.

The Elements

I must now direct you about the crime of kidnapping. That crime has the following five elements:

One – The accused took or carried the complainant away.

Two – The accused deprived the complainant of his or her liberty.

Three – The accused did this by force or fraud.

Four – The complainant did not consent.

Five – The accused acted without lawful justification or excuse.

Before you can find NOA guilty of kidnapping you must be satisfied that the prosecution has proved all five of these elements beyond reasonable doubt.

I will now explain each of these elements in more detail.

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[892] Kidnapping by one parent in the context of family law disputes should generally be dealt with as a contempt of court if there are relevant family law orders. The matter should be treated as kidnapping only if the conduct of the parent was so serious that the ordinary person would regard it as criminal (*R v D* [1984] AC 778).

Take or Carry Away

The first element that the prosecution must prove is that the accused took or carried NOC away.

The words "took" and "carried" are ordinary words that have their ordinary meaning. The element looks at whether NOA took NOC from where s/he wished to be to some other place.

[*If the NOA only took NOC a short distance, add the following shaded section*.]

The law does not proscribe a minimum distance that must be travelled before this element may be met. It is a matter for you to consider whether NOA took NOC far enough from where NOC wished to be that you can say the accused took or carried him/her away.

[*Summarise competing prosecution and defence evidence and arguments*.]

Deprivation of liberty

The second element that the prosecution must prove is that the accused deprived another person of his or her liberty.

To establish this element, the prosecution must show that NOA prevented NOC from freely moving from one place to another.

[*If the reasonableness of any means of escape are in issue, add the following shaded section*.]

In deciding whether NOA deprived NOC of his/her liberty, you must consider whether NOC had a reasonable means of escape. A person who has a reasonable means of escape is not unlawfully imprisoned. To determine whether a means of escape was reasonable, you must consider [*describe factors relevant to the reasonableness of escape, including risks to the victim, risks to property, distance and time required to escape and the legality of the means of escape*].

[*Summarise competing prosecution and defence evidence and arguments*.]

Force or Fraud

The third element that the prosecution must prove is that the accused deprived NOC of liberty and took or carried him/her away by force or fraud.

[*Summarise competing prosecution and defence evidence and arguments*.]

Without consent

The fourth element that the prosecution must prove is that the accused deprived NOC of liberty and took or carried him/her away without consent. That is, the conduct alleged must have occurred against the will of the complainant.

[*If fraud is capable of vitiating consent, add the following shaded section*.]

In this case, the prosecution have argued that while NOC willingly accompanied NOA, this consent was obtained by fraud and should not be treated as real and effective consent. If you find that NOC only accompanied NOC because [*describe factual findings necessary for fraud to vitiate consent, e.g.* "NOA impersonated a police office and told NOC that s/he must go with him/her to the police station"], then you may find this fourth element proven.

[*If the complainant is a young child, add the following shaded section*.]

As NOC is a child of [*insert age of child*], there are two matters you should consider when determining whether the prosecution has proven this element. First, you should consider whether NOC was old enough to have sufficient understanding and intelligence that s/he was capable of consenting. If you

find that NOC did not have sufficient maturity to be capable of freely agreeing to being deprived of his/her liberty and taken or carried away, then you may find this element proven. Secondly, if you find that NOC did have sufficient understanding and intelligence to be capable of consenting, then you must consider whether the prosecution has proved that s/he did not consent to being deprived of his/her liberty and taken or carried away.

[*Summarise competing prosecution and defence evidence and arguments.*]

Without lawful excuse

The fifth element that the prosecution must prove is that the accused acted without lawful justification or excuse.

This means that the prosecution must prove that [*describe facts required to disprove any alleged lawful excuse*].

[*Summarise competing prosecution and defence evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of kidnapping the prosecution must prove to you beyond reasonable doubt:

One – That NOA deprived NOC of his/her liberty;

Two – That NOA took or carried away NOC;

Three – That NOA did so by force or fraud;

Four – That NOC did not consent;

Five – That NOA acted without any lawful justification or excuse.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of kidnapping.

Last updated: 18 November 2013

7.4.19.2 Checklist: Kidnapping (Common Law)

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused took or carried the complainant away; and

2. The accused deprived the complainant of his or her liberty; and

3. The accused did so by force or fraud; and

4. The complainant did not consent; and

5. The accused acted without lawful justification or excuse.

Took or Carried Away

1. Did the accused take or carry the complainant from one place to another?

    If Yes, then go to 2.

    If No, then the Accused is not guilty of Kidnapping

Deprivation of Liberty

2. Did the accused deprive the complainant of his or her liberty?

If Yes, then go to 3.

If No, then the Accused is not guilty of Kidnapping

Force or Fraud

3. Did the accused take or carry the complainant and deprive him or her of liberty by force or fraud?

If Yes, then go to 4.

If No, then the Accused is not guilty of Kidnapping

Consent

4. Was the taking or carrying of the complainant and the deprivation of liberty without the consent of the complainant?

If Yes, then go to 5.

If No, then the Accused is not guilty of Kidnapping

Lawful excuse

5. Did the accused act without lawful justification or excuse?

If Yes, then the accused is guilty of Kidnapping. (as long as you have also answered Yes to questions 1, 2, 3 and 4).

If No, then the Accused is not guilty of Kidnapping

Last updated: 18 November 2013

7.4.20 Kidnapping (Statutory)

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Overview

1. The offence of kidnapping is created by Crimes Act 1958 s 63A.
2. The common law offence of kidnapping continues to exist, despite the statutory kidnapping offence (*R v Nguyen* [1998] 4 VR 394). For information on the common law offence, see 7.4.19 Kidnapping (Common Law).

Elements

3. Statutory kidnapping has the following two elements:
   (a) The accused led, took or enticed away or detained a person;
   (b) The accused did so either:
      i) With the intent to demand from that person or any other person any payment by way of ransom for the return or release of that person; or

ii) With intent to gain for him or herself or any other person an advantage, however arising, from the detention of that person (Crimes Act 1958 s 63A).

4. The purpose of the provision is to prevent the interference with the liberty of the victim for the purpose of obtaining an advantage (*Davis v R* [2006] NSWCCA 392).
5. Kidnapping is a continuing offence that begins when the victim is initially taken away, and ends when the victim is released. The primary offender is liable at the moment the victim is taken or detained with the necessary intent. Despite that, a secondary offender may be liable for kidnapping by participating in the continued detention of the victim, even if he or she was not involved in initially detaining the victim, provided all the elements are established (see *Davis v R* [2006] NSWCCA 392; *R v Vu* [2011] BCCA 112; *Charlesworth v R* [2009] NSWCCA 27; *R v Manwaring* [1983] 2 NSWLR 82).
6. Where the accused takes the victim away and detains him or her, the jury may find the accused guilty of statutory kidnapping if satisfied that the necessary intent was formed during the detention, even if the accused did not have that intention at the time of taking the person away (*R v Rowe* (1996) 89 A Crim R 467).

Taking or enticing away or detaining of a person

7. The first element of kidnapping can be satisfied in four different ways. The jury may find that the accused:
    - Lead a person away;
    - Took a person away;
    - Enticed a person away; or
    - Detained a person (*Crimes Act 1958* s 63A).
8. Section 63A does not create multiple separate offences. Instead, the first element can be performed in any of four different ways, and the prosecution may particularise more than one form of interference with liberty, such as that the accused took and detained the victim (*Davis v R* [2006] NSWCCA 392).
9. However, while any of those four forms of conduct may constitute the first element, the judge must direct the jury only on the forms of conduct specified by the prosecution and should not include forms of conduct not specifically alleged (*R v DMC* (2002) 137 A Crim R 246).
10. Unlike the common law offence of kidnapping, section 63A does not require proof that the offender carried the victim away. It includes culpability on the basis of detention alone (*Davis v R* [2006] NSWCCA 392).
11. For the accused's conduct to amount to "taking away", that conduct must be an effective cause of the victim accompanying the accused to another place (*R v Wellard* [1978] 1 WLR 921; *Davis v R* [2006] NSWCCA 392; *R v Fetherston* [2006] VSCA 278).
12. This can also be expressed as a requirement that the victim was taken away from the place s/he wished to be (*R v Wellard* [1978] 1 WLR 921).
13. Where the prosecution particularises its case on the basis of "detaining", it must prove that the victim did not consent to the detaining and that the accused did not believe that the complainant was willing or consenting (*R v DMC* (2002) 137 A Crim R 246). It is not clear whether the prosecution must prove an absence of consent in relation to the other forms of conduct.
14. The offence concerns the fact of interference with the liberty of the victim, rather than the duration or magnitude of that interference. Where in issue, the sufficiency of the distance travelled, or the length of time the person is detained, is a jury question and to be decided on the facts of each case (*R v Wellard* [1978] 1 WLR 921; *Davis v R* [2006] NSWCCA 392; *R v Campbell and Brennan* [1981] Qd R 516).

15. The offence is committed when accused leads, take or entices the victim away from the place the victim wished to be. It is not necessary to show that the victim reached the destination the kidnapper intended (*R v Wellard* [1978] 1 WLR 921).

16. An accused cannot rely on a claim of right to justify the detention of a person in order to enforce a debt. The circumstances in which a person has a lawful power to detain another are limited, and include the relationship of parent or guardian and child, or a lawful power to arrest or detain (*Williams v R* [2006] NSWCCA 26).

Intention

17. The second element concerns the offender's intention. Section 63A specifies two forms of intention that may establish the offence.

Intent to demand a ransom

18. The first way to establish the second element is to show that the offender intended to demand payment by way of ransom for the release or return of the victim (*Crimes Act 1958* s 63A).

19. Demand for ransom from a 'person' may include a demand made to the State and arguably other organisations that that are not natural persons (*R v Boland* [1974] VR 849; *Austin v R* (1988) 49 SASR 108).

20. The demand may also be made to the person who was detained or taken away or to a third person (*Crimes Act 1958* s 63A; *R v Campbell & Brennan* [1981] Qd R 516).

21. It is not necessary to show that any demand or threat was actually made, or that it reached its intended recipient (*Crimes Act 1958* s 63A; *Austin v The Queen* (1989) 166 CLR 669).

Intent to gain an advantage

22. The second way in which the prosecution may prove the second element is to show that the offender intended to gain an advantage from the detention of the victim (*Crimes Act 1958* s 63A).

23. This basis of proving the second element is therefore limited to cases in which the prosecution proves the first element by showing that the accused detained the victim. Merely luring or taking the victim away will not provide the factual basis for meeting this element without also proving that the victim was detained (see *Crimes Act 1958* s 63A and *R v Hendy-Freegard* [2008] QB 57). See 7.4.17 False Imprisonment for information on when a person is detained.

24. The advantage need not be a pecuniary one and may be satisfied in a variety of ways. It can include psychological satisfaction from spending time in the company of the victim or sexual gratification (*R v Nguyen* [1998] 4 VR 394; *R v Robson & Collett* [1978] 1 NSWLR 73; *R v Stuart*, NSW DC, 20/5/1976; *Davis v R* [2006] NSWCCA 392; *R v Rowe* (1996) 89 A Crim R 467; *R v Rose* [2003] NSWCCA 411).

25. The advantage may be obtained from the victim of the detention and the offence is not limited to an intention to gain an advantage from a third person (*R v Robson & Collett* [1978] 1 NSWLR 73).

26. An intent to prevent a disadvantage (such as preventing a victim from escaping who could otherwise inform police of the offender's location) may be treated as an intent to gain an advantage (*R v Robson & Collett* [1978] 1 NSWLR 73).

27. The process of detaining the victim may itself provide an advantage, such as where a kidnapper demands transportation from the victim (*R v Campbell & Brennan* [1981] Qd R 516).

Last updated: 2 December 2013

7.4.20.1 Charge: Kidnapping (Statutory)

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This charge can be used when the accuse is charged with kidnapping contrary to Crimes Act 1958 s 63A.

The Elements

I must now direct you about the crime of kidnapping. That crime has the following two elements which the prosecution must prove beyond reasonable doubt:

One – The accused led, took or enticed the complainant away, or detained the complainant.

Two – The accused did so with the intention of demanding a ransom or gaining an advantage.

I will now explain each of these elements in more detail.[893]

Leading, taking, enticing or detaining

The first element that the prosecution must prove is that the accused led, took or enticed NOC away, or detained NOC.

[*If the accused is alleged to have led, took or enticed the complainant, add the following shaded section.*]

To establish this element, the prosecution must prove that NOA's actions were an effective cause of NOC accompanying him/her to another place. It does not matter whether this was accomplished by violence or by persuasion. What matters is whether NOA caused NOC to accompany him/her.

[*If the accused is alleged to have detained the complainant, add the following shaded section.*]

To establish this element, the prosecution must show that NOA prevented NOC from freely moving from one place to another. [*If the reasonableness of any means of escape are in issue, add the following darker shaded section.*]

In deciding whether NOA detained NOC, you must consider whether NOC had a reasonable means of escape. A person who has a reasonable means of escape is not detained. To determine whether a means of escape was reasonable, you must consider [*describe factors relevant to the reasonableness of escape, including risks to the victim, risks to property, distance and time required to escape and the legality of the means of escape*].

[*Summarise competing prosecution and defence evidence and arguments.*]

Intention

The second element is that at the time of [leading NOC away/taking NOC away/enticing NOC away/detaining NOC], NOA intended to demand a ransom or gain an advantage from detaining NOC. There are two possible intentions that will meet this element – intending to demand a ransom or gain an advantage from detaining NOC.

In this case, the prosecution says that NOA intended to [demand a ransom/gain an advantage from detaining NOC].

---

[893] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[*If the prosecution relies on an intent to demand a ransom, add the following shaded section.*]

A ransom is a payment for the release or return of a person. The law says that a person may be guilty of this offence by intending to demand a ransom from either NOC, or from another person. In considering this element, it does not matter if NOA did not demand a ransom or did not successfully communicate this demand. This element is only concerned with NOA's intention at the time s/he [led NOC away/took NOC away/enticed NOC away/detained NOC].[894]

[*If the prosecution relies on an intent to gain an advantage, add the following shaded section.*]

The law says that NOA may intend to gain an advantage for him/herself or another, and that advantage has a very broad meaning. If you are satisfied that, by detaining NOC, NOA intended [*describe advantage relied upon by the prosecution, e.g.* "to have the benefit of NOC's company"/"to stop NOC from reporting his location to police"], then you may find this element proven.

[*Summarise competing prosecution and defence evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of kidnapping the prosecution must prove to you beyond reasonable doubt:

One – That NOA led, took or enticed NOC away, or detained NOC;

Two – That NOA did so with the intention of demanding a ransom or gaining an advantage.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of kidnapping.

Last updated: 2 December 2013

7.4.20.2 Checklist: Kidnapping (Statutory)

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Two elements the prosecution must prove beyond reasonable doubt:

1. The accused led, took or enticed the complainant away, or detained the complainant; and

2. The accused did so with the intention of demanding a ransom or gaining an advantage.

Taking the complainant

1.1 Did the accused lead, take or entice the complainant away?

Consider – Was the accused the effective cause of the complainant accompanying him or her?

If yes, then go to 2.1

If no, then go to 1.2

1.2 Did the accused detain the complainant?

Consider – Did the accused prevent the complainant from moving freely from one place to another,

[894] If the accused's intention may have changed over time, the judge should explain how those changes may be relevant.

without a reasonable means of escape?

If yes, then go to 2.1

If no, then the accused is not guilty of kidnapping

Intention of accused

2.1 Did the accused take or detain the complainant with the intention of demanding a ransom?

If yes, then the accused is guilty of kidnapping (as long as you also answered yes to question 1.1 or 1.2)

If no, then go to 2.2

2.2 Did the accused take or detain the complaint with the intention of gaining an advantage?

If yes, then the accused is guilty of kidnapping (as long as you also answered yes to question 1.1 or 1.2)

If no, then the accused is not guilty of kidnapping

Last updated: 30 May 2014

7.4.21 Common Law Riot

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Introduction

1. At common law, an assembly of three or more people is an 'unlawful assembly' if it is carried out with the intention to commit a crime by open force or to carry out any lawful or unlawful common purpose in a manner that gives firm and courageous people in the neighbourhood reasonable grounds to apprehend a breach of the peace (*R v O'Sullivan* (1948) 48 SR (NSW) 400; 65 WN (NSW) 155; see also *Black v Corkery* (1988) 33 A Crim R 134).
2. A lawful assembly of three or more people may become unlawful if a proposal is made to it to commit a violent act which will disturb the public peace, and that proposal is acted on (*R v O'Sullivan* (1948) 48 SR (NSW) 400; 65 WN (NSW) 155; see also *Black v Corkery* (1988) 33 A Crim R 134).
3. An 'unlawful assembly' becomes a 'rout' as soon as the assembled persons do anything toward carrying out the illegal common purpose which makes their assembly unlawful. A 'rout' becomes a 'riot' when this illegal purpose is forcibly effected by persons mutually intending to resist any opposition (*Halsbury's Laws of England* (4th ed, 1976) Vol 11, paras 856–862).

Riots, routs and unlawful assembly distinguished

4. It is suggested that the distinction between a riot, rout and unlawful assembly is that a riot is a tumultuous meeting of people who are guilty of actual violence; a rout occurs where such people try to commit an act that would make them rioters; and an unlawful assembly occurs where such people meet intending to make a riot, but neither carry their purpose into effect, nor make any attempt to.
5. Like an affray, a riot involves both violence and public alarm. They involve public alarm because they are currently or potentially dangerous.

Elements

6. For an accused to be guilty of riot, the following five elements must be satisfied simultaneously:
   (a) Three or more people assembled, of which the accused is one;
   (b) At least three of these people, including the accused, had a common purpose;
   (c) The assembled people, including the accused, embarked on executing that common purpose;
   (d) The people who had the common purpose intended to help each other, by force if necessary, against any person who may oppose them in the execution of their common purpose, and the accused also intended to provide such help; and
   (e) The people who had the common purpose used such violence as would alarm at least one person of reasonable firmness and courage (R v McCormack [1981] VR 104; Anderson v Attorney-General (NSW) (1987) 10 NSWLR 198; Cook, Hartigan and McCarr v R [1995] 2 Qd R 77; Boxer v R (1995) 14 WAR 505).
7. The requirement of a common purpose means that participants in a riot may be jointly charged only if they were contemporaneously involved in the alleged riot (*Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198).
8. A jury may find an accused guilty of rout or unlawful assembly as alternative verdicts to riot if the prosecution fails to prove all the essential elements of riot (*R v Wright* (1994) 74 A Crim R 152; *R v Cook* [1995] 2 Qd R 77; *Boxer v The Queen* (1995) 14 WAR 505).

Three or more people assembled

9. The first element that the prosecution must prove is that there were three or more persons assembled, and that the accused was one of those persons.
10. All alleged participants must be present at the scene of the riot at the same time, unless they incited the riot that subsequently ensued in their absence (*Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198; see also *R v Sharpe* (1848) 3 Cox CC 288; *R v Caird* (1970) 54 Cr App R 499).
11. Thus, when several accused are alleged to have committed the same offence of riot and one leaves the scene, they cannot be jointly guilty of the offence from the time that person leaves (*Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198).
12. The exception to this is where an accused encourages or incites the others to continue the riot, even though he or she has left the scene. In that instance, the accused may be charged as a principal along with the others (*Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198; see also *R v Sharpe* (1848) 3 Cox CC 288).
13. Where a crowd temporarily disperses, but a significant number of them later reassemble, valid charges of riot may still be brought (*Tomarchio v Pocock* [2002] WASCA 156).

For a common purpose

14. The second element is that at least three persons, one of which must be the accused, must have been assembled for a common purpose.
15. The common purpose may be lawful or unlawful (*Cunninghame, Graham and Burns* (1888) 16 Cox CC 420).
16. It may also be a private or public or political purpose (*O'Brien v Friel* [1974] NI 29).
17. The common purpose cannot be constituted by continuing the riot itself. Thus, it is not sufficient to prove a common purpose to show that, once a riot has commenced and extended over a period of time, people, otherwise than peaceably, joined the assembly and participated in it (*Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198).

Who embark on executing that common purpose

18. The third element requires those persons to have embarked on that common purpose (*Field v The Receiver of the Metropolitan Police* [1921] 2 KB 853).

19. For an accused to be guilty of the offence of riot, he or she must have been involved in at least some of the activity that makes the assembly a riot (*R v Wright* (1994) 74 A Crim R 152; *R v Cook* [1995] 2 Qd R 77; *Boxer v The Queen* (1995) 14 WAR 505).

20. Whether a particular accused is sufficiently involved is a question for the jury (*R v Cook* [1995] 2 Qd R 77).

21. However, it has been suggested that, where the behaviour that is alleged to make an assembly a riot is comprised of the assembly moving in a threatening way, the accused must participate in such movement. If the alleged behaviour is made up of several elements, such as movement, threats and property damage, it would be sufficient for the accused to be involved in some of that activity (*R v Cook* [1995] 2 Qd R 77; see also *R v Thomas* [1993] 1 Qd R 323).

22. Where some, but not all, of the members of a group that is unlawfully assembled engage in riotous behaviour, only those who actively engage in such behaviour will be guilty of the offence of riot (*R v Cook* [1995] 2 Qd R 77).

Intending to help each other by force if necessary

23. The next element that needs to be proved requires the assembled persons to have intended to help each other by force if necessary (*Field v The Receiver of the Metropolitan Police* [1921] 2 KB 853; see also *R v Murray* (1992) 16 Crim LJ 273).

24. The accused must also have individually had that same intent to help the other members of the group by force if necessary.

25. It has been noted that this element means that it is difficult to envisage a situation where a person can be guilty of the same offence of riot as another person unless at some point in time they were present together in the assembly (*Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198).

26. Therefore, if several accused are charged with the one offence of riot, they each must have had both a common purpose and intention to help each other, by force if necessary, against any person who might oppose them in execution of that common purpose (*Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198).

Who use such violence to alarm at least one person of reasonable firmness and courage

27. The final element requires those persons to use such violence to alarm at least one person of reasonable firmness and courage.

28. It is doubtful that this requires a real person to be alarmed. The better view is that the violence must be of such a level that a hypothetical bystander of reasonable firmness and courage would be put in fear by the display (*Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198; see also *J W Dwyer Ltd v Metropolitan Police District Receiver* [1967] 2 QB 970; *Kamara v Director of Public Prosecutions* [1974] AC 104).

29. The assembly of persons becomes riotous at the latest when alarming force or violence begins to be used (*Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198).

30. The alleged force and violence needs to occur simultaneously with the execution of the common purpose. Therefore, if a group of three or more assemble together for a common purpose and incidentally display force and violence, but then peacefully set out to execute the common purpose, no offence of riot will have been committed. However, they could be guilty of participating in an unlawful assembly (*Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198).

31. It has been suggested that the degree of force required to be displayed to constitute the offence of riot must be 'so tumultuous ... as to disturb the peace' (*Boxer v The Queen* (1995) 14 WAR 505).

32. This does not necessarily require physical violence, personal injury or property damage. It only requires 'tumult', which has been interpreted as involving several people being involved in agitated movement, or an excited and emotionally aroused assembly of people, which is usually (although not necessarily) accompanied by noise (*R v Thomas* [1993] 1 Qd R 323; see also *Boxer v The Queen* (1995) 14 WAR 505; *J W Dwyer Ltd v Metropolitan Police District Receiver* [1967] 2 QB 970).

Last updated: 1 July 2017

7.4.21.1 Charge: Common Law Riot

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I must now direct you about the crime of riot. To prove this crime, the prosecution must prove the following five elements beyond reasonable doubt.

One – the accused was one of three or more people who were assembled.

Two – at least three of these people, including the accused, had a common purpose.

Three – the people who had the common purpose, including the accused, embarked on executing that common purpose.

Four – the people who had the common purpose intended to help each other, by force if necessary, against any person who may oppose the group in the execution of its common purpose, and the accused also intended to provide such help.

Five – the people with the common purpose used such violence to alarm at least one person of reasonable firmness and courage.

I will now explain each of these elements in more detail.

The accused was one of three or more people who were assembled

The first element that the prosecution must prove beyond reasonable doubt is that the accused was one of three or more people who were assembled. The accused must have been present at the scene with these people at the same time, unless s/he incited the riot that subsequently ensued in his/her absence.

In this case the prosecution alleged that NOA was part of the following group: [*identify alleged group*].

[*Summarise relevant evidence and arguments about alleged group.*]

It is for you to determine, based on all the evidence, whether NOA was one of three or more persons who were assembled. It is only if you are satisfied, beyond reasonable doubt, that s/he did, that this first element will be met.

Those people had a common purpose

The second element that the prosecution must prove beyond reasonable doubt is that at least three of these people, including the accused, had a common purpose. The common purpose may be lawful or unlawful. It may also be a private or public or political purpose.

In this case the prosecution alleged that at least three of these people, including NOA, had the following common purpose: [*identify alleged common purpose*].

[*Summarise relevant evidence and arguments about alleged common purpose.*]

[*Summarise relevant evidence and arguments about accused's purpose.*]

It is only if you are satisfied, beyond reasonable doubt, that at least three people, including NOA, had a common purpose, that this second element will be met.

The group embarked on executing that common purpose

The third element that the prosecution must prove beyond reasonable doubt is that the people with the common purpose, including the accused, embarked on executing that common purpose.

In this case, the prosecution alleged that the people with the common purpose, including NOA, embarked on executing that common purpose by: [*identify acts alleged to have been done in pursuance of that common purpose*].

[*Summarise relevant evidence and arguments about acts alleged to have been done in pursuance of the common purpose.*]

It is only if you are satisfied, beyond reasonable doubt, that the assembled people, including NOA, embarked on executing that common purpose, that this third element will be met.

The group including the accused intended to help each other by force if necessary

The fourth element that the prosecution must prove beyond reasonable doubt is that the people who had the common purpose intended to help each other by force if necessary and that the accused individually had that intent.

In this case the prosecution alleged that the people who had the common purpose intended to help each other by force if necessary because: [*identify evidence alleged to prove intent of group*].

[*Summarise relevant evidence and arguments about evidence alleged to prove intent of people with common purpose.*]

The prosecution also alleged that NOA had that intent individually because: [*identify evidence alleged to prove intent of NOA*].

[*Summarise relevant evidence and arguments about evidence alleged to prove intent of NOA.*]

It is only if you are satisfied, beyond reasonable doubt, that the people who had the common purpose intended to help each other by force if necessary, and that NOA individually had that same intent, that this fourth element will be met.

The group used such violence to alarm at least one person of reasonable firmness and courage

The fifth element that the prosecution must prove beyond reasonable doubt is that the group with the common purpose used such violence so as to alarm at least one person of reasonable firmness and courage.

In this case the prosecution alleged that the group with the common purpose used such violence to alarm at least one person of reasonable firmness and courage by: [*identify alleged acts of violence*].

[*Summarise relevant evidence and arguments about evidence regarding acts of violence and their capacity to cause the requisite level of alarm.*]

It is only if you are satisfied, beyond reasonable doubt, that the group used such violence to alarm at least one person of reasonable firmness and courage, that this fifth element will be met.

Relate law to the evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of riot the prosecution must prove to you beyond reasonable doubt:

One – that s/he was one of three or more people who were assembled; and

Two – that at least three of these people, including NOA, had a common purpose; and

Three – the people with the common purpose, including NOA, embarked on executing that common purpose; and

Four – the people who had the common purpose intended to help each other by force if necessary and NOA also intended to provide such help; and

Five – that the people with the common purpose used such violence to alarm at least one person of reasonable firmness and courage.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of riot.

Rout or unlawful assembly

[*In most cases, it will be necessary to leave a rout or unlawful assembly offence as an alternative offence. In such cases, a suitably modified version of the appropriate charge should be inserted here. When modifying the charge, the judge must carefully explain the differences between riot, rout and unlawful assembly.*]

Last updated: 1 July 2017

7.4.21.2 Checklist: Common Law Riot

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[*This checklist is based on intentional riot. If recklessness is in issue it will need to be amended as necessary.*]

Five elements that the prosecution must prove beyond reasonable doubt:

33. The accused was one of three or more people who were assembled; and
34. At least three of these people, including the accused, had a common purpose; and
35. The people who had the common purpose, including the accused, embarked on executing that common purpose; and
36. The people who had the common purpose intended to help each other by force if necessary and the accused also intended to provide such help; and
37. The group used such violence to alarm at least one person of reasonable firmness and courage.

Assembly of people

1. Was the accused one of three or more people who were assembled?

If Yes, then go to 2.1

If No, then the accused is not guilty of riot

Common purpose

2.1 Did at least three of those people have a common purpose?

If Yes, then go to 2.2

If No, then the accused is not guilty of riot

2.2 Did the accused have that same common purpose?

If Yes, then go to 3

If No, then the accused is not guilty of riot

Execution of common purpose

3. Did the people who had the common purpose, including the accused, embark on executing that common purpose?

If Yes then go to 4.1

If No, then the accused is not guilty of riot

Intention

4.1. Did the people who had the common purpose intend to help each other, by force if necessary, against any person who may oppose the group in the execution of its common purpose?

If Yes, go to 4.2

If No, then the accused is not guilty of riot

4.2 Did the accused also intend to provide such help?

If Yes, go to 5

If No, then the accused is not guilty of riot

Use of violence

5. Did the people with the common purpose use such violence to alarm at least one person of reasonable firmness and courage?

If Yes, then the accused is guilty of riot (as long as you have answered yes to Questions 1, 2, 3 and 4)

If No, then the accused is not guilty of riot

Last updated: 1 July 2017

7.4.22 Affray

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Introduction

1. Affray is a statutory offence under *Crimes Act 1958* s 195H.
2. Before the commencement of *Crimes Act 1958* s 195G, affray was a common law offence.

3. The common law offence was defined as where the accused participates in unlawful violence of such a kind as is calculated to cause any person of reasonable firmness who might witness it to be terrified (*Attorney General's Reference (No 3 of 1983)* [1985] 1 All ER 501; *DPP v Russell* (2014) 44 VR 471).
4. Under the *Crimes Act 1958*, affray is committed where a person uses or threatens unlawful violence and whose conduct would cause a person of reasonable firmness present at the scene to be terrified.
5. The statutory offence largely had the effect of expanding the common law offence to explicitly include threats of violence in addition to the use of violence. The statutory provision also simplified the law regarding whether a "person of reasonable firmness" need be present.
6. Unless stated otherwise, all statutory references are to sections of the *Crimes Act 1958*.

Elements

7. For an accused to be guilty of affray, the following elements must be satisfied:
   (a) The accused used or threatened unlawful violence;
   (b) The accused's conduct was intentional or reckless;
   (c) The accused's conduct would cause a person of reasonable firmness present at the scene to be terrified.

Used or threatened unlawful violence

8. The first element the prosecution must prove is that the accused used or threatened unlawful violence.
9. An affray can occur in private as well as public places (*Crimes Act 1958* s 195H(4)(a); *Button v DPP* [1966] AC 591, *Taylor v DPP* [1973] AC 964).

'Unlawful violence'

10. The *Crimes Act 1958* does not define 'unlawful violence' for affray. It does, however identify "engaging in unlawful fighting with another person" as an example of "unlawful violence" (*Crimes Act 1958* s 195H(1)).
11. Common law prosecutions for affray provide further examples of unlawful violence, including face-to-face confrontations where violence was used or threatened (*I v Director of Public Prosecutions* [2002] 1 AC 285) and one or more people shouting, struggling, threatening, waving weapons, throwing objects and exchanging and threatening blows (*R v Smith* [1997] 1 Cr App R 14).
12. In the context of interpreting the term "act of violence" in *Crimes Act 1958* s 3A, the Full Court explained that violence was not limited to physical force, but included threats and menaces to induce fear or terror or to intimidate in order to remove resistance (*R v Butcher* [1986] VR 43; *R v Galas* (2007) 18 VR 205, [31]; *Rich v R* (2014) 43 VR 558, [258]).

'Threatened'

13. Mere possession of weapons does not amount to a threat of unlawful violence. However, where the weapons are visible, or held or brandished in a threatening way, this might amount to unlawful violence (*I v Director of Public Prosecutions* [2002] 1 AC 285).
14. Words alone are not sufficient to provide a threat of unlawful violence (*Crimes Act 1958* s 195H(3); *R v Robinson* [1993] Crim LR 581). However, a verbal threat of unlawful violence which is accompanied by brandishing a weapon of some kind may be sufficient (*R v Dixon* [1993] Crim LR 579).

Number of persons

15. Affray can be committed by one person alone, if they are using or threatening unlawful violence in a manner that might reasonably be expected to terrify a bystander (*Taylor v DPP* [1973] AC 964; *Attorney General's Reference (No 3 of 1983)* [1985] 1 All ER 501; *Colosimo and Ors v Director of Public Prosecutions* [2005] NSWSC 854).

16. If two or more persons threaten unlawful violence, their conduct will be considered together, and it is immaterial whether they used or threatened unlawful violence simultaneously (*Crimes Act 1958* s 195H(5)).

Intentionally or recklessly

17. The second element the prosecution must prove is that the accused's conduct was intentional or reckless.

18. The accused must have intended to use or threaten violence or was reckless as to whether the person's conduct involved the use of violence or threatend violence (*Crimes Act 1958* s 195H(2)).

19. Reckless in this context means acting in the knowledge that unlawful violence would probably result from their conduct but deciding to continue regardless (*R v Crabbe* (1985) 156 CLR 464).

Would cause a person of reasonable firmness to be terrified

20. The third element the prosecution must prove is that the conduct of the accused would cause a person of reasonable firmness present at the scene to be terrified.

21. This element is concerned with whether the conduct would cause a hypothetical person of reasonable firmness to fear for their safety, rather than a specific person at the scene (*I v Director of Public Prosecutions* [2002] 1 AC 285).

22. In assessing this element, the jury is concerned with the reaction of the hypothetical reasonable person at the time of the accused's acts of intentional violence (*R v Novakovic* [2019] VSC 339, [396]).

23. It is not necessary to prove that a person of reasonable firmness was present at the time of the alleged affray (*Crimes Act 1958* s 195H(4)(b)).

24. At common law, this element operated differently for affrays in public and in private. For public affrays, it was unnecessary to prove the presence or likely presence of a person of reasonable firmness (*Attorney General's Reference (No 3 of 1983)* [1985] 1 All ER 501), whereas for private affrays, the prosecution needed to prove the actual presence of persons of reasonable firmness (*R v Taylor* [1973] AC 964). Under statute, the presence of a person of reasonable firmness is not required in any case.

25. The prosecution need only prove that the violence was capable of terrifying a bystander of reasonable firmness (*R v Sharp* [1957] 1 QB 552; *Paisley v R* [2012] VSCA 79). The conduct must be examined objectively.

'Reasonable firmness'

26. The meaning of "reasonable firmness" is not defined in the *Crimes Act 1958* (Vic).

27. Common law authorities often referred to a person of "reasonableness firmness and courage" (*R v Ly* [2004] VSCA 45; *DPP v Russell* (2014) 44 VR 471) or "reasonably firm character" (*R v Taylor* [1973] AC 964).

'Terrified'

28. 'Terrified' is a more agitated emotional state than "nervous" or "frightened" (*Paisley v R* [2012] VSCA 79).

29. The circumstances of affray are varied. Affray may involve trivial rowdy scenes which terrify for a short time or at the other end of the scale, an extensive skirmish involving numerous casualties (*R v Keys* (1987) 84 Cr App R 204).

Affray while wearing a face covering

30. Section 195H(1)(b) specifies a higher maximum penalty that applies if, at the time of committing the offence, the accused was wearing a face covering primarily:

    i) To conceal the person's identity; or

    ii) To protect the person from the effects of a crowd-controlling substance (*Crimes Act 1958* s 195H(1)(b)).

31. While this provision has not yet been considered, it is likely that the higher maximum penalty will only apply where the prosecution specifies that the face-covering was present as part of its statement of the offence, and the jury is satisfied of proof of these additional matters beyond reasonable doubt as elements of an aggravated offence (see *R v Courtie* (1984) AC 463; *Kingswell v The Queen* (1985) 159 CLR 264; *R v Meaton* (1986) 160 CLR 359; *R v Satalich* (2001) 3 VR 231).

32. Cases involving face-covering therefore require proof of two additional elements:

    (a) That the accused was wearing a face covering at the time of committing the offence; and

    (b) That the accused's purpose of wearing the face-covering was to conceal his or her identity or to protect from the effects of a crowd-controlling substance.

Self-defence

33. Self-defence is a complete defence to the charge of affray (*Attorney General's Reference (No 3 of 1983)* [1985] 1 All ER 501; *Honeysett v The Queen* (1987) 10 NSWLR 638; *R v Nguyen* (1995) 36 NSWLR 397).

34. If self-defence arises, the jury will need to be instructed about that issue. See 8.1 Statutory Self-defence (From 1/11/14).

Last updated: 17 February 2020

7.4.22.1 Charge: Affray

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This charge should be used when the prosecution alleges that the accused committed the offence of affray but the accused, at the time of committing the offence, was not wearing a face covering.

This charge will need to be modified where the accused is one of several people allegedly involved in the affray. See Statutory Complicity (From 1/11/14) and Charge: Common law riot for guidance.

I must now direct you about the crime of affray. To prove this crime, the prosecution must prove the following three elements beyond reasonable doubt.

One – the accused used or threatened unlawful violence.

Two – the accused's use or threat of violence was [intentional/reckless].

Three – the accused's conduct would cause a person of reasonable firmness to be terrified.

I will now explain each of these elements in more detail.

Used or threatened unlawful violence

The first element the prosecution must prove beyond reasonable doubt is that the accused used or threatened unlawful violence.

There are two parts to this element, and the prosecution must prove both parts beyond reasonable doubt.

Firstly, you need to be satisfied that NOA actually engaged in the conduct alleged by the prosecution.

In this case the prosecution has alleged that NOA [*identify alleged conduct*].

[*Summarise relevant evidence and arguments about NOA's specific conduct.*]

The second part of this element is that the accused's conduct involved the use or threat of unlawful violence. There is no dispute that, if NOA [*identify alleged conduct*], that conduct involves unlawful violence.[895]

If you are satisfied that NOA [*identify alleged unlawful violence*], and that this conduct constitutes unlawful violence for the purposes of the offence of affray, then this first element will be met.

Intentional or reckless

The second element goes to the accused's state of mind. The prosecution must prove beyond reasonable doubt that the accused used or threatened violence [intentionally/recklessly].

[*If the prosecution alleges that the accused acted reckless, add the following shaded section.*]

To prove this element, the prosecution must prove that NOA was aware that [his/her] conduct would probably involve [using/threatening] unlawful violence.

[*Summarise relevant evidence and arguments regarding intention and/or recklessness.*]

It is only if you are satisfied beyond reasonable doubt that the accused's use or threat of violence was [intentional/reckless] that this second element will be met.

A person of reasonable firmness would be terrified

The third element the prosecution must prove beyond reasonable doubt is that the accused's conduct would cause a person of reasonable firmness present at the scene to be terrified.

The prosecution does not need to prove that any person of reasonable firmness actually was present at the time, or was terrified. Instead, the question is whether NOA's conduct was *capable* of terrifying such a person, if such a person had been present.

The law does not define the phrase 'reasonable firmness'. It is up to you to decide what it means, and how it operates for this charge.

[*If two or more people are alleged to have used or threatened unlawful violence, add the following shaded section.*]

When you are considering the impact of the violence on a person of reasonable firmness, you must also take into account any unlawful violence by [*identify other relevant people*]. You must assess the total impact of all the conduct of [*identify relevant people*] which you find proved. For this purpose, you are not limited to conduct that occurred at the exact same time. [*If appropriate, give an example of non-simultaneous conduct in the circumstances of the case.*]

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[895] If the characterisation of the conduct as unlawful violence is in issue, this part of the direction must be modified to explain the issues.

[*Summarise relevant prosecution and defence evidence and arguments regarding the conduct and whether it would have been terrifying to a person of reasonable firmness.*]

It is only if you are satisfied, beyond reasonable doubt, that the NOA's conduct would cause a person of reasonable firmness present at the scene to be terrified, that this third element will be met.

Relate law to the evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of affray the prosecution must prove to you beyond reasonable doubt:

One – the accused used or threatened unlawful violence; and

Two – the accused's use or threat of violence was [intentional/reckless]; and

Three – the accused's conduct would cause a person of reasonable firmness present at the scene to be terrified.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of affray.

Last updated: 17 April 2019

7.4.22.2 Checklist: Affray

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused used or threatened unlawful violence; and

2. The accused's conduct was intentional or reckless; and

3. The accused's conduct would cause a person of reasonable firmness present at the scene to be terrified.

Use or threaten unlawful violence

1. Did the accused use or threaten unlawful violence?

If yes, then go to 2

If no, then the accused is not guilty of affray

State of Mind

2. Was the accused's conduct [intentional/reckless]?

Consider – Reckless means aware that it was probable that the conduct involved unlawful violence

If yes, then go to 3

If no, then the accused is not guilty of affray

Person of reasonable firmness would be terrified

3. Would the accused's conduct have caused a person of reasonable firmness present at the scene to be terrified?

If yes, then the accused is guilty of affray (as long as you also answered yes to questions 1 and 2)

If no, then the accused is not guilty of affray

Last updated: 17 April 2019

7.4.22.3 Charge: Affray with Face Covering

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This charge should be used when the prosecution alleges that the accused committed the offence of affray and the accused, while committing the offence, was wearing a face covering.

If the accused was not wearing a face covering, use Charge: Affray.

This charge will need to be modified where the accused is one of several people allegedly involved in the affray. See Statutory Complicity (From 1/11/14) and 7.4.21.1 Charge: Common law riot for guidance.

I must now direct you about the crime of affray with face covering. To prove this crime, the prosecution must prove the following five elements beyond reasonable doubt.

One – the accused used or threatened unlawful violence.

Two – the accused's use or threat of violence was [intentional/reckless].

Three – the accused's conduct would cause a person of reasonable firmness to be terrified.

Four – the accused, while engaging in the conduct, was wearing a face covering.

Five – the accused was wearing the face covering used primarily to conceal their identity or to protect the person from the effects of a crowd-controlling substance.

I will now explain each of these elements in more detail.

Used or threatened unlawful violence

The first element the prosecution must prove beyond reasonable doubt is that the accused used or threatened unlawful violence.

There are two parts to this element, and the prosecution must prove both parts beyond reasonable doubt.

Firstly, you need to be satisfied that NOA actually engaged in the conduct alleged by the prosecution.

In this case the prosecution has alleged that NOA [*identify alleged conduct*].

[*Summarise relevant evidence and arguments about NOA's specific conduct.*]

The second part of this element is that the accused's conduct involved the use or threat of unlawful violence. There is no dispute that, if NOA [*identify alleged conduct*], that conduct involves unlawful violence.[896]

If you are satisfied that NOA [*identify alleged unlawful violence*], and that this conduct constitutes unlawful violence for the purposes of the offence of affray, then this first element will be met.

[896] If the characterisation of the conduct as unlawful violence is in issue, this part of the direction must be modified to explain the issues.

Intentional or reckless

The second element goes to the accused's state of mind. The prosecution must prove beyond reasonable doubt that the accused used or threatened violence [intentionally/recklessly].

[*If the prosecution alleges that the accused acted reckless, add the following shaded section.*]

To prove this element, the prosecution must prove that NOA was aware that [his/her] conduct would probably involve [using/threatening] unlawful violence.

[*Summarise relevant evidence and arguments regarding intention and/or recklessness.*]

It is only if you are satisfied beyond reasonable doubt that the accused's use or threat of violence was [intentional/reckless] that this second element will be met.

A person of reasonable firmness would be terrified

The third element the prosecution must prove beyond reasonable doubt is that the accused's conduct would cause a person of reasonable firmness present at the scene to be terrified.

The prosecution does not need to prove that any person of reasonable firmness actually was present at the time, or was terrified. Instead, the question is whether NOA's conduct was *capable* of terrifying such a person, if such a person had been present.

The law does not define the phrase 'reasonable firmness'. It is up to you to decide what it means, and how it operates for this charge.

[*If two or more people are alleged to have used or threatened unlawful violence, add the following shaded section.*]

When you are considering the impact of the violence on a person of reasonable firmness, you must also take into account any unlawful violence by [*identify other relevant people*]. You must assess the total impact of all the conduct of [*identify relevant people*] which you find proved. For this purpose, you are not limited to conduct that occurred at the exact same time. [*If appropriate, give an example of non-simultaneous conduct in the circumstances of the case.*]

[*Summarise relevant prosecution and defence evidence and arguments regarding the conduct and whether it would have been terrifying to a person of reasonable firmness.*]

It is only if you are satisfied, beyond reasonable doubt, that the NOA's conduct would cause a person of reasonable firmness present at the scene to be terrified, that this third element will be met.

Wearing a face covering

The fourth element the prosecution must prove beyond reasonable doubt is that the accused, while engaging in the conduct was wearing a face covering.

In this case the prosecution has alleged that the NOA, while [*identify alleged unlawful violence*], wore a [*identify specific type of face covering*].

[*Summarise relevant evidence about NOA's face covering.*]

It is only if you are satisfied, beyond reasonable doubt, that the accused was wearing a face covering while engaging in the conduct, that this fourth element will be met.

Face covering used to conceal identity or protect from crowd-controlling substance

The fifth element that the prosecution must prove is that the accused was wearing a face covering primarily [to conceal their identity/to protect the person from the effects of a crowd-controlling substance].

[*Summarise relevant evidence about primary purpose of NOA's face covering.*]

It is only if you are satisfied, beyond reasonable doubt, that the accused wore a face covering primarily to [conceal his/her identity/protect himself/herself from the effects of a crowd controlling substance] that this fifth element will be met.

Relate law to the evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of affray the prosecution must prove to you beyond reasonable doubt:

One – the accused used or threatened unlawful violence; and

Two – the accused's use or threat of violence was [intentional/reckless]; and

Three – the accused's conduct would cause a person of reasonable firmness present at the scene to be terrified.

Four – the accused, while engaging in the conduct, was wearing a face covering.

Five – the accused was wearing the face covering primarily [to conceal his/her identity/to protect himself/herself from the effects of a crowd-controlling substance].

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of affray with face covering.

Last updated: 17 April 2019

7.4.22.4 Checklist: Affray with Face Covering

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused used or threatened unlawful violence; and

2. The accused's use or threat of violence was intentional or reckless; and

3. The accused's conduct would cause a person of reasonable firmness present at the scene to be terrified; and

4. The accused was wearing a face covering;

5. The accused was wearing the face covering primarily to [conceal their identity/protect themselves from the effects of a crowd-controlling substance]

Use or threaten unlawful violence

1. Did the accused use or threaten unlawful violence?

If yes, then go to 2

If no, then the accused is not guilty of affray with face covering

State of Mind

2. Was the accused's use or threat of unlawful violence [intentional/reckless]?

Consider – Reckless means aware that it was probable that the conduct involved unlawful violence

If yes, then go to 3

If no, then the accused is not guilty of affray with face covering

Person of reasonable firmness would be terrified

3. Would the accused's conduct have caused a person of reasonable firmness present at the scene to be terrified?

If yes, then go to 4

If no, then the accused is not guilty of affray with face covering

Wearing a Face Covering

4. Was the accused wearing a face covering when he/she used or threatened violence?

If yes, then go to 5

If no, then the accused is not guilty of affray with face covering

Face Covering Used to Conceal Identity or Protect from Crowd-Controlling Substance

5. Was the accused's primary purpose of wearing the face covering to [conceal his/her identity/protect himself/herself from the effects of a crowd-controlling substance]?

If yes, then the accused is guilty of affray with face covering (as long as you also answered yes to questions 1, 2, 3 and 4)

If no, then the accused is not guilty of affray with face covering

Last updated: 17 April 2019

7.5 Dishonesty and Property Offences

7.5.1 Theft

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Overview

1. While the offence of theft is created by *Crimes Act 1958* s 74, its basic definition is set out in s 72(1), with further explanation provided by s 73.

2. The offence has the following three elements which the prosecution must prove beyond reasonable doubt:

   i) The accused appropriated property belonging to another;

   ii) The accused did so with the intention of permanently depriving the other of the property; and

   iii) The accused acted dishonestly (*Crimes Act 1958* s 72).

3. The law of theft draws heavily upon the civil law of property. This commentary does not attempt to offer a detailed discussion of that law.

Appropriation of property belonging to another

4. For the first element to be met, the jury must be satisfied that:

   - The accused *appropriated* something;
   - The thing appropriated was *property*; and
   - The property *belonged to another person*.

Appropriation

5. Theft can only be committed by an act of "appropriation" (*Crimes Act 1958* s 72(1)).
6. The accused will have "appropriated" property if s/he:

   - Assumed any of the rights of the owner (*Crimes Act 1958* s 73(4)); and
   - Adversely interfered with or usurped the owner's rights in some way (*Roffel v R* [1985] VR 511).

Assumption of the owner's rights

7. A person "assumes the rights" of an owner by taking on the right to do something which the owner has the right to do by virtue of his or her ownership (*Stein v Henshall* [1976] VR 612).
8. There is no simple categorisation of the rights which constitute "the rights of the owner". This must be determined by reference to the civil law of property (*Roffel v R* [1985] VR 511; *Stein v Henshall* [1976] VR 612; *W (a child) v Woodrow* [1988] VR 358).
9. The rights of the owner generally include the right to control the property and the right to possess it (see, e.g. *Roffel v R* [1985] VR 511; *Stein v Henshall* [1976] VR 612; *W (a child) v Woodrow* [1988] VR 358).
10. This requirement will be satisfied if the accused has taken on *any* of the owner's rights. The prosecution does not need to prove the accused assumed *all* of those rights (*Stein v Henshall* [1976] VR 612; *W (a child) v Woodrow* [1988] VR 358).
11. Depending on the circumstances, "appropriation" can involve taking, using, damaging, extinguishing, lending, retaining or offering to sell another person's property (or any of their property rights) (see, e.g. *R v Williams* (2001) 1 Cr App R 23; *Roffel v R* [1985] VR 511; *Stein v Henshall* [1976] VR 612; *W (a child) v Woodrow* [1988] VR 358).

Adverse interference with the owner's rights

12. To have "appropriated" property, the accused must have adversely interfered with or usurped the owner's rights in some way (*R v Morris* [1984] AC 320; *Roffel v R* [1985] VR 511).[897]

13. The accused will therefore not have appropriated property if s/he acted with the owner's consent (*R v Morris* [1984] AC 320; *Roffel v R* [1985] VR 511).

14. The owner's consent will only prevent an act from being considered an "appropriation" if that consent was real. If the consent was induced by fraud, deception or false representation, the accused will be regarded as having appropriated the property, despite the owner's purported consent (*Lawrence v Metropolitan Police Commissioner* [1972] AC 626; *R v Baruday* [1984] VR 685; *R v Gomez* [1993] VR 685).

Innocent acquisition of property

15. If the accused came by the property innocently, but later assumed a right to it by keeping or dealing with it as an owner, s/he will have appropriated it (*Crimes Act 1958* s 73(4)).

16. However, if s/he purchased the property (or any "right or interest" in property) in good faith for value, but received a defective title, his/her assumption of the owner's rights are deemed not to be theft (*Crimes Act 1958* s 73(5)).

Property

17. The thing that the accused appropriated must have been "property" (*Crimes Act 1958* s 72(1)).

18. "Property" is defined to include "money and all other property real or personal including things in action and other intangible property" (*Crimes Act 1958* s 71(1)).

19. This definition includes some things with no physical existence, such as debts (*R v Baruday* [1984] VR 685; *R v Holt* (1983) 12 A Crim R 1, 16–17).

20. However, other intangible items may not be classified as property. For example, in England it has been held that confidential information is not property (*Oxford v Moss* (1978) 68 Cr App R 183), and copyright may not be (*R v Lloyd* [1985] 1 QB 829).

21. While electricity is not property under this definition (*Low v Blease* [1975] Crim L R 513), fraudulent abstraction, wastage, use, diversion or consumption of electricity is punishable as theft through the combined effect of *State Electricity Commission Act 1958* s 107 and *Electric Light and Power Act 1958* s 51 (repealed).

22. Whether the thing assumed by the accused was "property" can involve questions of both law and fact. It is for the judge to determine as a question of law whether a particular circumstance creates a property right, but if in issue, it will be for the jury to determine whether that circumstance existed as a question of fact (See *R v Hall* [1973] QB 126).

Special forms of property

23. Land and things forming part of land can only be stolen in the limited circumstances specified in *Crimes Act 1958* s 73(6).

24. Section 73(6) provides that a person may commit theft of land or fixtures where:

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[897] The proposition that appropriation must involve an adverse interference with the owner's rights was rejected by the House of Lords in *R v Gomez* [1993] AC 442 and *R v Hicks* [2000] 4 All ER 833, and was also criticised (in *obiter*) by McHugh and Callinan JJ in *MacLeod v The Queen* (2003) 214 CLR 230. However, *Roffel v R* [1985] VR 511 remains the leading authority on the issue in Victoria.

- the accused is a trustee, personal representative or authorised by power of attorney or as a liquidator of a company to sell or dispose of land belonging to another and deals with it in breach of the confidence reposed in him or her;
- where the accused severs something from the land; or
- where a tenant appropriates a fixture or structure let to be used with the land.

25. Section 73(6)(a) specifically recognises that a person may be a personal representative but not a trustee. The section also allows land to be stolen even if the accused is both the legal and beneficial owner of the land, where there is a dealing with it in breach of confidence (*Coleman v DPP* [2018] VSCA 264, [6], [110]).
26. Wild animals are regarded as property, but may only be stolen in the circumstances specified in *Crimes Act 1958* s 73(7).[898]

Property must be in existence

27. Property must be in existence before it can be appropriated (*Akbulut v Grimshaw* [1998] 3 VR 756).
28. Accordingly, creating a future obligation in the owner of a telephone service to pay for unauthorised telephone calls does not involve theft of property (*Akbulut v Grimshaw* [1998] 3 VR 756).

Belonging to another

29. It is only theft if a person appropriates property "belonging to another" (s 72(1)).
30. Property "belongs" to anyone who has possession or control of it, or who has any other proprietary right or interest in it (*Crimes Act 1958* s 71(2)).
31. These interests include legal and equitable proprietary interests (*R v Clowes (No 2)* [1994] 2 All ER 316).
32. However, property does *not* "belong" to a person who only has an equitable interest in that property, if that equitable interest arose from an agreement to transfer the property or grant an interest in it (*Crimes Act 1958* s 71(2)).
33. Whether a person has a proprietary right or interest is a question of civil property law (*R v Walker* [1984] Crim LR 112).
34. The prosecution needs only to establish that someone other than the accused had property rights that were appropriated. There is no requirement that the prosecution prove *who* actually held those rights (*Lodge v Lawton* [1978] VR 112).
35. It does not matter if the accused has property rights in the relevant property. If someone else also has property rights in it (e.g. a partner), the property "belongs to another" and can be appropriated (*R v Bonner* [1970] WLR 838).

Abandoned property

36. Property no longer "belongs" to a person who has intentionally relinquished all ownership rights (abandoned the property) (*R v Small* [1987] Crim LR 777).
37. However, there is a distinction between "losing" and "abandoning" property. Property which is merely lost still "belongs" to the owner and can be appropriated (*R v Small* [1987] Crim LR 777).

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[898] These include where the animal is tamed and kept in captivity; where the animal has been reduced into possession and has not been lost or abandoned; or where a person is in the course of reducing the animal into possession.

Ownership in special cases

38. Section 73 of the *Crimes Act 1958* describes four special cases where property is deemed to "belong to" people who might not otherwise be regarded as property owners. These cases are where the property is:

    i) Subject to a trust (s 73(8));

    ii) Held under a fiduciary obligation (s 73(9));

    iii) Subject to an obligation to make restoration (s 73(10)); or

    iv) The property of a corporation sole (s 73(11)).

Property subject to a trust (s 73(8))

39. Although trust property will ordinarily "belong to" the beneficiaries of the trust (due to the application of *Crimes Act 1958* s 71(2)), in some cases there will not be any beneficiaries (e.g. a purpose trust).

40. In such cases, the property subject to the trust is deemed to belong to anybody having a right to enforce the trust (*Crimes Act 1958* s 73(8)).

Property held under a fiduciary obligation (s 73(9))

41. Section 73(9) covers the situation where a person, who is not a trustee, appropriates property (or proceeds from property) while under a fiduciary obligation to use the property in a particular way. In such a case, the property is deemed (as against the fiduciary) to belong to the beneficiary of the obligation.

42. The "obligation" must be a "legal obligation" (*R v Meech* [1974] QB 549; *R v Arnold* [1997] 4 All ER 1).

43. This provision applies only where the accused was required to deal with the *particular* property (or its proceeds) in a particular way. A mere contractual obligation to provide a service in return for payment is not sufficient (*R v Hall* [1973] QB 126).

44. Accordingly, this provision was held not to apply where a travel agent received payments for air tickets, but did not provide the tickets or return the money. It was held that the accused had only entered a contractual obligation to provide the air tickets, and was not required to use the customer's particular deposit for obtaining those tickets (*R v Hall* [1973] QB 126).

Property subject to an obligation to make restoration (s 73(10))

45. *Crimes Act 1958* s 73(10) addresses the situation where:

- A person (the "receiver") received property by the mistake of another;
- The receiver was not aware at the time that a mistake was being made, or had not yet decided to dishonestly retain the property;[899]
- The mistake was not "fundamental" (i.e. it did not concern the identity of the receiver, or the nature or volume of the property);[900] and
- The receiver is under an obligation to return the property.

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[899] If the receiver *was* aware that a mistake was being made, and dishonestly decided to accept the property anyway, s 73(10) will not be necessary – as the property will still have "belonged" to the person making the mistake at the time of the appropriation.

[900] If the mistake *was* fundamental, then the original owner will retain property rights in the relevant property, and so s 73(10) will not be necessary.

46. Section 73(10) provides that in such circumstances, the property is to be regarded (as against the receiver) to belong to the person entitled to restoration. A dishonest decision not to return the property can therefore amount to theft (see, e.g. *Attorney-General's Reference (No 1 of 1983)* [1985] QB 182).

47. The obligation to restore the property must be a "legal obligation" (*R v Gilks* [1972] 1 WLR 1341).

48. Whether there is a legal obligation to restore is a question of civil property law (*Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105).

Property of a corporation sole (s 73(11))

49. The property of a corporation sole is regarded as belonging to the corporation, notwithstanding any vacancy in the corporation (*Crimes Act 1958* s 73(11)).

50. This provision covers the situation where property is stolen from a corporation sole, and the incumbent is dead or the position is otherwise vacant.

Intention to permanently deprive

51. The second element of theft requires the accused to have intended to permanently deprive the owner of the property when s/he appropriated it (*Crimes Act 1958* s 72(1)).

52. If the accused only had an intention to temporarily deprive the owner of his or her property, this element will not be met (subject to the exceptions specified in s 73 (see below)) (*R v Lloyd* [1985] 1 QB 829).

53. Similarly, this element will not be met if the accused had not decided how s/he was going to dispose of the property when s/he appropriated it (subject to the exceptions specified in s 73 (see below)). She must have already formed the intention to permanently deprive the owner of the property at the time of the appropriation (*R v Easom* [1971] 2 QB 315; *Sharp v McCormick* [1986] VR 869).

54. Where the period or circumstances of the appropriation are such that the accused intends to return the property only after the owner's interest has been fundamentally changed (e.g. returning a concert ticket after the performance), this may amount to an intention to permanently deprive the owner of that property (*R v Lloyd* [1985] 1 QB 829).

55. A person who takes property (e.g. goods or cash), intending to return equivalent (but not identical) property, will have an intention to permanently deprive the owner of the property (because s/he does not intend to return the exact same coins, notes or goods that s/he took) (*R v Williams* [1953] 1 QB 660; *R v Cockburn* [1968] 1 All ER 466; *R v Pace* [1965] 3 Can CC 55 (NSSC)).

Acting regardless of the owner's rights: s 73(12)

56. The accused is deemed to have an intention to permanently deprive a person of property, despite the fact that s/he did not actually have that intention when s/he appropriated the property, if s/he intends to treat the property as his or her own to dispose of regardless of the owner's rights (*Crimes Act 1958* s 73(12)).

57. Section 73(12) will only be relevant in exceptional cases. It is apt to confuse and should only rarely be introduced into a charge (*R v Dardovska* (2003) 6 VR 628).

58. Circumstances in which s 73(12) has been held to be relevant include:

    - Where the accused takes the property, promising to return it only in exchange for payment (*R v Lloyd* [1985] 1 QB 829);
    - Where the accused takes the property, intending to return it only after fundamentally altering its nature (e.g. returning the piece of paper a cheque is written on, after receiving payment from the bank) (*R v Duru* [1974] 1 WLR 2);
    - Where the accused takes the property, while leaving open the possibility that s/he might return it to the owner at a later date, but in the meantime treats it as his/her own (*Sharp v McCormick* [1986] VR 869).

59. Two other circumstances in which s 73(12) may be relevant are:

    - Where the accused borrows the property from its owner, ultimately intending to return it; or
    - Where the accused lends the owner's property to a third party, intending to return it to the owner upon retrieving it.

    In such cases, the accused will only be deemed to have an intention to permanently deprive the owner of the property if the borrowing or lending was for a period, or in circumstances, which made it equivalent to an outright taking or disposal (*Crimes Act 1958* s 73(12)).

60. Section 73(12) may also be relevant where the accused parts with property belonging to another, under a condition as to its return which s/he may not be able to perform (e.g. pawning it). If this was done for the accused's own purposes, and without the consent of the owner, the accused will be deemed to have treated the property as his or her own to dispose of regardless of the owner's rights (*Crimes Act 1958* s 73(13)). By virtue of s 73(12), s/he will be regarded as having had an intention to permanently deprive the owner of that property.

Motor vehicles and aircraft

61. Proof that a person used, in any manner, a motor vehicle or aircraft without the consent of the owner or lawful possessor is conclusive evidence that the person intended to permanently deprive the owner of that property (*Crimes Act 1958* s 73(14)).

62. Section 73(14) applies if the vehicle is used "in any manner". This can include situations where there is no movement or attempted movement of the vehicle (*Inglis v Davies* [1974] VR 438).

63. The provision can also apply to a person who rides as a passenger in a vehicle he or she knows to be stolen (*W (a child) v Woodrow* [1988] VR 358).

Intention to deprive special owners

64. A person who intends to defeat a trust is regarded as having an intention to deprive any person having a right to enforce the trust of the trust property (*Crimes Act 1958* s 73(8)).

65. Where a person receives property by mistake, and is under an obligation to restore that property, an intention not to do so is regarded as an intention to deprive the person of the property (or its proceeds) (*Crimes Act 1958* s 73(10)).

Dishonesty

66. The accused's appropriation of property belonging to another will only be theft if it is "dishonest" (*Crimes Act 1958* s 72(1)).

67. Dishonesty has a special meaning when used in Division 2 of the *Crimes Act 1958*. It means that the accused acted without any claim of legal right (*R v Salvo* [1980] VR 401; *R v Bonollo* [1981] VR 633 and *R v Brow* [1981] VR 783).

68. This interpretation of "dishonesty" differs from the interpretation of "dishonesty" in the equivalent provision of the English *Theft Act* and the interpretation of "dishonesty" in s 86 of the Commonwealth *Crimes Act 1914*. In those jurisdictions, "dishonesty" has its ordinary meaning, and is assessed according to the standards of the ordinary person (*Peters v the Queen* (1998) 192 CLR 493; *Macleod v the Queen* (2003) 214 CLR 230; *R v Ghosh* [1982] QB 1053).[901]

[901] Other Australian jurisdictions adopt different approaches to dishonesty, and their authorities should be approached with caution.

69. In Victoria, section 73(2) restates this general definition in the context of theft, and adds two deeming provisions. It provides that a person's appropriation is not to be regarded as dishonest if the person believed that:

    i) S/he had a legal right to deprive the owner of the property; or

    ii) The owner would have consented to the appropriation if s/he had known of it and the circumstances surrounding it; or

    iii) The owner could not be discovered by taking reasonable steps.

70. The term "dishonestly" in s 72(1) has no residual meaning beyond this statutory definition (*R v Salvo* [1980] VR 401; see also *R v Bonollo* [1981] VR 633 and *R v Brow* [1981] VR 783).

Belief in a legal right to deprive: s 73(2)(a)

71. The accused's appropriation of property will not have been dishonest if s/he believed that s/he had a legal right to deprive the other person of the property (s 73(2)(a)).

72. The belief must relate to a right "in law" – a claim of legal right. A claim of moral right is not sufficient (*Crimes Act 1958* s 73(2)(a)).

73. The claim of right must extend to all of the property taken, not just to part of it (*R v Bedford* (2007) 98 SASR 514).

74. It does not matter if the accused's belief was based on a mistake of fact[902] or a mistake of law.[903] If the accused genuinely believed s/he had a legal claim of right, s/he will not have acted dishonestly (*R v Langham* (1984) 36 SASR 48; *R v Lopatta* (1983) 35 SASR 101).

75. The accused merely needs to have believed s/he had a legal right to the property. S/he does not need to have believed that s/he had the right to use the measures s/he used to take the property (*R v Bedford* (2007) 98 SASR 514; *R v Salvo* [1980] VR 401).

76. So even if the accused used violent measures to take the property, s/he should not be convicted of theft if s/he genuinely believed s/he had a right to the property. However, s/he may be convicted of an offence relating to the violence used (*R v Bedford* (2007) 98 SASR 514; *R v Salvo* [1980] VR 401).

Belief that the owner cannot be discovered: s 73(2)(c)

77. A person will not have acted dishonestly if s/he appropriated the property in the belief that the person to whom the property belongs could not be discovered by taking reasonable steps (*Crimes Act 1958* s 73(2)(c)).

78. This provision covers the case of a person who finds property, or who receives property by mistake. As long as the finder or receiver genuinely believed that the owner could not be identified or located by taking reasonable steps, they will not be guilty of theft (*R v MacDonald* (1983) 8 A Crim R 248).

79. This provision does not apply where the accused gained the property as a trustee or personal representative (*Crimes Act 1958* s 73(2)(c)).

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[902] A mistaken belief that certain facts existed, which would have created a legal claim if true.

[903] A mistaken belief that certain interests create legal rights.

The nature of the accused's beliefs

80. Dishonesty is a subjective concept. The jury is concerned with the accused's subjective beliefs (*R v Salvo* [1980] VR 401 (Murphy J)).

81. Each form of "honesty" outlined in s 73(2) relies upon the accused having held a particular belief. That belief:

    - Must have been honestly or genuinely held (*R v Salvo* [1980] VR 401; *R v Bernhard* (1984) SASR 48); and
    - Does not need to have been reasonable. The jury can, however, take into account the reasonableness of the belief in assessing if it was genuinely held (*R v Salvo* [1980] VR 401; *R v Dardovska* (2003) 6 VR 628).

Willingness to pay for the property: s 73(3)

82. The accused's appropriation of property belonging to another may have been dishonest, even though s/he was willing to pay for the property (*Crimes Act 1958* s 73(3)).

83. This does not mean that the accused's willingness to pay can *never* prove that she was not acting dishonestly. It simply means that the fact that s/he was willing to pay does not *necessarily* exclude dishonesty (*R v Senese* [2004] VSCA 136).

Need for concurrency of elements

84. The prosecution must prove that each of the three elements of theft existed at the same time (*R v Greenberg* [1972] Crim LR 331).

85. In cases where the accused appropriates property which s/he was under a fiduciary obligation to use in a particular way, it is sufficient that the person acted dishonestly at the point of appropriation. There is no need for the *receipt* of the property and the dishonest appropriation to coincide (*R v Hall* [1973] QB 126).

Last updated: 11 September 2020

7.5.1.1 Charge: Theft (Short)

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This charge is adapted for use in cases where the only issue is whether or not the accused was the thief.

The Elements

I must now direct you about the crime of theft. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused appropriated property that belonged to another person.

Two – the accused intended to permanently deprive that person of his or her property.

Three – the accused acted dishonestly.

I will now explain each of these elements in more detail.

Appropriation of Property Belonging to Another

The first element that the prosecution must prove is that the accused appropriated property that belonged to another person.

Although the word "appropriation" has a technical legal meaning, and includes many different types of acts, here it simply means to take something without the owner's consent.

In this case, the prosecution alleged that NOA took [*identify property*] that belonged to [*identify owner*]. [*Summarise prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

It is for you to determine, based on all the evidence, whether NOA took the [*describe property*]. It is only if you are satisfied, beyond reasonable doubt, that s/he did that this first element will be met.

Intention to Permanently Deprive

The second element that the prosecution must prove is that, when the accused appropriated the [*describe property*], s/he intended to permanently deprive the owner of it. That is, s/he intended that the owner would never get it back.

It does not matter whether the accused intended to keep, sell, give away, destroy or hide the appropriated property. If his/her intention was that the owner would not get the property back, then s/he will have had the necessary intention.

In this case, the prosecution alleged that NOA had such an intention [*identify prosecution evidence and/or arguments*].

Dishonesty

The third element that the prosecution must prove is that at the time of the appropriation, the accused was acting dishonestly.

In this context, "dishonesty" does not have its ordinary meaning. It is given a special legal meaning. The basic legal meaning is that people act dishonestly when they appropriate property if they do not believe that they have a legal right to take that property.

In this case there is no evidence that the accused had any honest belief in respect of the appropriation. You should therefore have no difficulty finding this element proven.

Summary

To summarise, before you can find NOA guilty of theft, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA appropriated property belonging to NOC; and

Two – that NOA intended to permanently deprive NOC of that property; and

Three – that NOA appropriated the property dishonestly.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of theft.

Last updated: 3 December 2012

7.5.1.2 Charge: Theft (Extended)

Click here to obtain a Word version of this document for adaptation

The Elements

I must now direct you about the crime of theft. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused appropriated property that belonged to another person.

Two – the accused intended to permanently deprive that person of his or her property.

Three – the accused acted dishonestly.

I will now explain each of these elements in more detail.

Appropriation of Property Belonging to Another

The first element that the prosecution must prove is that the accused appropriated property that belonged to another person.

There are three parts to this element:

- First, the accused must have appropriated something;
- Second, the thing appropriated must have been property; and
- Third, that property must have belonged to another person when it was appropriated.

[*If it is not disputed that the thing stolen was property belonging to another, add the following shaded section.*]

In this case, it is alleged that NOA appropriated [*identify property*]. It is not disputed that [*describe item*] is property, nor that this [*identify property*] belonged to another person, NOC, at the relevant time. The main issue for you to determine in relation to this element is whether NOA appropriated that property.

Appropriation

[*If, in the circumstances of the case, appropriation means taking without consent, add the following shaded section.*]

Although the word "appropriation" has a technical legal meaning, and includes many different types of acts, here it simply means to take something without the owner's consent.

In this case, the prosecution alleged that NOA took the [*identify property and summarise prosecution evidence and/or arguments*]. The defence denied this, arguing [*insert defence evidence and/or arguments*].

[*If, in the circumstances of the case, appropriation means something other than taking without consent, add the following shaded section.*]

The word "appropriation" has a technical legal meaning, and includes many different types of acts. For example, it includes physically taking an object without the owner's consent.

However, appropriation is not limited to physically taking an object, in the sense of grabbing it with the hands. The law says that any assumption of a person's property rights that adversely interferes with those rights amounts to an "appropriation".

This means that a person appropriates property whenever s/he:

- Takes on any right to do something with that property, if that right belongs to the owner of the property by virtue of his or her ownership; and
- By doing so interferes unfavourably with the owner's property rights.

[*If relevant to the circumstances of the case, add*: The accused does not need to have interfered with all of the owner's property rights. S/he only needs to have interfered with any one of those rights.]

In this case it is alleged that NOA appropriated the [*identify property*] by [*describe the* form *of appropriation; the* findings of fact *necessary for the jury to find that the accused appropriated the property; and the* prosecution evidence *and/or arguments concerning appropriation*]. The defence denied that NOA appropriated the property, arguing [*insert defence evidence and/or arguments*].

[*If consent is in issue, add the following shaded section.*]

If you find that NOC consented to NOA [*describe form of appropriation*] the [*describe property*], then NOA will not have appropriated that property.[904] An "appropriation" requires the accused to have acted without consent.

It is important to note that it is not for the defence to prove that NOC consented. It is for the prosecution to prove that s/he did not. If the prosecution cannot prove beyond reasonable doubt that NOC did not consent, then this first element will not be met.

It is for you to determine, based on all the evidence, whether NOA appropriated property that belonged to another person. It is only if you are satisfied beyond reasonable doubt that NOA [*describe form of appropriation and identify property*], that this element will be met. If you are not satisfied that this is the case, then NOA will be not guilty of theft.

Property

[*If there is an issue about whether the thing appropriated was property, add the following shaded section.*]

The second part of this element requires the thing appropriated to be "property".

"Property" is also a technical legal term, which includes many different things. It does not only refer to physical objects.

Of relevance to this case, [*describe relevant type of property*] is a type of "property". This means that this part of the first element will be met if you are satisfied that what NOA appropriated was [*describe type of property*].

The prosecution argued [*insert prosecution evidence and/or arguments*]. The defence denies that this was the case, arguing [*insert defence evidence and/or arguments*].

For this element to be satisfied, you must find that [*explain findings necessary for the relevant item to be classified as property*]. If you are not satisfied that this was the case, then the accused will be not guilty of theft.

Belonging to Another

[*If there is an issue about whether the property appropriated belonged to another, add the following shaded section.*]

The third part of this element requires the thing appropriated to have belonged to another person at the time of the appropriation.

The law says that property "belongs" to anyone who has possession or control of that property, or

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[904] This part of the charge is based on the assumption that the issue of consent was outlined in the judge's summary of the defence arguments re appropriation. If this was not the case, then it will need to be modified accordingly.

who has any other proprietary right or interest in it. This includes [*insert relevant example*].[905]

In this case the prosecution alleged that the [*describe property*] belonged to NOC. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

[*If there is uncertainty about which third party the property belonged to, add the following darker shaded section.*]

The prosecution does not need to prove who the property actually belonged to, as long as they can prove that it belonged to someone other than the accused.

[*If it is alleged that the accused had a property right in the relevant property, add the following darker shaded section.*]

It does not matter if you find that the accused had [*describe property right*]. If another person also had [*describe property right*] that was appropriated, then for the purposes of this element the property belonged to another person.

[*If it is alleged that the complainant had abandoned the relevant property, add the following darker shaded section.*]

If you find that NOC had abandoned the [*describe property*], giving up all ownership rights to it, then that property will no longer have belonged to him/her when it was appropriated.

However, there is a difference between abandoning property and losing it. If NOC had only lost the [*describe property*], then it still belonged to him/her, even though s/he didn't know where it was.

It is for the prosecution to prove beyond reasonable doubt that NOC had not abandoned the property. If they cannot do this, then NOA will be not guilty of theft.

Intention to Permanently Deprive

The second element that the prosecution must prove is that, when the accused appropriated the property, s/he intended to permanently deprive the owner of it. That is, s/he intended that the owner would never get the property back.

It does not matter whether the accused intended to keep, sell, give away, destroy or hide the appropriated property. If his/her intention was that the owner would not get it back, then s/he will have had the necessary intention.

[*If the accused may not yet have formed the relevant intention when s/he appropriated the property, add the following shaded section.*]

For this element to be met, the accused must have already decided not to return the property to its owner when s/he appropriated it. This element will not be satisfied if, when the accused appropriated the property, s/he was not yet certain whether or not s/he would give it back – only deciding later that s/he was going to keep it.

[*If the accused may have only had an intention to temporarily deprive the owner of his/her property, add the following shaded section.*]

The accused's intention must have been to permanently deprive the owner of the property. This

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[905] If it is alleged that the property was subject to a trust, held under a fiduciary obligation, subject to an obligation to make restoration, or the property of a corporation sole, this section may need to be expanded. See 7.5.1 Theft for further information.

element will not be met if s/he only meant to deprive the owner of his/her property temporarily, and then to give it back to him/her.

[*If it is alleged that the accused was going to return the property only after its nature had been fundamentally changed, add the following darker shaded section.*]

However, if the accused was only planning on returning the property after its nature had been fundamentally changed, you may find that s/he intended to permanently deprive the owner of that property. This is because, although it may seem that s/he intended to return the owner's property, in reality s/he did not intend to give back what s/he took – s/he intended to return something that was completely different.

That is what the prosecution argued happened here. [*Insert prosecution evidence and/or arguments.*] The defence denied this, alleging [*insert defence evidence and/or arguments*].

[*If it is alleged that the accused was only borrowing the property, add the following shaded section*.]

In this case the defence alleged that the accused did not intend to keep the property in question, but was merely borrowing it. [*Identify relevant evidence and/or arguments.*]

It is not theft to borrow something if the borrower intends to return that property. This is true even if the borrowing is done without permission.

[*If the borrowing may have amounted to an outright taking, add the following darker shaded section.*]

Warning: this direction will only be relevant in exceptional cases. See the discussion of s 73(12) in 7.5.1 Theft.

However, if the accused borrowed the property for a period, or in circumstances, which made it equivalent to an outright taking or disposal, then the law says that s/he will have had an intention to permanently deprive the owner of the property. This will be the case even if s/he intended to give the property back eventually.

That is what the prosecution alleged happened here. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

[*If it is alleged that the accused intended to replace the money or goods appropriated, add the following shaded section.*]

In this case, you have heard evidence that although NOA took [money/*describe object*] from NOC, s/he intended to replace it.

Even if you find this to be the case, that does not mean that NOA did not intend to permanently deprive NOC of his/her property. Unless s/he was planning on returning to NOC the exact same [notes/coins/object] that s/he took, NOA will have had an intention to permanently deprive NOC of his/her property. Returning an equivalent [amount of money/item] is not sufficient.

[*If the appropriated property is a motor vehicle or aircraft, add the following shaded section.*]

A special rule applies where an accused is charged with the theft of [a motor car/an aircraft]. The law says that proof that the accused took, or in any way used the [car/aircraft] without the consent of the [owner/person who was in lawful possession] is conclusive evidence that the accused intended to permanently deprive the owner of that vehicle.

This means that if you are satisfied that NOA appropriated the vehicle, and that s/he did not have the permission of [the owner/someone entitled to give that permission], then this element will be proven.

[*If the accused did not have an intention to permanently deprive, but may have had an intention to treat the property as his/her own, add the following shaded section.*]

[This direction is based *Crimes Act 1958* s 73(12). It should only be used in exceptional cases. See *7.5.1 Theft* for further information.]

There is one exception to the rule that the accused had to intend to permanently deprive the owner of his/her property. This arises where, despite not having such an intention, the accused appropriated the property intending to treat it as his/her own to dispose of regardless of the owner's rights.

[*If it is alleged that the accused parted with the property under a condition as to its return that s/he may not have been able to perform (e.g. by pawning the property), add the following darker shaded section.*]

The law says that a person will have done this if, for his/her own purposes and without the owner's consent, s/he parted with the property under a condition that s/he may not be able to meet.

The prosecution alleges that that was the case here. [*Insert prosecution evidence and/or arguments*.] The defence denies this, arguing [*insert defence evidence and/or arguments*].

If you are satisfied beyond reasonable doubt that the accused did intend to treat the [*describe property*] as his/her own to dispose of regardless of NOC's rights, then this element will be proven, even if NOA ultimately intended to give back the property.

[*If there is evidence that the property belonged to the complainant in one of the special senses described in section 74 (e.g. as a person with a right to enforce a* trust*, or as a person entitled to* restoration of property *following mistaken delivery), an additional direction will need to be given concerning the intention to permanently deprive. See* 7.5.1 Theft *for further information.*]

Dishonesty

The third element that the prosecution must prove is that at the time of the appropriation, the accused was acting dishonestly.

In this context, "dishonesty" does not have its ordinary meaning. It is given a special legal meaning. The basic legal meaning is that people act dishonestly when they appropriate property if they do not believe that they have a legal right to take that property.

[*If other s 72(3) beliefs are raised on the evidence, add the following shaded section.*]

The law also says that people act dishonestly when they appropriate property if they:

[*Add relevant bulleted paragraphs*

- Do not believe that the owner would have consented to the appropriation if he or she had known all the circumstances; [and]
- Do not believe that the owner could not be discovered by taking reasonable steps.]

For this element to be met, the prosecution must prove that the accused did not have [this/any of these/either of these] belief(s). If it is reasonably possible that the accused did have [this/one of these] belief(s), then s/he will not have acted dishonestly.

Belief in Legal Right

[*If there is evidence that the accused believed s/he had a right to the property, add the following shaded section.*]

In this case, the defence alleged that NOA was not acting dishonestly when s/he appropriated the [*describe property*] because s/he believed that s/he had a legal right to take the property. [*Describe defence*

evidence and/or arguments.]

If the accused genuinely had this belief s/he will not be guilty of theft, even if his/her belief was legally wrong. However, s/he must have believed that s/he had a legal right to take the property. It is not sufficient for him/her to have believed that s/he had a moral right to the property.

[*If the circumstances of appropriation were potentially dishonest, add the following darker shaded section.*]

The issue here is solely whether the accused believed s/he had a legal right to take the property. S/he does not need to have believed that s/he had a legal right to take the property in the way that s/he did. Even if the accused knew that s/he should not take the property in that way, or acted illegally in the way that s/he took it, she will not be guilty of theft if s/he believed s/he had a legal right to the property.

Belief that the Owner Would Have Consented

[*If there is evidence that the accused believed the owner would have consented, add the following shaded section.*]

In this case, the defence alleged that NOA was not acting dishonestly when s/he appropriated the [*describe property*] because s/he believed that, if the owner had have known of the appropriation and the circumstances surrounding it, s/he would have consented. [*Describe defence evidence and/or arguments.*]

This question relates to the accused's state of mind. The question is whether NOA believed, at the time s/he appropriated the property, that NOC would have consented. It does not matter whether or not NOC actually would have consented, as long as NOA genuinely believed that s/he would have if s/he had been aware of all the circumstances.

Belief that the Owner Could Not Be Discovered

[*If there is evidence that the accused believed the owner could not be discovered, add the following shaded section.*]

[Note: this explanation cannot be relied upon by a person who received the property as a trustee or personal representative.]

In this case, the defence alleged that NOA was not acting dishonestly when s/he appropriated the [*describe property*] because s/he believed that the owner of the property could not be discovered by taking reasonable steps. [*Describe defence evidence and/or arguments.*]

This requires the accused to not only have believed that s/he could not identify or locate the owner of the property, but to have believed that s/he could not do so even if s/he took reasonable steps.

Willingness to Pay

[*If there is evidence that the accused was willing to pay for the property, add the following shaded section.*]

[Note: while this direction is primarily relevant to a claim of belief in consent, it may also be relevant to a claim of legal right.]

In this case, you have heard evidence that, at the time NOA took the property, s/he was willing to pay for it. This does not necessarily mean that s/he was not dishonest. The law says that the appropriation of another person's property may be dishonest even if the accused is willing to pay for it.

Mistaken Belief

[*If the accused's belief may have been incorrect or unreasonable, add the following shaded section.*]

It is important to note that the accused's belief does not need to have been correct, or even

reasonable. All that is necessary is that it is reasonably possible that NOA genuinely held that belief. If s/he did, s/he will not have acted dishonestly, even if his/her belief was wrong or unreasonable.

However, the reasonableness of the accused's alleged belief is not irrelevant. In determining whether or not NOA in fact held that belief, you may consider whether his/her belief was reasonable in all the circumstances. This is because the more reasonable NOA's belief was, the more likely you might think it is that s/he actually believed what s/he says s/he believed.

Onus of Proof

[*If dishonesty is in issue, add the following shaded section.*]

I want to reiterate that it is for the prosecution to prove that the accused was acting dishonestly. It is not for the defence to prove that s/he acted honestly.

In this case, that means that the prosecution must prove, beyond reasonable doubt, that NOA did not believe that [*describe relevant belief*]. The defence do not have to prove that s/he had that belief.

In determining whether the accused acted dishonestly, your sole focus should be on his/her state of mind at the time s/he [*describe relevant act*]. The issue is not whether you think s/he was right or wrong to do what s/he did, but whether s/he had the relevant belief at that time.

It is only if you are satisfied, beyond reasonable doubt, that the accused did not believe [*describe relevant belief*] that this third element will be met.

Summary

To summarise, before you can find NOA guilty of theft, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA appropriated property belonging to NOC; and

Two – that NOA intended to permanently deprive NOC of that property; and

Three – that NOA appropriated the property dishonestly.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of theft.

Last updated: 5 December 2007

7.5.1.3 Checklist: Theft

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused appropriated property belonging to another; and
2. The accused did so with the intention of permanently depriving the other of that property; and
3. The accused appropriated the property dishonestly.

Appropriation of Property Belonging to Another

1. Did the accused appropriate property that belonged to another person?

Consider – Did the accused [take the property/assume the rights of an owner/interfere with the rights of the owner] in the way alleged by the prosecution?

Consider – Did the accused do this without consent?

If Yes, then go to 2

If No, then the accused is not guilty of Theft

Intention to Permanently Deprive

2. Did the accused intend to permanently deprive another person of that property?

Consider – Did the accused intend that the owner would never get the property back?

If Yes, then go to 3

If No, then the accused is not guilty of Theft

Dishonesty

3. Did the accused appropriate the property dishonestly?

Consider – Has the prosecution proved that the accused did not believe that he/she had a legal right to obtain the property?

If Yes, then the accused is guilty of Theft (as long as you also answered Yes to Questions 1 and 2)

If No, then the accused is not guilty of Theft

Last updated: 5 June 2009

7.5.2 Robbery

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Overview

1. Robbery is an offence under *Crimes Act 1958* s 75.
2. The offence has the following three elements:
   i) The accused stole something (i.e., committed "theft");
   ii) Immediately before or at the time of the theft, the accused:
      - Used force on any person; or
      - Put any person in fear that s/he or another person would, then and there, be subject to the use of force; or
      - Sought to put any person in fear that s/he or another person would, then and there, be subject to the use of force.
   iii) The accused did so in order to commit the theft.

The accused committed theft

3. The first element that the prosecution must prove is that the accused stole something (*Crimes Act 1958* s 75(1)).

4. A person "steals" (and thereby commits the offence of "theft") if s/he
    - Appropriates property belonging to another;
    - Does so with the intention of permanently depriving the other of the property; and
    - Acts dishonestly (*Crimes Act* s 72).
5. See 7.5.1 Theft for further information concerning each of these requirements.

The accused used force or fear of force

6. The second element that the prosecution must prove is that, immediately before or at the time of the theft, the accused:

    i) Used force on any person; or

    ii) Put any person in fear that s/he or another person would, then and there, be subject to the use of force; or

    iii) Sought to put any person in fear that s/he or another person would, then and there, be subject to the use of force (*Crimes Act 1958* s 75(1)).

Use of force

7. There is no legal standard for the minimum physical contact that can constitute the "use of force" (*Dawson & James* (1976) 64 Crim App R 170; *Hood v R* [2000] WASCA 98).
8. If there is an issue about whether the accused's actions constituted a "use of force", it is for the jury to determine (*Dawson & James* (1976) 64 Crim App R 170; cf. *Hood v R* [2000] WASCA 98).
9. The "force" does not need to have been applied directly to the victim's body. It is sufficient if it was applied to items carried by the victim (*R v Clouden* [1987] Crim LR 56).

Putting a person in fear of the use of force

10. Where it is alleged that the accused put the victim in fear that s/he or another person would be subject to the use of force, the victim must have feared that the force would be used "then and there" (*Crimes Act 1958* s 75(1)).
11. While any physical contact may be legally sufficient to meet this element where the "use of force" is relied upon, there is a minimum standard for threats capable of meeting this element. The accused's threat must place the victim "in fear" of the use of force. This means the threat must be sufficient to cause personal intimidation (*R v Butcher* [1986] VR 43).

Seeking to put a person in fear of the use of force

12. It is not necessary for the victim to have actually feared that s/he or someone else would be subjected to force for this element to be met. It will be met if the accused "sought" to put the victim in such fear, even if that attempt was not successful (*Crimes Act 1958* s 75(1)).

"Immediately before or at the time of theft"

13. The accused must have used force, or put or sought to put the victim in fear of the use of force, "immediately before or at the time" of the theft (*Crimes Act 1958* s 75(1)).[906]

14. This element will therefore not be met if the force was applied, or the fear induced, after the property was appropriated (*R v Foster* (1995) 78 A Crim R 517 (NSWCCA)).[907]

15. An act of appropriation may be a continuing act. If the accused used force, or put or sought to put the victim in fear of the use of force, at any point in time prior to the appropriation being complete, this element will be satisfied (*R v Hale* (1978) 68 Cr App R 415).

16. If there is an issue about whether or not the appropriation was already complete by the time the accused used force, or put or sought to put the victim in fear of the use of force, it is for the jury to determine when the appropriation was complete (*R v Hale* (1978) 68 Cr App R 415).

Victim may be "any person"

17. It is not necessary for the victim to have been the subject of the use or threat of force. This element will be met if the accused used force against any person, or put or sought to put the victim in fear that another person would be subjected to force (*Crimes Act 1958* s 75(1)).

18. A "person" must have been the subject of the use or threat of force (*Crimes Act 1958* s 75(1)). It is therefore not sufficient to prove that force was used or threatened against property.[908] However, if the accused, by the (threatened) use of force against property, puts (or seeks to put) the victim in fear that s/he or another person will themselves be subject to the use of force, this element will be satisfied.

Conduct was committed "in order" to steal

19. The third element requires the prosecution to prove that the force was used or threatened "in order to" carry out the theft (*Crimes Act 1958* s 75(1)).

20. In determining whether this element is met, the jury must consider the accused's *purpose* when s/he committed the relevant acts. S/he must have committed those acts so that s/he could steal.

21. This test differs from the former common law test in two ways:

    - It does not require proof that the force, or the threat of force, *caused* the victim to part with the property taken (see, e.g. *R v Foster* (1995) 78 A Crim R 517 (NSWCCA)).
    - It does not require the force to have been used for the purpose of *overpowering* the party robbed (rather than simply using the amount of force necessary to get possession of the property) (see, e.g. *Hood v the Queen* [2000] WASCA 98).

22. As the purpose of the use or threat of force must have been to commit theft, this element will not be met if the accused used, or threatened to use, force upon the victim for a different reason, but upon seeing an unanticipated opportunity created by his or her actions, stole the victim's property.

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[906] This requirement replaced the former common law requirement that the property must have been taken from, or in the presence of, the victim of the violence (see, e.g. *R v McNamara* [1965] VR 372). There is no reason to believe that this "presence" requirement is preserved in the statutory offence.

[907] The accused may, however, be guilty of another offence, such as assault.

[908] Where force is used or threatened against property, the accused may be guilty of another offence, such as blackmail (*Crimes Act 1958* s 87).

Defences

23. Any defence to theft will also be defence to robbery. For example, as an honest belief in a claim of right to property is a defence to theft (see 7.5.1 Theft), it is not robbery if the accused honestly believed in his or her entitlement to take the property (*R v Skivvington* [1968] 1 QB 166).

24. For a claim of right to succeed, the accused does not need to have believed that s/he had a legal right to appropriate the property *by the use of force*. S/he merely needs to have believed that s/he had a legal right to *appropriate the property*. The use of force was simply his or her means of achieving that goal (*R v Skivvington* [1968] 1 QB 166; *R v Robinson* [1977] Crim LR 173. See also *R v Salvo* [1980] VR 401; *R v Bedford* (2007) 98 SASR 514).[909]

Last updated: 24 January 2017

7.5.2.1 Charge: Robbery (Short)

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This charge can be used where the only defence relied upon by the accused, or raised by the evidence, is that the accused was not the offender.

The Elements

I must now direct you about the crime of robbery. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused committed theft.

Two – immediately before or at the time of the theft, the accused either:

- Used force on a person; or
- Put a person in fear, or sought to put a person in fear, that force was going to be used on him/her [or another person], then and there.

Three – the accused acted in that way in order to commit the theft.

Facts in Issue

In this case the defence did not contest the evidence that someone [*summarise evidence of robbery*]. They agreed that these events occurred, and that the person who was responsible for them is guilty of robbery.[910] However, they denied that NOA was the person who acted in that way.[911]

Consequently, the only issue for your consideration [on this count] is whether or not the prosecution have proved, beyond reasonable doubt, that NOA was the person who [*describe alleged conduct*]. If you are satisfied that it was NOA who did those acts, you should have no difficulty finding all three elements of this offence to have been proved.

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[909] In such circumstances, the accused may be convicted of an offence relating to the violence used (*R v Bedford* (2007) 98 SASR 514; [2007] SASC 276; *R v Salvo* [1980] VR 401).

[910] If this concession has not been made, care should be taken before abbreviating the charge in this way.

[911] This charge will need to be adapted if it is alleged that the accused was guilty on the basis of some form of accessorial liability. See Part 5: Complicity.

The evidence was [*describe evidence relevant to identification*]. Counsel argued [*describe arguments relevant to identification*].

[*If not done elsewhere, include directions and warnings about* identification evidence. *See* 4.12 Identification Evidence *and* 4.12.1 Charges: Identification Evidence *for assistance.*]

Summary

To summarise, you have only one issue to decide in respect of this count. That issue is, have the prosecution proved beyond reasonable doubt that NOA was the person who [*describe alleged conduct*].

If you are satisfied that they have, then you should have no difficulty finding all the elements of this offence proved. In such circumstances you should find NOA guilty of robbery.

However, if you are not satisfied beyond reasonable doubt that it was NOA who [*describe alleged conduct*], you must find him/her not guilty of robbery.

Last updated: 3 December 2012

7.5.2.2 Charge: Robbery (Extended)

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This charge can be used where one or more elements of the offence are in issue. If the only issue relied upon by the accused, or raised by the evidence, is that the accused was not the offender, see 7.5.2.1 Charge: Robbery (Short).

The Elements

I must now direct you about the crime of robbery. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused committed theft.

Two – immediately before or at the time of the theft, the accused either:

- Used force on a person; or
- Put a person in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put a person in fear that force was going to be used on him/her [or another person], then and there.

Three – the accused acted in that way in order to commit the theft.

I will now explain each of these elements in more detail.[912]

[912] If an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

Theft

The first element that the prosecution must prove is that the accused committed theft. In order to do this, the prosecution must prove three things.[913]

First, they must prove that the accused appropriated property that belonged to another person. Although the word "appropriation" has a technical legal meaning, and includes many different types of acts, here it simply means to take something without the owner's consent.

In this case, the prosecution alleged that NOA took [*identify property*] that belonged to [*identify owner*]. [*Summarise prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

Secondly, the prosecution must prove that, when the accused appropriated the [*describe property*], s/he intended to permanently deprive the owner of it. That is, s/he intended that the owner would never get it back.

It does not matter whether the accused intended to keep, sell, give away, destroy or hide the appropriated property. If his/her intention was that the owner would not get the property back, then s/he will have had the necessary intention.

In this case, the prosecution alleged that NOA had such an intention. [*Identify prosecution evidence and/or arguments.*]

Thirdly, the prosecution must prove that, at the time of the appropriation, the accused was acting dishonestly. In this context, "dishonesty" does not have its ordinary meaning. It is given a special legal meaning, which says that the accused will have acted dishonestly if, when s/he took the property, s/he did not believe that s/he had a legal right to take it.

In this case there is no evidence that the accused believed s/he had a legal right to take the [*identify property*]. So if you are satisfied that NOA took that property, you should have no difficulty finding this requirement proven.

It is for you to determine, based on all the evidence, whether NOA committed theft. This will only be the case if you are satisfied that all three of the requirements I have just outlined have been proven beyond reasonable doubt.

Force or fear of force

The second element that the prosecution must prove is that, immediately before or at the time of the theft, the accused either:

- Used force on a person; or
- Put a person in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put a person in fear that force was going to be used on him/her [or another person], then and there.

In this case the prosecution alleged that NOA [*identify relevant ground*[*s*] *and people involved, e.g. "*used force against NOC*"*] when s/he [*describe relevant conduct*]. The defence denied this, arguing [*describe defence evidence and/or arguments*].

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[913] This part of the charge is designed for use in cases where the theft element does not raise any technical issues. If such issues do arise, the charge should be adapted or expanded accordingly. Guidance can be obtained from 7.5.1.2 Charge: Theft (Extended).

[*If it is alleged that the accused put, or sought to put, a person in fear, add the following shaded section.*]

You will note that it is not enough for the prosecution to prove that NOA put, or sought to put, NOC in fear that force was going to be used on him/her/NO3P[914] at some distant or uncertain time. To prove this element on the basis of the threatened use of force, the prosecution must prove that NOA put, or sought to put, NOC in fear that force was going to be used on him/her/NO3P then and there.

You will also note that, while this element will be met if you are satisfied that NOC was actually fearful that such force was going to be used, this is not necessary. This element will be met if the prosecution can prove that NOA sought to put NOC in fear, even if that attempt was unsuccessful.

Conduct was committed "in order" to steal

The third element that the prosecution must prove is that the accused acted in the way s/he did in order to commit the theft. That is, NOA must have [used force on NOC/put NOC in fear of the use of force/sought to put NOC in fear of the use of force] for the purpose of stealing the [*identify property*], rather than for another reason.

[*Insert any relevant evidence and/or arguments.*]

Summary

To summarise, before you can find NOA guilty of robbery, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA committed theft, by dishonestly appropriating property that belonged to another person, intending to permanently deprive the owner of that property; and

Two – that immediately before or at the time of the theft, NOA either:

- Used force on NOC; or
- Put NOC in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put NOC in fear that force was going to be used on him/her [or another person], then and there; and

Three – that NOA acted in this way in order to commit the theft.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of robbery.

Theft

I must also direct you about the crime of theft. This is an alternative to the crime of robbery. That means you only need to return a verdict on the crime of theft if you are not satisfied that the prosecution have proved all the elements of robbery beyond reasonable doubt. If you decide that NOA is guilty of robbery, then you do not need to return a verdict on this alternative.

I have already explained the elements of theft to you, when instructing you about the first element of robbery. They are:

One – that the accused appropriated property belonging to another person; and

Two – that the accused intended to permanently deprive the other person of that property; and

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[914] Name of third party.

Three – that the accused appropriated the property dishonestly, in that s/he did not believe that s/he had a legal right to take it.

For NOA to be guilty of theft, you must be satisfied that the prosecution has proved all of these matters beyond reasonable doubt. If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of theft.

Last updated: 27 March 2013

7.5.2.3 Checklist: Robbery

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused committed theft; and
2. Immediately before or at the time of the theft, the accused either:
    - Used force on a person; or
    - Put or sought to put a person in fear that force was going to be used against someone, then and there; and
3. The accused acted in that way in order to commit the theft.

Theft

1. Did the accused commit theft?

1.1 Did the accused appropriate property that belonged to another person?

*Consider – **Did the accused take something without the owner's consent?***

If Yes, then go to 1.2

If No, then the accused is not guilty of Robbery

1.2 Did the accused intend to permanently deprive another person of that property?

If Yes, then go to 1.3

If No, then the accused is not guilty of Robbery

1.3 Was the accused acting dishonestly?

Consider – Might the accused have believed that s/he had a legal right to take the property?

If Yes, then go to 2

If No, then the accused is not guilty of Robbery

Use of Force

2.1 Immediately before or at the time of the theft, did the accused use force against another person?

If Yes, then go to 3

If No, go to 2.2

2.2 Immediately before or at the time of the theft, did the accused put a person in fear, or seek to put a person in fear, that force was going to be used on him or her or another person, then and there?

If Yes, then go to 3

If No, then the accused is not guilty of Robbery

Force Used in Order to Commit Theft

3. Did the accused act in this way in order to commit the theft?

Consider – Did the accused use or threaten the use of force for the purpose of stealing, rather than for another purpose?

If Yes, then the accused is guilty of Robbery

If No, then the accused is not guilty of Robbery

Last updated: 13 August 2009

7.5.3 Armed Robbery

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Overview

1. Armed robbery is an offence under the *Crimes Act 1958* s 75A.
2. The offence has the following two elements:
   i) The accused committed robbery; and
   ii) At that time the accused had a firearm, imitation firearm, offensive weapon, explosive or imitation explosive with him or her.

The accused committed robbery

3. The first element that the prosecution must prove is that the accused committed robbery (*Crimes Act 1958* s 75A(1)).
4. The accused will have committed robbery if s/he:
   i) Stole something (i.e., committed "theft");
   ii) Immediately before or at the time of the theft:
      (a) Used force on any person; or
      (b) Put any person in fear that s/he or another person would, then and there, be subject to the use of force; or
      (c) Sought to put any person in fear that s/he or another person would, then and there, be

subject to the use of force; and

iii) Did so in order to commit the theft (*Crimes Act 1958* s 75).

5. See 7.5.2 Robbery and 7.5.1 Theft for further information concerning each of these requirements.

The accused was armed

6. The second element that the prosecution must prove is that, at the time s/he committed the robbery, the accused had one of the following five articles with him or her:

   i) A firearm;

   ii) An imitation firearm;

   iii) An offensive weapon;

   iv) An explosive; or

   v) An imitation explosive (*Crimes Act 1958* s 75A).

7. These articles have the meaning assigned to them in *Crimes Act 1958* s 77(1) (*Crimes Act 1958* s 75A(1)).

Specified articles

Firearms

8. The term "firearm" is defined to have the same meaning as provided in section 3 of the *Firearms Act 1996* (*Crimes Act 1958* s 77(1A)).

9. That provision defines firearms broadly to include devices that are:

   - Designed or adapted to discharge shot, bullets or other missiles
   - By the expansion of gases or by compressed gas (*Firearms Act 1996* s 3 "firearm"(a)).

10. It does not matter whether the device is assembled or disassembled, complete or incomplete, operable or inoperable (*Firearms Act 1996* s 3 "firearm").

11. The definition of "firearm" excludes:

    - Certain specified industrial tools (*Firearms Act 1996* s 3 "firearm" (c),(d),(h));
    - Underwater spear guns (*Firearms Act 1996* s 3 "firearm" (e));
    - Signal flare devices and line throwers (*Firearms Act 1996* s 3 "firearm" (f),(i)); and
    - Devices of a prescribed class (*Firearms Act 1996* s 3 "firearm" (j)). These currently include certain cannons or field guns, nets for catching animals, and devices mounted to model warships (see *Firearms Regulations 2008* s 20).[915]

Imitation firearms

12. An "imitation firearm" is anything which has the appearance of being a firearm, whether or not it is capable of being discharged (*Crimes Act 1958* s 77(1A)).

13. As the definition of "firearm" in section 3 of the *Firearms Act 1996* extends to devices which "have the appearance of" a firearm, the definitions of "firearm" and "imitation firearm" overlap.

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[915] While these articles will not be firearms, they may still be "offensive weapons" for the purposes of this offence.

Offensive weapons

14. An "offensive weapon" is any article which:

    - Is *made for* causing injury or incapacitation to a person; or
    - Is *adapted for the use of* causing injury or incapacitation to a person; or
    - The accused *threatens to use for* the purpose of causing injury or incapacitation to a person; or
    - The accused *intends to use for* the purpose of causing injury or incapacitation to a person (*Crimes Act 1958* s 77(1A)).

Articles made for causing injury or incapacitation

15. An article is "made for use" in causing injury or incapacitation to a person if it is normally used only for that purpose (*Wilson v Kuhl* [1979] VR 315).

16. Examples of this kind of article include knuckle dusters and sawn-off shotguns. Carving knives and walking sticks are not articles of this kind (*Wilson v Kuhl* [1979] VR 315).

17. Articles that fall within this category will be offensive weapons regardless of how the accused intends to use them (*Wilson v Kuhl* [1979] VR 315).

Articles adapted for the use of causing injury of incapacitation

18. An otherwise inoffensive article is "adapted" for the use of causing injury or incapacitation if it is physically modified to transform it into a dangerous or threatening object (*R v Nguyen* [1997] 1 VR 551).

19. A glass bottle may therefore become an offensive weapon if it is smashed to produce jagged edges (*R v Nguyen* [1997] 1 VR 551).

20. An article will not be "adapted" into an "offensive weapon" merely by being handled or presented aggressively. It must undergo some kind of physical transformation (*R v Nguyen* [1997] 1 VR 551).[916]

Articles the accused intends or threatens to use to cause injury or incapacitation

21. An unmodified and otherwise inoffensive article may become an "offensive weapon" if it is carried (or kept available) by a person who intends or threatens to use it to injure or incapacitate (*Crimes Act 1958* s 77(1A); *Wilson v Kuhl* [1979] VR 315; *R v Nguyen* [1997] 1 VR 551).

22. Kitchen knives, walking sticks and silk stockings carried with aggressive intent are examples of articles that fall into this category (*Wilson v Kuhl* [1979] VR 315; *R v Nguyen* [1997] 1 VR 551).

23. An item as innocuous as a half-full plastic drink bottle, when wielded in a manner capable of causing injury, can also fall into this category (*R v Nguyen* [1997] 1 VR 551).

24. It is not necessary to prove that the accused's original intention in carrying the article was to use it offensively. It is sufficient if the prosecution can prove that the accused had that intention at the time of the robbery (*R v Nguyen* [1997] 1 VR 551).

25. An accused's threat to use an article to cause injury or incapacitation will not qualify the article as an offensive weapon if the victim knows the threat is fanciful (*R v Nguyen* [1997] 1 VR 551).

Explosives and imitation explosives

26. An "explosive" is any article that is:

    - Manufactured for the purpose of producing a practical effect by explosion; or
    - Which the accused intends to have that purpose (*Crimes Act 1958* s 77(1A)).

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[916] However, a mundane item that is handled aggressively may be an "offensive weapon" due to its intended or threatened use (see below).

27. An "imitation explosive" is any article which might reasonably be taken to be, or to contain, an explosive (*Crimes Act 1958* s 77(1A)).

The accused had the article "with" him or her

28. For this element to be met, the accused must have had one of the specified articles "with" him or her at the time of the robbery (*Crimes Act 1958* s 75A).
29. A person will have had the article "with" him or her if, at the time of the robbery, he or she had the article either on his or her person, or readily available for use (*R v Hartwick* (1985) 17 A Crim R 281).
30. This element will only be met if the accused *knew* that he or she had the article with him or her, or available for use (*R v Kolb & Adams* 14/12/1979 CCA Vic; *R v Cugullere* [1961] 1 WLR 858).
31. A person does not have an article "with" him or her if it is possessed in such a way that it cannot be used (e.g. if it is concealed on his or her person in a sealed package) (*R v Kolb & Adams* 14/12/1979 CCA Vic; *R v Pawlicki* [1992] 3 All ER 902).
32. However, an instrument may be "used" by doing no more than drawing attention to its existence (*R v Kolb & Adams* 14/12/1979 CCA Vic).
33. The ordinary principles of criminal complicity apply to this offence. This means that this element will be met if an accomplice, acting in concert with the accused, had the article "with" him or her (*R v Hartwick* (1985) 17 A Crim R 281). See Part 5: Complicity for further information about the principles of criminal complicity.

Possession must be for the purpose of the robbery

34. The expression "has with him" creates an implied requirement that the accused possessed the article *for the purpose of the robbery* (*R v Reid* 7/4/1998 CA Vic; *R v Kolb & Adams* 14/12/1979 CCA Vic).
35. To establish that the accused possessed an article for the purpose of the robbery, the prosecution must prove that the accused intended to:
    - Use the article to apply force to a person; or
    - Use the article to put a person in fear that s/he or another person would, then and there, be subject to the use of force (*R v Kolb & Adams* 14/12/1979 CCA Vic).
36. The accused will have possessed an article for the purpose of the robbery if s/he intended to use it for that purpose, even if it was not actually used (*R v Nguyen* [1997] 1 VR 551).
37. It is the accused's purpose or intention at the time of the robbery that matters (rather than when s/he originally equipped him/herself with the article) (*R v Nguyen* [1997] 1 VR 551).

Last updated: 24 January 2017

7.5.3.1 Charge: Armed Robbery (Short)

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This charge can be used where the only defence relied upon by the accused, or raised by the evidence, is that the accused *was not the offender*.

The Elements

I must now direct you about the crime of armed robbery. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt.

One – the accused committed theft.

Two – that, immediately before or at the time of the theft, the accused either:

- Used force on a person; or
- Put a person in fear, or sought to put a person in fear, that force was going to be used on him/her [or another person], then and there.

Three – the accused acted in that way in order to commit the theft.

Four – the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the theft.

Facts in Issue

In this case the defence did not contest the evidence that someone [*summarise evidence of armed robbery*]. They agreed that these events occurred, and that the person who was responsible for them is guilty of armed robbery.[917] However, they denied that NOA was the person who acted in that way.[918]

Consequently, the only issue for your consideration [on this count] is whether or not the prosecution have proved, beyond reasonable doubt, that NOA was the person who [*describe alleged conduct*]. If you are satisfied that it was NOA who did those acts, you should have no difficulty finding all four elements of this offence to have been proved.

The evidence was [*describe evidence relevant to identification*]. Counsel argued [*describe arguments relevant to identification*].

[*If not done elsewhere, include directions and warnings about identification evidence. See* 4.12 Identification Evidence *and* 4.12.1 Charges: Identification Evidence *for assistance.*]

Summary

To summarise, you have only one issue to decide in respect of this count. That issue is, have the prosecution proved beyond reasonable doubt that NOA was the person who [*describe alleged conduct*].

If you are satisfied that they have, then you should have no difficulty finding all the elements of this offence proved. In such circumstances you should find NOA guilty of armed robbery.

However, if you are not satisfied beyond reasonable doubt that it was NOA who [*describe alleged conduct*], you must find him/her not guilty of armed robbery.

Last updated: 26 March 2009

7.5.3.2 Charge: Armed Robbery (Extended)

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This charge can be used where one or more elements of the offence are in issue. If the only issue relied upon by the accused, or raised by the evidence, is that the accused was not the offender, see 7.5.3.1 Charge: Armed Robbery (Short).

[917] If this concession has not been made, care should be taken before abbreviating the charge in this way.

[918] This charge will need to be adapted if it is alleged that the accused was guilty on the basis of some form of accessorial liability. See Part 5: Complicity.

The Elements

I must now direct you about the crime of armed robbery. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused committed theft.

Two – that, immediately before or at the time of the theft, the accused either:

- Used force on a person; or
- Put a person in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put a person in fear that force was going to be used on him/her [or another person], then and there.

Three – the accused acted in that way in order to commit the theft.

Four – the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the theft.

I will now explain each of these elements in more detail.[919]

Theft

The first element that the prosecution must prove is that the accused committed theft. In order to do this, the prosecution must prove three things.[920]

First, they must prove that the accused appropriated property that belonged to another person. Although the word "appropriation" has a technical legal meaning, and includes many different types of acts, here it simply means to take something without the owner's consent.

In this case, the prosecution alleged that NOA took [*identify property*] that belonged to [*identify owner*]. [*Summarise prosecution evidence and/or arguments*]. The defence denied this, arguing [*insert defence evidence and/or arguments*].

Secondly, the prosecution must prove that, when the accused appropriated the [*describe property*], s/he intended to permanently deprive the owner of it. That is, s/he intended that the owner would never get it back.

It does not matter whether the accused intended to keep, sell, give away, destroy or hide the appropriated property. If his/her intention was that the owner would not get the property back, then s/he will have had the necessary intention.

In this case, the prosecution alleged that NOA had such an intention. [*Identify prosecution evidence and/or arguments.*]

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[919] If an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

[920] This part of the charge is designed for use in cases where the theft element does not raise any technical issues. If such issues do arise, the charge should be adapted or expanded accordingly. Guidance can be obtained from 7.5.1.2 Charge: Theft (Extended).

Thirdly, the prosecution must prove that, at the time of the appropriation, the accused was acting dishonestly. In this context, "dishonesty" does not have its ordinary meaning. It is given a special legal meaning, which says that the accused will have acted dishonestly if, when s/he took the property, s/he did not believe that s/he had a legal right to take it.

In this case there is no evidence that the accused believed s/he had a legal right to take the [*identify property*]. So if you are satisfied that NOA took that property, you should have no difficulty finding this requirement proved.

It is for you to determine, based on all the evidence, whether NOA committed theft. This will only be the case if you are satisfied that all three of the requirements I have just outlined have been proved beyond reasonable doubt.

Force or fear of force

The second element that the prosecution must prove is that, immediately before or at the time of the theft, the accused either:

- Used force on a person; or
- Put a person in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put a person in fear that force was going to be used on him/her [or another person], then and there.

In this case the prosecution alleged that NOA [*identify relevant ground*[*s*] *and people involved, e.g. "*used force against NOC*"*] when s/he [*describe relevant conduct*]. The defence denied this, arguing [*describe defence evidence and/or arguments*].

[*If it is alleged that the accused put, or sought to put, a person in fear, add the following shaded section.*]

You will note that it is not enough for the prosecution to prove that NOA put, or sought to put, NOC in fear that force was going to be used on him/her/NO3P[921] at some distant or uncertain time. To prove this element on the basis of the threatened use of force, the prosecution must prove that NOA put, or sought to put, NOC in fear that force was going to be used on him/her/NO3P then and there.

You will also note that, while this element will be met if you are satisfied that NOC was actually fearful that such force was going to be used, this is not necessary. This element will be met if the prosecution can prove that NOA sought to put NOC in fear, even if that attempt was unsuccessful.

Conduct was committed "in order" to steal

The third element that the prosecution must prove is that the accused acted in the way s/he did in order to commit the theft. That is, NOA must have [used force on NOC/put NOC in fear of the use of force/sought to put NOC in fear of the use of force] for the purpose of stealing the [*identify property*], rather than for another reason.

[*Insert any relevant evidence and/or arguments.*]

The accused was armed

The fourth element that the prosecution must prove is that the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the theft. For this element to be met, there are three things that the prosecution must prove.

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[921] Name of third party.

First, they must prove that, at the time of the theft, NOA had [*identify item*] either on him/her or readily available for use.

Secondly, the prosecution must prove that [*identify item*] falls within the category of [firearm/imitation firearm/offensive weapon/explosive/imitation explosive].

[*Where there is a dispute about whether the article possessed was a firearm, add relevant parts of the following shaded section.*]

The law defines a "firearm" to be any device which is designed or adapted to discharge bullets or other missiles, either by the expansion of gases produced in the device by the ignition of strongly combustible materials, or by compressed air or other gases. The definition of "firearm" also includes anything which looks like such a device.

However, certain things are excluded from the definition of a "firearm". These include [*identify relevant exception, e.g.* "underwater spear guns"].

To be a "firearm", the device does not need to be assembled, complete or operational. If it fits the definition I have just given you, it will be a "firearm", whether or not it actually works.

[*Where it is alleged that the accused had an imitation firearm with him/her, add the following shaded section.*]

An "imitation firearm" is anything which has the appearance of being a firearm, whether or not it is capable of being shot.

[*Where it is alleged that the accused had an offensive weapon with him/her, add the following shaded section.*]

An "offensive weapon" can be an item which is specifically made or adapted for the use of injuring or incapacitating a person. An ordinarily inoffensive item can also become an "offensive weapon" if the person carrying it intends or threatens to use it to injure or incapacitate a person.

[*If it is alleged that the relevant article was made for the use of injuring or incapacitating a person, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] is an "offensive weapon" because it is made for injuring or incapacitating people. That is, it is an item that is normally used for this purpose.

[*If it is alleged that the relevant article was adapted for the use of injuring or incapacitating a person, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because it was adapted for the use of injuring or incapacitating people. That is, it was physically modified so that it could cause injury or incapacitate a person.

[*If it is alleged that an ordinary article became an offensive weapon because of the accused's use, threats or intention, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because NOA [used/threatened to use/intended to use] it for the purpose of injuring or incapacitating a person.

[*Where it is alleged that the accused had an explosive with him/her, add the following shaded section.*]

An "explosive" is any item which is manufactured for the purpose of producing a practical effect by explosion, or which is intended to have that purpose. Any item that fits this definition will be an "explosive", whether or not it actually works.

[*Where it is alleged that the accused had an imitation explosive with him/her, add the following shaded section.*]

An "imitation explosive" is any item which might reasonably be taken to be, or to contain, an

explosive.

Thirdly, the prosecution must prove that NOA had the [*identify item*] with him/her for the purpose of the robbery. That is, s/he intended to use the [*identify item*] to apply force to a person, or to put a person in fear that s/he or another person would, then and there, be subject to the use of force.

[*If the accused may not have used the article for this purpose, add the following shaded section.*]

It does not matter whether NOA actually used the [*identify item*] for this purpose. What is important is whether s/he intended to use it for the purpose of the robbery.

In determining this matter you should focus on NOA's intention at the time of the robbery. It does not matter what his/her intention was at the time s/he first handled the [*identify item*].

In this case the prosecution argued that all three of these requirements have been met. [*Describe prosecution evidence and/or arguments.*]

The defence [*describe defence case* [*if any*] *in respect of this element, e.g.*

- denied that NOA had a gun with him/her at the time of the robbery;
- denied that the bottle was an offensive weapon;
- denied that NOA had the knife with him/her for the purpose of the robbery].

It is for you to determine, based on all the evidence, whether all three of these matters have been proved beyond reasonable doubt. It is only if you are satisfied that NOA had [*identify item*] with him/her at the time of the theft, that [*identify item*] was a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive], and that NOA had that item with him/her for the purposes of the robbery that this element will be met.

Summary

To summarise, before you can find NOA guilty of armed robbery, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA committed theft, by dishonestly appropriating property that belonged to another person, intending to permanently deprive the owner of that property; and

Two – that immediately before or at the time of the theft, NOA either:

- Used force on NOC; or
- Put NOC in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put NOC in fear that force was going to be used on him/her [or another person], then and there; and

Three – that NOA acted in this way in order to commit the theft; and

Four – that NOA had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the theft. That is:

- At the time of the theft, s/he had a [*identify item*] on him/her or readily available;
- That a [*identify item*] falls within the category of a [*identify category*]; and
- That NOA had the [*identify item*] with him/her for the purpose of the robbery.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of armed robbery.

Robbery

In this case, there are two alternatives to the offence of armed robbery. The first is the offence of robbery.

This is an alternative to the offence of armed robbery. That means that you will only be asked to return a verdict on this offence if you are not satisfied that the prosecution has proved the offence of armed robbery beyond reasonable doubt. If you decide that NOA is guilty of armed robbery, then you do not need to deliver a verdict on this alternative.

The offence of robbery is very similar to the offence of armed robbery, with one important difference: the accused does not need to have had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the theft.

In other words, if you are satisfied that the prosecution have proved the first three elements I just described beyond reasonable doubt, but are not satisfied that they have proved element four, then you should find the accused guilty of robbery. However, if you find that any of the first three elements have not been proved beyond reasonable doubt, then you must find the accused not guilty of robbery.

Theft

The second alternative offence is theft. As theft is an alternative to the offences of robbery and armed robbery, you will only be asked to return a verdict on the offence of theft if you are not satisfied that the prosecution have proved either of those offences beyond reasonable doubt. If you decide that NOA is guilty of either armed robbery or robbery, then you do not need to deliver a verdict on this alternative.

I have already explained the elements of theft to you, when instructing you about the first element of armed robbery. They are:

One – that the accused appropriated property belonging to another person; and

Two – that the accused intended to permanently deprive the other person of that property; and

Three – that the accused appropriated the property dishonestly, in that s/he did not believe that s/he had a legal right to take it.

For NOA to be guilty of theft, you must be satisfied that the prosecution has proved all of these matters beyond reasonable doubt. If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of theft.

Last updated: 27 March 2013

7.5.3.3 Checklist: Armed Robbery

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused committed theft; and
2. Immediately before or at the time of the theft, the accused either:
    - Used force on a person; or
    - Put or sought to put a person in fear that force was going to be used against someone, then and there; and
3. The accused acted in that way in order to commit the theft; and
4. The accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the theft.

Theft

1. Did the accused commit theft?

1.1 Did the accused appropriate property that belonged to another person?

*Consider – **Did the accused take something without the owner's consent?***

If Yes, then go to 1.2

If No, then the accused is not guilty of Armed Robbery

1.2 Did the accused intend to permanently deprive another person of that property?

If Yes, then go to 1.3

If No, then the accused is not guilty of Armed Robbery

1.3 Was the accused acting dishonestly?

Consider – Might the accused have believed that s/he had a legal right to take the property?

If Yes, then go to 2

If No, then the accused is not guilty of Armed Robbery

Use of Force

2.1 Immediately before or at the time of the theft, did the accused use force against another person?

If Yes, then go to 3

If No, go to 2.2

2.2 Immediately before or at the time of the theft, did the accused put a person in fear, or seek to put a person in fear, that force was going to be used on him or her or another person, then and there?

If Yes, then go to 3

If No, then the accused is not guilty of Armed Robbery

Force Used in Order to Commit Theft

3. Did the accused act in this way in order to commit the theft?

Consider – Did the accused use or threaten the use of force for the purpose of stealing, rather than for another purpose?

If Yes, then go to 4

If No, then the accused is not guilty of Armed Robbery

The Accused was Armed

4. Did the accused have a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the theft?

4.1 Did the accused have this item either on him/her or readily available for use?

If Yes, then go to 4.2

If No, then the accused is not guilty of Armed Robbery

4.2 Was the item a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive]?

If Yes, then go to 4.3

If No, then the accused is not guilty of Armed Robbery

4.3 Did the accused have this item with him/her for the purpose of the robbery?

Consider – Did the accused intend to use the item to apply force to a person, or to put a person in fear that s/he or another person would, then and there, be subject to the use of force?

If Yes, then the accused is guilty of Armed Robbery

If No, then the accused is not guilty of Armed Robbery

Last updated: 13 August 2009

7.5.4 Burglary

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Overview

1. Burglary is an offence under *Crimes Act 1958* s 76.
2. The offence has the following three elements:
   i) The accused entered a building (or part of a building);
   ii) The accused did so as a trespasser; and
   iii) The accused intended to:
      - Steal something from the building or part in question; or
      - Commit an offence punishable by imprisonment for a term of five years or more involving either:

- An assault to a person in the building or part in question; or
- Damage to the building or to property in the location (*Crimes Act 1958* s 76).

The accused entered a building or part of a building

3. The first element that the prosecution must prove is that the accused entered a "building" or "part of a building" (*Crimes Act 1958* s 76(1)).

Entering a "building"

4. Whether or not a structure is a "building" is a question of fact for the jury. Relevant characteristics include size, weight, permanence of position, the presence of doors and locks, and the availability of electricity (*B and S v Leathley* [1979] Crim LR 314).
5. Inhabited vehicles and vessels are treated as "buildings" for the purposes of this offence (*Crimes Act 1958* s 76(2)).
6. Issues can arise where the accused entered the external structure of a building (e.g. the porch). In such cases it is for the jury to determine whether the accused entered the "building", or simply entered a space outside the building (*R v Cahill* [1999] 2 VR 387).

Entering "part of a building"

7. Sometimes a person will be lawfully allowed to enter certain parts of a building, but prohibited from entering other parts. This first element will be met if the accused enters an unauthorised "part of a building" (*Crimes Act 1958* s 76(1)).
8. In this context, there are only two distinguishable "parts" to a building: the part of a building that the accused could lawfully enter, and the remainder of the building (*R v Walkington* [1979] 1 WLR 1169).
9. While these "parts" do not need to be physically demarcated, apparent demarcations will be pertinent to the jury's assessment of whether or not the "part of the building" the accused entered was in fact "off-limits", and whether or not the accused was aware of that fact. These considerations will be relevant for the purpose of determining whether the accused was knowingly trespassing (the second element) (*R v Walkington* [1979] 1 WLR 1169).

Entry as a trespasser

10. The second element that the prosecution must prove is that the accused entered the building (or part of a building) "as a trespasser" (*Crimes Act 1958* s 76(1)).
11. This requires the prosecution to prove that the accused entered the building (or part of the building) without right or authority to enter (*Barker v R* (1983) 153 CLR 338).[922]
12. The prosecution must also prove that the accused entered the building (or part of the building):

    i) Knowing that he or she had no right or authority to enter; or

    ii) Being reckless as to whether he or she had any right or authority to enter (*Barker v R* (1983) 153 CLR 338).

[922] This is the same physical act that is required for "trespass" at civil law, but the mental state required differs (see below) (*Barker v R* (1983) 153 CLR 338).

13. When a person enters a building as a trespasser, s/he will still be a trespasser when s/he enters a room in that house (*R v Chimirri* [2010] VSCA 57).

Absence of right or authority to enter

14. A person does not enter a building (or part of a building) as a trespasser if his or her entry is justified by right or authority (*Barker v R* (1983) 153 CLR 338).

15. A variety of "rights" and "authorities" arise under the civil law. As listed by Brennan and Deane JJ in *Barker v R* (1983) 153 CLR 338, they include the following:

    - A paramount right to possession;
    - Some other statutory or common law right of entry;
    - Involuntary and inevitable accident; or
    - The licence of the person in possession of the property (*Barker v R* (1983) 153 CLR 338).

16. If the trial judge directs the jury in terms of a "right", "licence" or "authority" to enter, he or she should describe the meaning of that term (*R v Taylor* (2004) 10 VR 199).

Limited authority to enter

17. The accused's authority to enter a building (or part of a building) may be subject to express or implied limitations regarding the time, place, manner or purpose of entry. In such cases, any entry outside those terms may be a trespass (*Barker v R* (1983) 153 CLR 338).

18. Whether or not the accused's authority to enter a building (or part of a building) is limited in any way is a question of fact. It cannot be assumed that the authority to enter is subject to any particular limitations (e.g. limits concerning the purpose of the entry) (*Barker v R* (1983) 153 CLR 338).

19. A specific limitation cannot be implied just because it is probable that, if raised, it would have been incorporated as a limitation to the authority (*Barker v R* (1983) 153 CLR 338).

20. Where the authority to enter is based on general law, that authority will ordinarily be limited to entry for the purpose for which the authority exists. Any entry for a purpose other than the authorised purpose is likely to be a trespass (*Barker v R* (1983) 153 CLR 338).

21. It is therefore trespass if a person is authorised to enter a property for the purpose of protecting its contents, but instead enters the property for the purpose of stealing those contents (*Barker v R* (1983) 153 CLR 338).

22. The accused will not have entered as a trespasser if he or she complied with all of the express and implied limitations of the authority to enter, even if he or she entered the property with the intention of violating a fundamental interest of the authorising party (e.g. by stealing or damaging property, or by assaulting a person) (*Barker v R* (1983) 153 CLR 338).

Unlimited authority to enter

23. Sometimes a person will have unlimited authority to enter a building (or part of a building), such as where they are a tenant. A person who has a right of exclusive possession of the relevant premises cannot be a trespasser (*BA v The King* [2023] HCA 14, [69]–[101]).

24. The position in relation to a person who has an unqualified licence to enter premises is less clear.

25. In England and Wales it has been held that a person who enters a building with an undisclosed intention to steal enters as a trespasser, even if he or she has unlimited authority to enter the building (*R v Jones & Smith* [1976] 1 WLR 672; *R v Taylor* (2004) 10 VR 199).

26. In Australia, Brennan, Deane and Murphy JJ in *Barker v The Queen* doubted whether a person with an unqualified licence to enter would become a trespasser when they entered premises for the purpose of committing some offence (see *Barker v The Queen* (1983) 153 CLR 338 (obiter per Brennan, Deane and Murphy JJ). But c.f. *R v Munro* [2006] VSCA 94).

27. The Charge Book burglary and aggravated burglary charges adopt the narrower approach suggested in *Barker v R* (1983) 153 CLR 338. That is, they direct the jury that an undisclosed intention to commit an offence cannot by itself convert an authorised visitor into a trespasser.

Remaining on property after authority has been withdrawn

28. Sometimes a person will remain upon property after his or her authority to be there has ended or been withdrawn. While at civil law he or she may be treated as having been a trespasser from the time of entry (a trespasser *ab initio*), this is not the case in criminal proceedings. In such proceedings a lawful entry cannot be retrospectively transformed into a trespassory entry (*Barker v R* (1983) 153 CLR 338; *Victoria v Second Comet Pty Ltd* (Vic SC 21/12/1994).

29. It follows that if the accused lawfully enters a building, but his or her authority to be there is subsequently terminated, he or she will not become a burglar simply by remaining there in order to steal or commit another relevant offence. For this second element to be met, he or she must make a fresh "entry" into the building or distinguishable part of the building.

The Accused's Mental State

30. For the purposes of the offence of burglary, a person only enters a building (or part of a building) as a trespasser if he or she enters:

    - Knowing that he or she has no right or authority to enter; or
    - Being reckless as to whether he or not she has any such right or authority (*Barker v R* (1983) 153 CLR 338; *R v Taylor* (2004) 10 VR 199; *R v Lambourn* [2007] VSCA 187).

31. For the accused to have been "reckless" as to whether he or not she had the right or authority to enter a building (or part of a building), he or she must have believed that it was *probable* that s/he had no right or authority to enter the building (or its relevant part) (See *R v Verde* [2009] VSCA 16, [21]. See also *R v Campbell* [1997] 2 VR 585; *R v Nuri* [1990] VR 641; *R v Kalajdic* [2005] VSCA 160, [30]–[31]; *DPP Reference No 1 of 2019* [2021] HCA 26; *DPP Reference No 1 of 2019* [2020] VSCA 181).

32. It is not sufficient that the accused was merely aware of the *possibility* that his or her entry was unauthorised (see *R v Verde* [2009] VSCA 16, [21]; *R v Kalajdic* [2005] VSCA 160, [30]–[31]; *R v Campbell* [1997] 2 VR 585; *R v Nuri* [1990] VR 641).

33. The trial judge should direct the jury on the meaning of the term "recklessness" where that concept is in issue. Failure to direct on the meaning of this term risks the jury deciding the issue on the basis of the lower standards of carelessness or negligence (*R v Taylor* (2004) 10 VR 199).

Intention to commit a prescribed offence

34. The third element that the prosecution must prove is that the accused entered the building (or part of the building) with the intention of committing an offence prescribed in s 76(1)(a) or (b) (*Crimes Act 1958* s 76(1)).

35. The offences prescribed by *Crimes Act 1958* s 76(1) are:

    i) The theft of anything in the building or unauthorised part of the building (s 76(1)(a));

    ii) An offence punishable by imprisonment for a term of five years or more that:

        - Involves an assault to a person in the building or unauthorised part of the building (s 76(1)(b)(i)); or
        - Involves any damage to the building or property in the or unauthorised part of the building (s 76(1)(b)(ii)).

36. Whether a particular offence is an offence "punishable by imprisonment" for any particular term is a question of law for the judge. This legal requirement does not create any factual issue for determination by the jury. So while the judge may need to make a ruling in this regard, it is not necessary to direct the jury on this issue.

37. The prosecution must prove that the accused intended to commit the prescribed offence at the time of entry. This element is not satisfied if that intention was only formed after the accused entered the building (*R v Verde* [2009] VSCA 16; *R v Walkington* [1979] 1 WLR 1169).

38. It seems that satisfaction of this element may depend on the way in which the presentment is framed. For example:

    - If it is alleged in the presentment that the accused entered *the house* as a trespasser, it will be necessary for the prosecution to prove that s/he had the requisite intention when s/he initially entered the house.
    - If it is alleged in the presentment that the accused entered a particular *room* in the house as a trespasser, the prosecution does not need to prove that the accused intended to commit the prescribed offence when initially entering the house. Instead, they only need to prove that the accused had that intention when entering the room identified in the presentment (*R v Chimirri* [2010] VSCA 57).

39. The accused may form the necessary intent even though important matters remain outside his or her knowledge or control. For example, this element will be satisfied if the accused entered the building (or part of the building) with an intention:

    - To steal anything of value which may be inside;
    - To assault any person who he or she may find inside; or
    - To assault a particular person if he or she finds them inside (*R v Verde* [2009] VSCA 16; *R v Walkington* [1979] 1 WLR 1169; *R v Garlett* (1987) 31 A Crim R 75).

40. This element is separate to and distinct from the *mens rea* component of the second element (i.e., the accused knowing that he or she had no right or authority to enter, or being reckless as to that possibility). The jury should be directed separately about these elements (*R v Spero* (2006) 13 VR 225).

41. It is permissible for the prosecution to allege different intents as alternatives bases of culpability in the one charge.[923] Where it does so, the jury should be directed that they must agree, not just on their ultimate verdict, but also on the basis of culpability. See Unanimous and Majority Verdicts for further information about this issue.

Intention to steal

42. The first way in which this element may be met is by proving that the accused intended to steal anything in the building or unauthorised part of the building (*Crimes Act 1958* s 76(1)(a)).

43. In such cases the prosecution only needs to prove that the accused intended to steal "anything in the building". It does not need to prove:

    - That the accused intended to steal a specific item;
    - That the accused actually stole anything; or
    - That there was anything on the premises worth stealing (*R v Walkington* [1979] 1 WLR 1169; *R v Nilson* [1968] VR 238).

44. If the accused's intention was to take property in circumstances not amounting to theft (e.g. because s/he believed that s/he had a legal claim of right), then this element will not be met. For more information about what amounts to theft, see 7.5.1 Theft.

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[923] For example, the prosecution could allege that the accused entered the building with an intention "to steal therein and/or to commit an assault to a person therein".

Intention to assault a person

45. The second way in which this element may be met is if the accused entered the building (or part of the building) with an intent to "commit an offence involving an assault upon a person in the building… which is punishable by imprisonment for a term of five years or more" (*Crimes Act 1958* s 76(1)(b)(i)).

46. The definition of assault in s 31(2) does not apply to burglary. It applies only to s 31(1) and s 40(1) of the *Crimes Act 1958*.

47. The s 76(1)(b)(i) formula most straightforwardly translates into an intention to commit the offence of common law assault. That offence is punishable by 5 years imprisonment (*Crimes Act 1958* s 320).

48. The prosecution can therefore meet this element by proving that the accused entered the property:

    - Intending to apply force to the body of a relevant person; or
    - Intending to cause a relevant person to apprehend the immediate application of force to his or her body (See 7.4.8 Common Law Assault for more information).

49. Numerous other offences against the person "involve an assault" in the sense that they involve actual touching, or causing physical injury, or threatened immediate application of force. If the prosecution relies upon an alternative offence then the charge will need to reflect the mental element of that offence.[924]

50. If the accused's intention was to engage in conduct that did not amount to an offence involving an assault (e.g. where consent is a defence to the relevant offence, and the accused believed the victim was consenting) then this element will not be met.

51. Where the accused is alleged to have offended as part of a group, this element can be proved by showing either that the accused intended to commit an assault personally, or that the accused intended to assist or encourage another person in the group to commit an assault (*R v Novakovic* [2019] VSC 339, [365]–[382]).

Intention to damage property

52. The third way in which this element may be met is if the accused entered the building (or part of the building) with an intent to "commit an offence involving any damage to the building or to property in the building … which is punishable by imprisonment for a term of five years or more" (*Crimes Act 1958* s 76(1)(b)(ii)).

53. The offences most commonly relied upon in this respect are the offences of arson or destroying or damaging property contrary to *Crimes Act 1958* s 197.

54. See 7.5.16 Criminal Damage for further information.

Last updated: 30 July 2023

7.5.4.1 Charge: Burglary (Short)

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[924] The jury need only be charged on the elements of the secondary offence to the extent that they are relevant to the allegation that the accused intended to commit that offence.

This abbreviated charge should only be used where the sole defence relied upon by the accused, or raised by the evidence, is that the accused *was not the offender.*[925]

The Elements

I must now direct you about the crime of burglary. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused entered [part of] a building.

Two – the accused did so as a trespasser.

Three – that, when s/he entered the [relevant part of the] building, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"].

Facts in Issue

In this case the defence did not contest the evidence that someone [*summarise evidence burglary*]. They agreed that you should be satisfied these events occurred, and that the person who was responsible for them is guilty of burglary.[926] However, they denied that NOA was the person who acted in that way.[927]

Consequently, the only issue for your consideration [on this count] is whether or not the prosecution have proved, beyond reasonable doubt, that NOA was the person who [*describe alleged conduct*]. If you are satisfied that it was NOA who did those acts, you should have no difficulty finding all three elements of this offence to have been proven.

The evidence was [*describe evidence relevant to identification*]. Counsel argued [*describe arguments relevant to identification*].

[*If not done elsewhere, include directions and warnings about* identification evidence*. See* 4.12 Identification Evidence *and* 4.12.1 Charges: Identification Evidence *for assistance.*]

Summary

To summarise, you have only one issue to decide in respect of this count. That issue is, have the prosecution proved beyond reasonable doubt that NOA was the person who [*describe alleged conduct*].

If you are satisfied that they have, then you should have no difficulty finding all the elements of this offence proved. In such circumstances you should find NOA guilty of burglary.

However, if you are not satisfied beyond reasonable doubt that it was NOA who [*describe alleged conduct*], you must find him/her not guilty of burglary.

Last updated: 3 December 2012

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[925] Abbreviated charges should normally be discussed with counsel before being used. Caution should be exercised before using this charge over the objection of counsel.

[926] If this concession has not been made, care should be taken before abbreviating the charge in this way.

[927] This charge will need to be adapted if it is alleged that the accused was guilty on the basis of some form of accessorial liability. See Part 5: Complicity.

7.5.4.2 Charge: Burglary

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The Elements

I must now direct you about the crime of burglary. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused entered [part of] a building.

Two – the accused did so as a trespasser.

Three – that, when s/he entered the [part of the] building, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"].

I will now explain each of these elements in more detail.[928]

The accused entered a building or part of a building

The first element that the prosecution must prove is that the accused entered [part of] a building.

In this case the [part of the] building it is alleged that NOA entered is [*identify relevant building or part of the building*].

[*If the "building" is an inhabited vehicle or vessel, add the following shaded section.*]

While you may not think that a [*identify relevant class of vehicle or vessel, e.g.* "caravan", "trailer", "houseboat"] is a "building", for the purposes of this offence a vehicle or vessel is treated as a "building" if it was inhabited at the time of the offence.

A vehicle or vessel will have been "inhabited" at the time of the offence if a person was living in it at that time. No-one needs to have actually been present in the vehicle or vessel at the time of the burglary. This requirement will be satisfied as long as someone was living there, even if they were out when the burglary took place.

[*Summarise relevant evidence and/or arguments.*]

It is for you to determine, based on all the evidence, whether NOA entered the [*identify relevant building or part of the building*]. It is only if you are satisfied, beyond reasonable doubt, that s/he did, that this first element will be met.

The accused entered as a trespasser

The second element that the prosecution must prove is that the accused entered the [part of the] building as a trespasser. For this element to be met, there are two things the prosecution must prove.

First, they must prove that NOA entered the [*identify relevant building or part of the building*] without any right or authority to enter. That is, that [part of the] building must have been "off-limits" to him/her.

[*If it is alleged that the accused entered a prohibited part of a building, add the following shaded section.*]

It is important to note that, in this case, the prosecution did not allege that the entire building was "off-limits" to NOA. They accepted that s/he was authorised to enter certain parts of the building,

[928] If an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

such as the [*identify authorised parts of the building*]. However, they argued that NOA was forbidden from entering the [*identify prohibited part of the building*]. That is, s/he had no right or authority to be there.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine whether that part of the building really was "off-limits" to NOA. This part of the second element will only be satisfied if you find that it was.

[*If it is alleged that the accused had limited authority to enter, but exceeded that authority, add the following shaded section.*]

In this case the prosecution did not deny that NOA had some authority to enter [*identify building or relevant part of building*]. However, they argued that s/he only had authority to enter [that part of] the building if s/he complied with certain conditions, such as [*identify alleged conditions.*]

The prosecution alleged that when NOA entered the [part of the] building s/he was not complying with these conditions, and so had no right or authority to enter. She was therefore trespassing.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine if NOA's authority to enter [*identify building or relevant part of building*] was subject to any conditions. In making this determination you can consider everything that was said and done by the parties, and also the way that people generally conduct themselves. However, you cannot assume that certain conditions were imposed just because those limits would have been imposed if the issue had been raised. You must be satisfied that those conditions actually were imposed.

If you find that NOA's authority to enter the [*identify building or relevant part of building*] was not subject to any conditions, then the second element will not be met. In such circumstances, the accused will have had unlimited authority to enter the [part of the] building, and so cannot have been trespassing, no matter what s/he intended to do. Even if s/he entered with some undesirable purpose in mind, s/he still had a right to enter.

If you find that NOA's authority to enter was subject to certain conditions, you must then determine whether or not, when s/he entered the [part of the] building, s/he was complying with those conditions. If s/he was, then s/he will not have been trespassing. That is, s/he will have had a right or authority to enter that [part of the] building.

However, if s/he was not complying with those conditions, then s/he will have had no right or authority to enter the building, and this part of the second element will be met.

To summarise, this part of the second element will only be met if you are satisfied that NOA was only authorised to enter [*identify building or relevant part of building*] if s/he complied with certain conditions, and you find that s/he did not comply with those conditions when s/he entered. If you are not satisfied of either of these matters beyond reasonable doubt, then this element will not be met.

The second matter that the prosecution must prove for the second element to be met is that the accused either knew that s/he had no right or authority to enter [*identify building or relevant part of building*], or s/he believed that it was probable that she had no such right or authority.

For this part of the second element to be satisfied, it is not sufficient for NOA to have known that it was possible that she had no right or authority to enter the [part of the] building. S/he must have at least known that this was probably the case.

[*Summarise relevant evidence and/or arguments.*]

It is only if you are satisfied, beyond reasonable doubt, that NOA entered the [*identify relevant building or part of the building*] without any right or authority to enter, and that s/he knew that s/he had no right or authority to enter that [part of the] building, or at least knew that that was probably the case, that this second element will be met. If you are not satisfied about both of these matters, then you must find NOA not guilty of burglary.

The accused intended to commit an offence

The third element that the prosecution must prove is that, when s/he entered the [part of the] building, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g. "theft", "common assault", "criminal damage"*].

[*Where the relevant offence is theft, add the following shaded section.*]

In order to do this, the prosecution must prove three things.[929]

First, they must prove that the accused intended to appropriate property that belonged to another person. In this case the word "appropriate" simply means to take something without the owner's consent.

Secondly, the prosecution must prove that the accused intended to permanently deprive the owner of the property in question. That is, the accused must have intended that the owner would never get it back.

Thirdly, the prosecution must prove that when s/he entered the [part of the] building, the accused did not believe that s/he had a legal right to take the property in question.

[*If further elaboration is necessary, include any relevant bullet points from the following list.*]

- The prosecution does not need to prove that any property was in fact stolen. They only need to prove that the accused intended to steal.
- The prosecution does not need to prove that the accused intended to steal any particular property. They only need to prove that s/he intended to steal property of some kind from inside the building.
- This element will be met if the prosecution can prove that, although the accused did not know what s/he would find in the [part of the] building, s/he intended to steal anything of value that s/he might come across.

[*Summarise relevant evidence and/or arguments.*]

[*Where the relevant offence is common assault, add the following shaded section.*]

In order to do this the prosecution must prove two things.[930]

First, they must prove that the accused intended either to apply force to a person's body, or to act in

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[929] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.5.1.2 Charge: Theft (Extended).

[930] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.4.8.1 Charge: Assault – Application of Force or 7.4.8.3 Charge: Assault – No Application of Force.

a way that would cause a person to apprehend the immediate application of force to his or her body.[931]

[*If further elaboration is necessary, include any relevant directions from the following bullet list*.]

- [*For application of force cases*] It does not matter how much force the accused intended to apply. Nor does it matter whether or not that force would have harmed the person. An intention to merely touch someone is enough.
- [*For application of force cases*] It does not matter whether s/he would have actually been able to apply the force. It is sufficient for the accused to have intended to apply force.
- [*For apprehension cases*] S/he does not need to have intended to actually apply such force. The accused only needs to have intended to cause someone to apprehend that force would be applied.

Secondly, the prosecution must prove that the accused intended to act in this way in circumstances in which there was no lawful justification or excuse for his/her conduct.

[*Possible forms of lawful justification or excuse include consent, self-defence, arrest, the lawful correction of children and ordinary social activity. For guidance on directions for these matters see* 7.4.8 Common Law Assault *and* 7.4.8.1 Charge: Assault – Application of Force *and/or* 7.4.8.3 Charge: Assault – No Application of Force.

[*If no lawful justifications or excuses are open on the evidence, add the following darker shaded section.*]

In this case, it has not been suggested that there was a lawful justification or excuse for the accused's alleged actions. You should therefore have no difficulty finding that, if NOA intended to [apply force to a person's body/act in a way that would cause a person to apprehend the immediate application of force to his or her body], that was done without lawful justification or excuse.

[*If any lawful justifications or excuses are open on the evidence, give appropriate directions incorporating reference to the evidence and arguments relevant to the justification or excuse, and concluding with the following darker shaded section.*]

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused's behaviour was without lawful [justification/excuse]. The defence does not need to prove that NOA had such a [justification/excuse].

The accused must have had the relevant intention at the time s/he entered the [part of the] building. If you accept that it is reasonably possible that NOA only formed that intention after entering the [part of the] building, then this element will not be satisfied.

Summary

To summarise, before you can find NOA guilty of burglary, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA entered [part of] a building; and

Two – that NOA did so as a trespasser. That is:

- S/he entered the [part of the] building without any right or authority to enter; and

[931] If the prosecution relies on only one basis of culpability, directions on the alternative basis should be omitted.

- S/he knew that s/he had no right or authority to enter that [part of the] building, or at least knew that that was probably the case; and

Three – that at that time NOA intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of burglary.

Last updated: 2 July 2020

7.5.4.3 Checklist: Burglary

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This checklist includes two possible third elements. Judges must omit or adapt this checklist depending on how the prosecution seeks to prove the third element.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused entered [part of] a building; and
2. The accused did so as a trespasser; and
3. At the time of entry the accused intended to commit the offence of [theft/common assault/criminal damage etc.] within the [part of the] building.

Entry into [part of] a building

1. Did the accused enter the [part of the] building?

If Yes, then go to 2

If No, then the accused is not guilty of Burglary

Entry as a trespasser

2. Did the accused enter as a trespasser?

2.1 Did the accused have a right or authority to enter the [part of the] building?

If Yes, then go to 2.2

If No, then go to 2.3

2.2 Did the accused enter the [part of the] building in circumstances that were not permitted by his or her right or authority to enter?

Consider – Was the accused only permitted to enter for a specific purpose or in specific circumstances, and did he or she in fact enter for a different purpose, or in different circumstances?

If Yes, then go to 2.3

If No, then the accused is not guilty of Burglary

2.3 Did the accused know or believe it was probable either that he or she had no right to enter the [part of the] building or that he or she was entering in circumstances that were not permitted by his or her right or authority to enter?

If Yes, then go to 3

If no, then the accused is not guilty of Burglary

The Accused Intended to Steal

3. At the time of entry, did the accused intend to steal property from within the [part of the] building?

3.1 Did the accused intend to appropriate property that belonged to another person?

Consider – ***Did the accused intend to take something without the owner's consent?***

If Yes, then go to 3.2

If No, then the accused is not guilty of Burglary

3.2 Did the accused intend to permanently deprive another person of that property?

If Yes, then go to 3.3

If No, then the accused is not guilty of Burglary

3.3 Did the accused believe that s/he had a legal right to take the property?

If No, then the accused is guilty of Burglary

If Yes, then the accused is not guilty of Burglary (as long as you answered yes to questions 1, 2, 3.1 & 3.2)

The Accused Intended to Assault a Person Inside the Building

3. At the time of entry, did the accused intend to assault a person in the [part of the] building?

3.1 Did the accused intend to apply force to the body of a person in the building?

If No, then go to 3.2

If Yes, then go to 3.3

3.2 Did the accused intend to act in a way that would cause a person in the building to apprehend the immediate application of force to his or her body?

If Yes, then go to 3.3

If No, then the accused is not guilty of Burglary

3.3 Did the accused have a lawful justification to act in this way?

If No, then the accused is guilty of Burglary (as long as you answered yes to questions 1, 2, 3.1 & 3.2)

If Yes, then the accused is not guilty of Burglary

Last updated: 22 May 2009

7.5.5 Aggravated Burglary

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1. Aggravated burglary is an offence under the *Crimes Act 1958* s 77.
2. The offence can be committed in two alternative ways:
   - aggravated burglary while armed (s 77(1)(a)); or
   - aggravated burglary where a person was present (s 77(1)(b)).

   These are addressed in turn below.

Aggravated burglary while armed

3. Aggravated burglary while armed has the following two elements:

   i) the accused committed burglary; and

   ii) at that time the accused had a firearm, imitation firearm, offensive weapon, explosive or imitation explosive with him or her.

The accused committed burglary

4. The first element that the prosecution must prove is that the accused committed burglary (*Crimes Act 1958* s 77(1)(a)).
5. The accused will have committed burglary if he or she:

   (a) entered a building (or part of a building); and

   (b) did so as a trespasser; and

   (c) intended to:

   i) steal something from the building or part in question; or

   ii) commit an offence punishable by imprisonment for a term of five years or more involving either:

   (a) an assault to a person in the building or part in question; or

   (b) damage to the building or to property in the location (Crimes Act 1958 s 76).

6. See 7.5.4 Burglary for further information concerning each of these requirements.

The accused was armed

7. The second element that the prosecution must prove (if it is alleged that the accused committed aggravated burglary while armed) is that, at the time the accused committed the burglary, he or she had one of the following five articles with him or her:

    i) a firearm;

    ii) an imitation firearm;

    iii) an offensive weapon;

    iv) an explosive; or

    v) an imitation explosive (Crimes Act 1958 s 77(1A)).

Specified articles

Firearms

8. The term "firearm" is defined to have the same meaning as provided in section 3 of the *Firearms Act 1996* (*Crimes Act 1958* s 77(1A)).

9. That provision defines firearms broadly to include devices that are:

    - designed or adapted to discharge shot, bullets or other missiles
    - by the expansion of gases or by compressed gas (*Firearms Act 1996* s 3 "firearm"(a)).

10. It does not matter whether the device is assembled or disassembled, complete or incomplete, operable or inoperable (*Firearms Act 1996* s 3 "firearm").

11. The definition of "firearm" excludes:

    - certain specified industrial tools (*Firearms Act 1996* s 3 "firearm" (c), (d), (h));
    - underwater spear guns (*Firearms Act 1996* s 3 "firearm" (e));
    - signal flare devices and line throwers (*Firearms Act 1996* s 3 "firearm" (f), (i)); and
    - devices of a prescribed class (*Firearms Act 1996* s 3 "firearm" (j)). These currently include certain cannons or field guns, nets for catching animals, and devices mounted to model warships (see *Firearms Regulations 2008* s 20).[932]

Imitation firearms

12. An "imitation firearm" is anything which has the appearance of being a firearm, whether or not it is capable of being discharged (*Crimes Act 1958* s 77(1A)).

13. As the definition of "firearm" in section 3 of the *Firearms Act 1996* extends to devices which "have the appearance of" a firearm, the definitions of "firearm" and "imitation firearm" overlap.

Offensive weapons

14. An "offensive weapon" is any article which:

    - is *made for* causing injury or incapacitation to a person; or
    - is *adapted for the use of* causing injury or incapacitation to a person; or
    - the accused *threatens to use for* the purpose of causing injury or incapacitation to a person; or

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[932] While these articles will not be firearms, they may still be "offensive weapons" for the purposes of this offence.

- the accused *intends to use for* the purpose of causing injury or incapacitation to a person (*Crimes Act 1958* s 77(1A)).

15. Where the accused is charged with aggravated burglary as a secondary party and the accused does not have the article in question, the fourth limb of the definition likely requires proof that the accused intended that the co-offender would use the article for the purpose of causing injury or incapacitation, or was aware that it was probable that the co-offender would use the article for that purpose (see *Crimes Act 1958* s 323(1) and *Kargar v R* [2018] VSCA 148, [42]).

Articles made for causing injury or incapacitation

16. An article is "made for use" in causing injury or incapacitation to a person if it is normally used only for that purpose (*Wilson v Kuhl* [1979] VR 315).

17. Examples of this kind of article include knuckle dusters and sawn-off shotguns. Carving knives and walking sticks are not articles of this kind (*Wilson v Kuhl* [1979] VR 315).

18. Articles that fall within this category will be offensive weapons regardless of how the accused intends to use them (*Wilson v Kuhl* [1979] VR 315).

Articles adapted for the use of causing injury of incapacitation

19. An otherwise inoffensive article is "adapted" for the use of causing injury or incapacitation if it is physically modified to transform it into a dangerous or threatening object (*R v Nguyen* [1997] 1 VR 551).

20. A glass bottle may therefore become an offensive weapon if it is smashed to produce jagged edges (*R v Nguyen* [1997] 1 VR 551).

21. An article will not be "adapted" into an "offensive weapon" merely by being handled or presented aggressively. It must undergo some kind of physical transformation (*R v Nguyen* [1997] 1 VR 551).[933]

Articles the accused intends or threatens to use to cause injury or incapacitation

22. An unmodified and otherwise inoffensive article may become an "offensive weapon" if it is carried (or kept available) by a person who intends or threatens to use it to injure or incapacitate (*Crimes Act 1958* s 77(1A); *Wilson v Kuhl* [1979] VR 315; *R v Nguyen* [1997] 1 VR 551).

23. Kitchen knives, walking sticks and silk stockings carried with aggressive intent are examples of articles that fall into this category (*Wilson v Kuhl* [1979] VR 315; *R v Nguyen* [1997] 1 VR 551).

24. An item as innocuous as a half-full plastic drink bottle, when wielded in a manner capable of causing injury, can also fall into this category (*R v Nguyen* [1997] 1 VR 551).

25. It is not necessary to prove that the accused's original intention in carrying the article was to use it offensively. It is sufficient if the prosecution can prove that the accused had that intention at the time of the burglary (*R v Nguyen* [1997] 1 VR 551).

26. An accused's threat to use an article to cause injury or incapacitation will not qualify the article as an offensive weapon if the victim knows the threat is fanciful (*R v Nguyen* [1997] 1 VR 551).

Explosives and imitation explosives

27. An "explosive" is any article that is:

    - manufactured for the purpose of producing a practical effect by explosion; or
    - which the accused intends to have that purpose (*Crimes Act 1958* s 77(1A)).

28. An "imitation explosive" is any article which might reasonably be taken to be, or to contain, an explosive (*Crimes Act 1958* s 77(1A)).

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[933] However, a mundane item that is handled aggressively may be an "offensive weapon" due to its intended or threatened use (see below).

The accused had the article "with" him or her

29. For this element to be met, the accused must have had one of the specified articles "with" him or her at the time of the burglary (*Crimes Act 1958* s 77(1)(a)).

30. A person will have had the article "with" him or her if, at the time of the burglary, he or she had the article either on his or her person, or readily available for use (*R v Hartwick* (1985) 17 A Crim R 281).

31. This element will only be met if the accused *knew* that he or she had the article with him or her, or available for use (*R v Kolb & Adams* 14/12/1979 CCA Vic; *R v Cugullere* [1961] 1 WLR 858).

32. A person does not have an article "with" him or her if it is possessed in such a way that it cannot be used (e.g. if it is concealed on his or her person in a sealed package)(*R v Kolb & Adams* 14/12/1979 CCA Vic; *R v Pawlicki* [1992] 3 All ER 902).

33. However, an instrument may be "used" by doing no more than drawing attention to its existence (*R v Kolb & Adams* 14/12/1979 CCA Vic).

34. The ordinary principles of criminal complicity apply to this offence. This means that this element will be met if an accomplice, acting in concert with the accused, had the article "with" him or her (*R v Hartwick* (1985) 17 A Crim R 281; *R v Khammash* (2004) 89 SASR 488). See Part 5: Complicity for further information about the principles of criminal complicity.

Possession must be for the purpose of the burglary

35. In relation to the offence of armed robbery (*Crimes Act 1958* s 75A), the expression "has with him" has been held to create an implied requirement that the accused possessed the article *for the purpose of the robbery* (*R v Kolb & Adams* 14/12/1979 CCA Vic. See 7.5.3 Armed Robbery).

36. It is likely that the interpretation of the phrase "has with him" in s 75A will guide the interpretation of this phrase in its use in s 77. However, this conclusion is not wholly certain (*R v Munro* [2006] VSCA 94; *DPP v Woodward* [2006] VSC 299]).

37. If the phrase "has with him" is interpreted in the same way for s 77 as for s 75A, it will create an implied requirement that the accused possessed the article *for the purpose of the burglary*.

38. It is likely that the "purposes" of burglary will be determined by reference to the elements of the offence of burglary. They are therefore unlikely to be the same as the purposes of robbery discussed in 7.5.3 Armed Robbery.

39. It is likely that the "purposes" of burglary will vary according to the secondary offence that the accused is alleged to have intended to commit. This means that:

    - where it is alleged that the accused trespassed with intent to commit theft, this aspect of the element will be met if the accused possessed the item intending to use it to steal;
    - where it is alleged that the accused trespassed with intent to assault, this aspect of the element will be met if the accused possessed the item intending to use it to assault a person;
    - where it is alleged that the accused trespassed with intent to damage property, this aspect of the element will be met if the accused possessed the item intending to use it to damage property.

40. The accused will have possessed an article for the purpose of the burglary if s/he *intended* to use it for that purpose, even if it was not actually used (*R v Nguyen* [1997] 1 VR 551).

41. It is the accused's purpose or intention at the time of the entry that matters:

    - it does not matter what his or her intent was when s/he originally equipped him/herself with the article;
    - it is not sufficient if the accused formed the relevant intent after entering the building or relevant part of the building (*R v Nguyen* [1997] 1 VR 551; *R v Munro* [2006] VSCA 94).

Aggravated burglary where a person was present

42. Aggravated burglary where a person was present has the following three elements:

    i) the accused committed burglary; and

    ii) a person was then present in the building or part of the building; and

    iii) the accused knew that a person was then so present, or was reckless as to whether or not a person was then so present (*Crimes Act 1958* s 77).

The accused committed burglary

43. The first element that the prosecution must prove is that the accused committed burglary (*Crimes Act 1958* s 77).

44. See above for a brief outline of the elements of burglary. See 7.5.4 Burglary for more information concerning each of these elements.

A person was present

45. The second element that the prosecution must prove (to prove this form of the offence) is that a person was present in the building or relevant part of the building at the time of the burglary (*Crimes Act 1958* s 77(1)(b)).

The accused's mental state

46. The third element the prosecution must prove (to prove this form of the offence) is that, at the time of the burglary, the accused either:

    - knew that a person was present in the building or unauthorised part of the building; or
    - was reckless as to whether or not a person was present in the building or unauthorised part of the building (*Crimes Act 1958* s 77(1)(b)).

47. An accused is reckless about whether or not a person is present in a location if s/he believes that a person is *probably* present (See *R v Verde* [2009] VSCA 16, [21]. See also *R v Campbell* [1997] 2 VR 585; *R v Nuri* [1990] VR 641; *DPP Reference No 1 of 2019* [2021] HCA 26; *DPP Reference No 1 of 2019* [2020] VSCA 181; *R v Kalajdic* [2005] VSCA 160, [30]–[31]).

48. It is not sufficient that the accused knew that it was *possible* that a person was present in the building or unauthorised part of the building at the time of the burglary (See *R v Verde* [2009] VSCA 16, [21]; *R v Kalajdic* [2005] VSCA 160, [30]–[31]; *R v Campbell* [1997] 2 VR 585; *R v Nuri* [1990] VR 641).

49. Satisfaction of this element may depend on the way in which the presentment is framed. For example:

    - if it is alleged in the presentment that the accused entered *the house* as a trespasser, it will be necessary for the prosecution to prove that s/he had the requisite mental state when s/he initially entered the house.
    - if it is alleged in the presentment that the accused entered a particular *room* in the house as a trespasser, the prosecution does not need to prove that the accused knew a person was present when initially entering the house, or was reckless as to their presence. Instead, they only need to prove that the accused had the requisite mental state when entering that room (*R v Chimirri* [2010] VSCA 57).

Agreement about basis of culpability

50. In some cases the prosecution may seek to prove aggravated burglary by presenting both forms of aggravation in the alternative. The prosecution is likely to do this by alleging the two forms of aggravation in the one count, relying upon *Crimes Act 1958* Schedule 6 Rule 5.[934]

51. The alternative elements for the two forms of aggravated burglary are proven by evidence of substantially different facts. They do not present a case where the jury verdict depends on different assessments of the same facts. It is therefore relatively clear that these offences should be treated as analogous to culpable driving rather than murder (*R v Walsh* (2002) 131 A Crim R 299).

52. It follows that where the jury are asked to consider more than one basis of culpability for aggravated burglary, they must agree on the mode of culpability before they can find the accused guilty. It is not just the ultimate verdict that the jury must agree upon, but the form of offence which has been committed (e.g. aggravated burglary "while armed" or aggravated burglary "where a person was present") (*R v Beach* (1994) 75 A Crim R 447; *R v Ciantar* (2006) 16 VR 26; *R v Secombe* [2010] VSCA 58).

53. The jury should give a single verdict, and they should not be asked to identify the basis of their verdict (*R v Ciantar* (2006) 16 VR 26).

54. See Unanimous and Majority Verdicts for further information about this issue.

Last updated: 27 October 2022

7.5.5.1 Charge: Aggravated Burglary while Armed (Short)

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This charge may be used where it is alleged that the accused was *armed* with a firearm, imitation firearm, offensive weapon, explosive, or imitation explosive at the time of the burglary.

This abbreviated charge should only be used where the sole defence relied upon by the accused, or raised by the evidence, is that the accused *was not the offender.*[935]

The Elements

I must now direct you about the crime of aggravated burglary. To prove this crime, the prosecution must prove the following four elements beyond reasonable doubt:

One – the accused entered [part of] a building.

Two – the accused did so as a trespasser.

Three – when s/he entered the [relevant part of the] building, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"].

Four – the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her when s/he entered the [relevant part of the] building.

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[934] However it is not unlawful to allege the alternative forms of culpability in separate counts. See *R v Davidson; R v Konestabo* [2008] VSCA 188.

[935] Abbreviated charges should normally be discussed with counsel before being used. Caution should be exercised before using this charge over the objection of counsel.

Facts in Issue

In this case the defence did not contest the evidence that someone [*summarise evidence of aggravated burglary*]. They agreed that you should be satisfied these events occurred, and that the person who was responsible for them is guilty of aggravated burglary.[936] However, they denied that NOA was the person who acted in that way.[937]

Consequently, the only issue for your consideration [on this count] is whether or not the prosecution have proven, beyond reasonable doubt, that NOA was the person who [*describe alleged conduct*]. If you are satisfied that it was NOA who did those acts, you should have no difficulty finding all four elements of this offence to have been proven.

The evidence was [*describe evidence relevant to identification*]. Counsel argued [*describe arguments relevant to identification*].

[*If not done elsewhere, include directions and warnings about* identification evidence*. See* 4.12 Identification Evidence *and* 4.12.1 Charges: Identification Evidence *for assistance.*]

Summary

To summarise, you have only one issue to decide in respect of this count. That issue is, have the prosecution proven beyond reasonable doubt that NOA was the person who [*describe alleged conduct*].

If you are satisfied that they have, then you should have no difficulty finding all the elements of this offence proven. In such circumstances you should find NOA guilty of aggravated burglary.

However, if you are not satisfied beyond reasonable doubt that it was NOA who [*describe alleged conduct*], you must find him/her not guilty of aggravated burglary.

Last updated: 13 February 2013

7.5.5.2 Charge: Aggravated Burglary while Armed

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This charge should be used where it is alleged that the accused was *armed* with a firearm, imitation firearm, offensive weapon, explosive, or imitation explosive at the time of the burglary.

The Elements

I must now direct you about the crime of aggravated burglary. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused entered [part of] a building.

Two – the accused did so as a trespasser.

Three – when s/he entered the [part of the] building, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"].

Four – the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her when s/he entered the [part of the] building.

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[936] If this concession has not been made, care should be taken before abbreviating the charge in this way.

[937] This charge will need to be adapted if it is alleged that the accused was guilty on the basis of some form of accessorial liability. See Part 5: Complicity.

I will now explain each of these elements in more detail.[938]

The accused entered a building or part of a building

The first element that the prosecution must prove is that the accused entered [part of] a building.

In this case the [part of the] building it is alleged that NOA entered is [*identify relevant building or part of the building*].

[*If the "building is an inhabited vehicle or vessel, add the following shaded section.*]

While you may not think that a [*identify relevant class of vehicle or vessel, e.g.* "caravan", "trailer", "houseboat"] is a "building", for the purposes of this offence a vehicle or vessel is treated as a "building" if it was inhabited at the time of the offence.

A vehicle or vessel will have been "inhabited" at the time of the offence if a person was living in it at that time. No-one needs to have actually been present in the vehicle or vessel at the time of the burglary. This requirement will be satisfied as long as someone was living there, even if they were out when the burglary took place.

[*Summarise relevant evidence and/or arguments.*]

It is for you to determine, based on all the evidence, whether NOA entered the [*identify relevant building or part of the building*]. It is only if you are satisfied, beyond reasonable doubt, that s/he did, that this first element will be met.

The accused entered as a trespasser

The second element that the prosecution must prove is that the accused entered the [part of the] building as a trespasser. For this element to be met, there are two things the prosecution must prove.

First, they must prove that NOA entered the [*identify relevant building or part of the building*] without any right or authority to enter. That is, that [part of the] building must have been "off-limits" to him/her.

[*If it is alleged that the accused entered a prohibited part of a building, add the following shaded section.*]

It is important to note that, in this case, the prosecution did not allege that the entire building was "off-limits" to NOA. They accepted that s/he was authorised to enter certain parts of the building, such as the [*identify authorised parts of the building*]. However, they argued that NOA was forbidden from entering the [*identify prohibited part of the building*]. That is, s/he had no right or authority to be there.

[*Summarise relevant evidence and/or arguments.*]

It is for you to determine whether that part of the building really was "off-limits" to NOA. This part of the second element will only be satisfied if you find that it was.

[*If it is alleged that the accused had limited authority to enter, but exceeded that authority, add the following shaded section.*]

In this case the prosecution did not deny that NOA had some authority to enter [*identify building or relevant part of building*]. However, they argued that s/he only had authority to enter [that part of] the

[938] If an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

building if s/he complied with certain conditions, such as [*identify alleged conditions.*]

The prosecution alleged that when NOA entered the [part of the] building s/he was not complying with these conditions, and so had no right or authority to enter. She was therefore trespassing.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine if NOA's authority to enter [*identify building or relevant part of building*] was subject to any conditions. In making this determination you can consider everything that was said and done by the parties, and also the way that people generally conduct themselves. However, you cannot assume that certain conditions were imposed just because those limits would have been imposed if the issue had been raised. You must be satisfied that those conditions actually were imposed.

If you find that NOA's authority to enter the [*identify building or relevant part of building*] was not subject to any conditions, then the second element will not be met. In such circumstances, the accused will have had unlimited authority to enter the [part of the] building, and so cannot have been trespassing, no matter what s/he intended to do. Even if s/he entered with some undesirable purpose in mind, s/he still had a right to enter.

If you find that NOA's authority to enter was subject to certain conditions, you must then determine whether or not, when s/he entered the [part of the] building, s/he was complying with those conditions. If s/he was, then s/he will not have been trespassing. That is, s/he will have had a right or authority to enter that [part of the] building.

However, if s/he was not complying with those conditions, then s/he will have had no right or authority to enter the building, and this part of the second element will be met.

To summarise, this part of the second element will only be met if you are satisfied that NOA was only authorised to enter [*identify building or relevant part of building*] if s/he complied with certain conditions, and you find that s/he did not comply with those conditions when s/he entered. If you are not satisfied of either of these matters beyond reasonable doubt, then this element will not be met.

The second matter that the prosecution must prove for the second element to be met is that the accused either knew that s/he had no right or authority to enter [*identify building or relevant part of building*], or s/he believed that it was probable that she had no such right or authority.

For this part of the second element to be satisfied, it is not sufficient for NOA to have known that it was possible that she had no right or authority to enter the [part of the] building. S/he must have at least known that this was probably the case.

[*Summarise relevant evidence and/or arguments.*]

It is only if you are satisfied, beyond reasonable doubt, that NOA entered the [*identify relevant building or part of the building*] without any right or authority to enter, and that s/he knew that s/he had no right or authority to enter that [part of the] building, or at least knew that that was probably the case, that this second element will be met. If you are not satisfied about both of these matters, then you must find NOA not guilty of aggravated burglary.

The accused intended to commit an offence

The third element that the prosecution must prove is that, when s/he entered the [part of the] building, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"].

[*Where the relevant offence is theft, add the following shaded section.*]

In order to do this, the prosecution must prove three things.[939]

First, they must prove that the accused intended to appropriate property that belonged to another person. In this case the word "appropriate" simply means to take something without the owner's consent.

Secondly, the prosecution must prove that the accused intended to permanently deprive the owner of the property in question. That is, the accused must have intended that the owner would never get it back.

Thirdly, the prosecution must prove that when s/he entered the [part of the] building, the accused did not believe that s/he had a legal right to take the property in question.

[*If further elaboration is necessary, include any relevant bullet points from the following list*.]

- The prosecution does not need to prove that any property was in fact stolen. They only need to prove that the accused intended to steal.
- The prosecution does not need to prove that the accused intended to steal any particular property. They only need to prove that s/he intended to steal property of some kind from inside the building.
- This element will be met if the prosecution can prove that, although the accused did not know what s/he would find in the [part of the] building, s/he intended to steal anything of value that s/he might come across

[*Summarise relevant evidence and/or arguments.*]

[*Where the relevant offence is common assault, add the following shaded section*.]

In order to do this the prosecution must prove two things.[940]

First, they must prove that the accused intended either to apply force to a person's body, or to act in a way that would cause a person to apprehend the immediate application of force to his or her body.[941]

[*If further elaboration is necessary, include any relevant directions from the following bullet list*.]

- [*For application of force cases*] It does not matter how much force the accused intended to apply. Nor does it matter whether or not that force would have harmed the person. An intention to merely touch someone is enough.
- [*For application of force cases*] It does not matter whether s/he would have actually been able to

[939] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.5.1.2 Charge: Theft (Extended).

[940] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.4.8.1 Charge: Assault – Application of Force or 7.4.8.3 Charge: Assault – No Application of Force.

[941] If the prosecution relies on only one basis of culpability, directions on the alternative basis should be omitted.

apply the force. It is sufficient for the accused to have intended to apply force.

- [*For apprehension cases*] S/he does not need to have intended to actually apply such force. The accused only needs to have intended to cause someone to apprehend that force would be applied.

Secondly, the prosecution must prove that the accused intended to act in this way in circumstances in which there was no lawful justification or excuse for his/her conduct.

[*Possible forms of lawful justification or excuse include consent, self-defence, arrest, the lawful correction of children and ordinary social activity. For guidance on directions for these matters see* 7.4.8 Common Law Assault.]

[*If no lawful justifications or excuses are open on the evidence, add the following darker shaded section.*]

In this case, it has not been suggested that there was a lawful justification or excuse for the accused's alleged actions. You should therefore have no difficulty finding that, if NOA intended to [apply force to a person's body/act in a way that would cause a person to apprehend the immediate application of force to his or her body], that was done without lawful justification or excuse.

[*If any lawful justifications or excuses are open on the evidence, give appropriate directions incorporating reference to the evidence and arguments relevant to the justification or excuse, and concluding with the darker shaded section.*]

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused's behaviour was without lawful [justification/excuse]. The defence does not need to prove that NOA had such a [justification/excuse].

The accused must have had the relevant intention at the time s/he entered the [part of the] building. If you accept that it is reasonably possible that NOA only formed that intention after entering the [part of the] building, then this element will not be satisfied.

The accused was armed

The fourth element that the prosecution must prove is that the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of entering the [part of the] building.

For this element to be met, there are three things that the prosecution must prove.

First, they must prove that, at the time of entering the [part of the] building, NOA had [*identify item*] either on him/her or readily available for use.

Secondly, the prosecution must prove that [*identify item*] falls within the category of [firearm/imitation firearm/offensive weapon/explosive/imitation explosive].

[*Where there is a dispute about whether the article possessed was a firearm, add relevant parts of the following shaded section.*]

The law defines a "firearm" to be any device which is designed or adapted to discharge bullets or other missiles, either by the expansion of gases produced in the device by the ignition of strongly combustible materials, or by compressed air or other gases. The definition of "firearm" also includes anything which looks like such a device.

However, certain things are excluded from the definition of a "firearm". These include [*identify relevant exception, e.g.* "underwater spear guns"].

To be a "firearm", the device does not need to be assembled, complete or operational. If it fits the definition I have just given you, it will be a "firearm", whether or not it actually works.

[*Where it is alleged that the accused had an imitation firearm with him/her, add the following shaded section.*]

An "imitation firearm" is anything which has the appearance of being a firearm, whether or not it is capable of being shot.

[*Where it is alleged that the accused had an offensive weapon with him/her, add the following shaded section.*]

The law defines two different kinds of items as "offensive weapons". First, an item is an offensive weapon if it is specifically made or adapted for the use of injuring or incapacitating a person. Secondly, an ordinarily inoffensive item that does not meet this criterion can also become an "offensive weapon" if the person carrying it intends or threatens to use it to injure or incapacitate a person.

[*If it is alleged that the relevant article was made for the use of injuring or incapacitating a person, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] is an "offensive weapon" because it is made for injuring or incapacitating people. That is, it is an item that is normally used for this purpose.

[*If it is alleged that the relevant article was adapted for the use of injuring or incapacitating a person, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because it was adapted for the use of injuring or incapacitating people. That is, it was physically modified so that it could cause injury or incapacitate a person.

[*If it is alleged that an ordinary article became an offensive weapon because of the accused's use, threats or intention, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because NOA [used/threatened to use/intended to use] it for the purpose of injuring or incapacitating a person.

[*Where it is alleged that the accused had an explosive with him/her, add the following shaded section.*]

An "explosive" is any item which is manufactured for the purpose of producing a practical effect by explosion, or which is intended to have that purpose. Any item that fits this definition will be an "explosive", whether or not it actually works.

[*Where it is alleged that the accused had an imitation explosive with him/her, add the following shaded section.*]

An "imitation explosive" is any item which might reasonably be taken to be, or to contain, an explosive.

Thirdly, the prosecution must prove that the accused had the [*identify item*] with him/her for the purpose of the burglary. This will be the case if NOA had the [*identify item*] with him/her for the purpose of [stealing property from within the [part of the] building/assaulting a person within the [part of the] building/causing criminal damage within the building].

In determining this matter you should focus on NOA's intention at the time s/he entered the [part of] the building. It does not matter what his/her intention was at the time s/he first handled the [*identify item*].

In this case the prosecution argued that all three of these requirements have been met. [*Describe prosecution evidence and/or arguments.*]

The defence [*describe defence case* [*if any*] *in respect of this element, e.g.*

- denied that NOA had a gun with him/her at the time of the burglary;
- denied that the bottle was an offensive weapon;
- denied that NOA had the knife with him/her for the purpose of the burglary].

It is for you to determine, based on all the evidence, whether all three of these matters have been proved beyond reasonable doubt. It is only if you are satisfied that NOA had [*identify item*] with him/her at the time of the entry, that [*identify item*] was a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive], and that NOA had that item with him/her for the purposes of the burglary that this element will be met.

Summary

To summarise, before you can find NOA guilty of aggravated burglary, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA entered [part of] a building; and

Two – that NOA did so as a trespasser. That is:

- S/he entered the [part of the] building without any right or authority to enter; and
- S/he knew that s/he had no right or authority to enter that [part of the] building, or at least knew that that was probably the case; and

Three – that at that time NOA intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"]; and

Four – that NOA had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the entry. That is:

- When s/he entered the [part of the] building, s/he had a [*identify item*] on him/her or readily available; and
- That a [*identify item*] falls within the category of a [*identify category*]; and
- That NOA had the [*identify item*] with him/her for the purpose of the burglary.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of aggravated burglary.

Burglary

I must also direct you about the crime of burglary. This is an alternative to the crime of aggravated burglary. That means you only need to return a verdict on the crime of burglary if you were not satisfied that the prosecution have proved all the elements of aggravated burglary beyond reasonable doubt. If you decide that NOA is guilty of aggravated burglary, then you do not need to return a verdict on this alternative.

The offence of burglary is very similar to the offence of aggravated burglary, with one important difference: the accused does not need to have had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her when s/he entered the [part of] the building.

In other words, if you are satisfied that the prosecution have proved the first three elements I just described beyond reasonable doubt, but are not satisfied that they have proved element four, then you should find the accused guilty of burglary. However, if you find that any of the first three elements have not been proved beyond reasonable doubt, then you must also find the accused not guilty of burglary.

Last updated: 2 July 2020

7.5.5.3 Checklist: Aggravated Burglary while Armed

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This checklist includes two possible third elements. Judges must omit or adapt this checklist depending on how the prosecution seeks to prove the third element.

Four elements the prosecution must prove beyond reasonable doubt:

1. The accused entered [part of] a building; and
2. The accused did so as a trespasser; and
3. At the time of entry the accused intended to commit the offence of [theft/common assault/criminal damage etc.] within the [part of the] building; and
4. The accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of entering the [part of the] building.

Entry into [part of] a building

1. Did the accused enter the [part of the] building?

If Yes, then go to 2

If No, then the accused is not guilty of Burglary or Aggravated Burglary

Entry as a trespasser

2. Did the accused enter as a trespasser?

2.1 Did the accused have a right or authority to enter the [part of the] building?

If Yes, then go to 2.2

If No, then go to 2.3

2.2 Did the accused enter the [part of the] building in circumstances that were not permitted by his or her right or authority to enter?

Consider – Was the accused only permitted to enter for a specific purpose or in specific circumstances, and did he or she in fact enter for a different purpose, or in different circumstances?

If Yes, then go to 2.3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

2.3 Did the accused know or believe it was probable either that he or she had no right to enter the [part of the] building or that he or she was entering in circumstances that were not permitted by his or her right or authority to enter?

If Yes, then go to 3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

The Accused Intended to Steal

3. At the time of entry, did the accused intend to steal property from within the [part of the] building?

3.1 Did the accused intend to appropriate property that belonged to another person?

Consider – ***Did the accused intend to take something without the owner's consent?***

If Yes, then go to 3.2

If No, then the accused is not guilty of Burglary or Aggravated Burglary

3.2 Did the accused intend to permanently deprive another person of that property?

If Yes, then go to 3.3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

3.3 Did the accused believe that s/he had a legal right to take the property?

If Yes, then the accused is not guilty of Burglary or Aggravated Burglary

If No, then go to 4

The Accused Intended to Assault a Person Inside the Building

3. At the time of entry, did the accused intend to assault a person in the [part of the] building?

3.1 Did the accused intend to apply force to the body of a person in the building?

If Yes, then go to 3.3

If No, then go to 3.2

3.2 Did the accused intend to act in a way that would cause a person in the building to apprehend the immediate application of force to his or her body?

If Yes, then go to 3.3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

3.3 Did the accused have a lawful justification to act in this way?

If Yes, then the accused is not guilty of Burglary or Aggravated Burglary

If No, then go to 4.

The Accused was Armed

4. Did the accused have a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the entry?

4.1 Did the accused have this item either on him/her or readily available for use?

If Yes, then go to 4.2

If No, then the accused is not guilty of Aggravated Burglary, but guilty of Burglary (as long as you answered yes to questions 1 to 3)

4.2 Was the item a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive]?

If Yes, then go to 4.3

If No, then the accused is not guilty of Aggravated Burglary, but guilty of Burglary (as long as you answered yes to questions 1 to 3)

4.3 Did the accused have this item with him/her for the purpose of the burglary?

Consider – Did the accused intend to use the item for the purpose of [*stealing property from/assaulting a person within*] *the* [*part of the*] *building?*

If Yes, the accused is guilty of Aggravated Burglary

If No, then the accused is not guilty of Aggravated Burglary, but guilty of Burglary (as long as you answered yes to questions 1 to 3)

Last updated: 22 May 2009

7.5.5.4 Charge: Aggravated Burglary where Person Present (Short)

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This charge may be used where it is alleged that the accused burgled a building *where a person was present*.

This abbreviated charge should only be used where the sole defence relied upon by the accused, or raised by the evidence, is that the accused *was not the offender.*[942]

[942] Abbreviated charges should normally be discussed with counsel before being used. Caution should be exercised before using this charge over the objection of counsel.

The Elements

I must now direct you about the crime of aggravated burglary. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt.

One – the accused entered [part of] a building.

Two – that the accused did so as a trespasser.

Three – when s/he entered the [part of the] building, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"].

Four – when the accused entered the [part of the] building a person was present in that [building/location].

Five – when s/he entered the [part of the] building the accused knew that a person was then present in that [part of the] building, or was reckless as to whether or not a person was then so present.

Facts in Issue

In this case the defence did not contest the evidence that someone [*summarise evidence of aggravated burglary*]. They agreed that you should be satisfied these events occurred, and that the person who was responsible for them is guilty of aggravated burglary.[943] However, they denied that NOA was the person who acted in that way.[944]

Consequently, the only issue for your consideration [on this count] is whether or not the prosecution have proven, beyond reasonable doubt, that NOA was the person who [*describe alleged conduct*]. If you are satisfied that it was NOA who did those acts, you should have no difficulty finding all five elements of this offence to have been proven.

The evidence was [*describe evidence relevant to identification*]. Counsel argued [*describe arguments relevant to identification*].

[*If not done elsewhere, include directions and warnings about* identification evidence*. See* 4.12 Identification Evidence *for assistance.*]

Summary

To summarise, you have only one issue to decide in respect of this count. That issue is, have the prosecution proven beyond reasonable doubt that NOA was the person who [*describe alleged conduct*].

If you are satisfied that they have, then you should have no difficulty finding all the elements of this offence proven. In such circumstances you should find NOA guilty of aggravated burglary.

However, if you are not satisfied beyond reasonable doubt that it was NOA who [*describe alleged conduct*], you must find him/her not guilty of aggravated burglary.

Last updated: 13 February 2013

7.5.5.5 Charge: Aggravated Burglary where Person Present

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[943] If this concession has not been made, care should be taken before abbreviating the charge in this way.

[944] This charge will need to be adapted if it is alleged that the accused was guilty on the basis of some form of accessorial liability. See Part 5: Complicity.

This charge should be used where it is alleged that the accused burgled a building where a person was present.

If it is alleged that the accused was armed with a firearm, imitation firearm, offensive weapon, explosive, or imitation explosive, use 7.5.5.2 Charge: Aggravated Burglary while Armed instead.

The Elements

I must now direct you about the crime of aggravated burglary. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused entered [part of] a building.

Two – the accused did so as a trespasser.

Three – when s/he entered the [part of the] building, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"].

Four – when the accused entered the [part of the] building a person was present in that [building/location].

Five – when s/he entered the [part of the] building the accused knew that a person was then present in that [part of the] building, or was reckless as to whether or not a person was then so present.

I will now explain each of these elements in more detail.[945]

The accused entered a building or part of a building

The first element that the prosecution must prove is that the accused entered [part of] a building.

In this case the [part of the] building it is alleged that NOA entered is [*identify relevant building or part of the building*].

[*If the "building" is an inhabited vehicle or vessel, add the following shaded section*.]

While you may not think that a [*identify relevant class of vehicle or vessel, e.g.* "caravan", "trailer", "houseboat"] is a "building", for the purposes of this offence a vehicle or vessel is treated as a "building" if it was inhabited at the time of the offence.

A vehicle or vessel will have been "inhabited" at the time of the offence if a person was living in it at that time. No-one needs to have actually been present in the vehicle or vessel at the time of the burglary. This requirement will be satisfied as long as someone was living there, even if they were out when the burglary took place.

[*Summarise relevant evidence and/or arguments.*]

It is for you to determine, based on all the evidence, whether NOA entered the [*identify relevant building or part of the building*]. It is only if you are satisfied, beyond reasonable doubt, that s/he did, that this first element will be met.

[945] If an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

The accused entered as a trespasser

The second element that the prosecution must prove is that the accused entered the [part of the] building as a trespasser. For this element to be met, there are two things the prosecution must prove.

First, they must prove that NOA entered the [*identify relevant building or part of the building*] without any right or authority to enter. That is, that [part of the] building must have been "off-limits" to him/her.

[*If it is alleged that the accused entered a prohibited part of a building, add the following shaded section*.]

It is important to note that, in this case, the prosecution did not allege that the entire building was "off-limits" to NOA. They accepted that s/he was authorised to enter certain parts of the building, such as the [*identify authorised parts of the building*]. However, they argued that NOA was forbidden from entering the [*identify prohibited part of the building*]. That is, s/he had no right or authority to be there.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine whether that part of the building really was "off-limits" to NOA. This part of the second element will only be satisfied if you find that it was.

[*If it is alleged that the accused had limited authority to enter, but exceeded that authority, add the following shaded section*.]

In this case the prosecution did not deny that NOA had some authority to enter [*identify building or relevant part of building*]. However, they argued that s/he only had authority to enter [that part of] the building if s/he complied with certain conditions, such as [*identify alleged conditions.*]

The prosecution alleged that when NOA entered the [part of the] building s/he was not complying with these conditions, and so had no right or authority to enter. She was therefore trespassing.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine if NOA's authority to enter [*identify building or relevant part of building*] was subject to any conditions. In making this determination you can consider everything that was said and done by the parties, and also the way that people generally conduct themselves. However, you cannot assume that certain conditions were imposed just because those limits would have been imposed if the issue had been raised. You must be satisfied that those conditions actually were imposed.

If you find that NOA's authority to enter the [*identify building or relevant part of building*] was not subject to any conditions, then the second element will not be met. In such circumstances, the accused will have had unlimited authority to enter the [part of the] building, and so cannot have been trespassing, no matter what s/he intended to do. Even if s/he entered with some undesirable purpose in mind, s/he still had a right to enter.

If you find that NOA's authority to enter was subject to certain conditions, you must then determine whether or not, when s/he entered the [part of the] building, s/he was complying with those conditions. If s/he was, then s/he will not have been trespassing. That is, s/he will have had a right or authority to enter that [part of the] building.

However, if s/he was not complying with those conditions, then s/he will have had no right or authority to enter the building, and this part of the second element will be met.

To summarise, this part of the second element will only be met if you are satisfied that NOA was only authorised to enter [*identify building or relevant part of building*] if s/he complied with certain conditions, and you find that s/he did not comply with those conditions when s/he entered. If you are not satisfied of either of these matters beyond reasonable doubt, then this element will not be met.

The second matter that the prosecution must prove for the second element to be met is that the accused either knew that s/he had no right or authority to enter [*identify building or relevant part of building*], or s/he believed that it was probable that she had no such right or authority.

For this part of the second element to be satisfied, it is not sufficient for NOA to have known that it was possible that she had no right or authority to enter the [part of the] building. S/he must have at least known that this was probably the case.

[*Summarise relevant evidence and/or arguments.*]

It is only if you are satisfied, beyond reasonable doubt, that NOA entered the [*identify relevant building or part of the building*] without any right or authority to enter, and that s/he knew that s/he had no right or authority to enter that [part of the] building, or at least knew that that was probably the case, that this second element will be met. If you are not satisfied about both of these matters, then you must find NOA not guilty of aggravated burglary.

The accused intended to commit an offence

The third element that the prosecution must prove is that, when s/he entered the [part of the] building, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g. "theft", "common assault", "criminal damage"*].

[*Where the relevant offence is theft, add the following shaded section.*]

In order to do this, the prosecution must prove three things.[946]

First, they must prove that the accused intended to appropriate property that belonged to another person. In this case the word "appropriate" simply means to take something without the owner's consent.

Secondly, the prosecution must prove that the accused intended to permanently deprive the owner of the property in question. That is, the accused must have intended that the owner would never get it back.

Thirdly, the prosecution must prove that when s/he entered the [part of the] building, the accused did not believe that s/he had a legal right to take the property in question.

[*If further elaboration is necessary, include any relevant bullet points from the following list.*]

- The prosecution does not need to prove that any property was in fact stolen. They only need to prove that the accused intended to steal.
- The prosecution does not need to prove that the accused intended to steal any particular property. They only need to prove that s/he intended to steal property of some kind from inside the building.
- This element will be met if the prosecution can prove that, although the accused did not know what s/he would find in the [part of the] building, s/he intended to steal anything of value that s/he might come across.

[946] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.5.1.2 Charge: Theft (Extended).

[*Summarise relevant evidence and/or arguments.*]

[*Where the relevant offence is common assault, add the following shaded section*.]

In order to do this the prosecution must prove two things.[947]

First, they must prove that the accused intended either to apply force to a person's body, or to act in a way that would cause a person to apprehend the immediate application of force to his or her body.[948]

[*If further elaboration is necessary, include any relevant directions from the following bullet list*.]

- [*For application of force cases*] It does not matter how much force the accused intended to apply. Nor does it matter whether or not that force would have harmed the person. An intention to merely touch someone is enough.
- [*For application of force cases*] It does not matter whether s/he would have actually been able to apply the force. It is sufficient for the accused to have intended to apply force.
- [*For apprehension cases*] S/he does not need to have intended to actually apply such force. The accused only needs to have intended to cause someone to apprehend that force would be applied.

Secondly, the prosecution must prove that the accused intended to act in this way in circumstances in which there was no lawful justification or excuse for his/her conduct.

[*Possible forms of lawful justification or excuse include consent, self-defence, arrest, the lawful correction of children and ordinary social activity. For guidance on directions for these matters see* 7.4.8 Common Law Assault.]

If no lawful justifications or excuses are open on the evidence, add the following darker shaded text

In this case, it has not been suggested that there was a lawful justification or excuse for the accused's alleged actions. You should therefore have no difficulty finding that, if NOA intended to [apply force to a person's body/act in a way that would cause a person to apprehend the immediate application of force to his or her body], that was done without lawful justification or excuse.

[*If any lawful justification or excuse is open on the evidence, give appropriate directions incorporating reference to the evidence and arguments relevant to the justification or excuse, and concluding with the following darker shaded section:*]

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused's behaviour was without lawful [justification/excuse]. The defence does not need to prove that NOA had such a [justification/excuse].

The accused must have had the relevant intention at the time s/he entered the [part of the] building. If you accept that it is reasonably possible that NOA only formed that intention after entering the [part of the] building, then this element will not be satisfied.

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[947] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.4.8.1 Charge: Assault – Application of Force or 7.4.8.3 Charge: Assault – No Application of Force.

[948] If the prosecution relies on only one basis of culpability, directions on the alternative basis should be omitted.

A person was present

The fourth element that the prosecution must prove is that when the accused entered the [part of the] building a person was present in that [building/location].

[*Summarise relevant evidence and/or arguments*.]

The accused's mental state

The fifth element that the prosecution must prove is that when s/he entered the [part of the] building the accused knew that a person was then present in that [part of the] building, or was reckless as to whether or not a person was then so present.

The law says that an accused will have been reckless in this way if s/he believed at the time of his/her entry, that another person was probably present in that [building/location].

It is not sufficient for the prosecution to prove that NOA believed that it was possible that a person was present. They must prove that s/he believed that this was probably the case.

[*Summarise relevant evidence and/or arguments.*]

Summary

To summarise, before you can find NOA guilty of aggravated burglary, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA entered [part of] a building; and

Two – that NOA did so as a trespasser. That is:

- S/he entered the [part of the] building without any right or authority to enter; and
- S/he knew that s/he had no right or authority to enter that [part of the] building, or at least knew that that was probably the case; and

Three – that at that time NOA intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"]; and

Four – that at that time a person was present in the [part of the] building; and

Five – that at that time the accused knew that a person was present in that [part of the] building, or was reckless as to whether or not a person was then so present.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of aggravated burglary.

Burglary

I must also direct you about the crime of burglary. This is an alternative to the crime of aggravated burglary. That means you only need to return a verdict on the crime of burglary if you were not satisfied that the prosecution have proved all the elements of aggravated burglary beyond reasonable doubt. If you decide that NOA is guilty of aggravated burglary, then you do not need to return a verdict on this alternative.

The offence of burglary is very similar to the offence of aggravated burglary, with two important differences: a person does not need to have been present at the time the accused entered the [part of the] building, and consequently the accused does not need to have had any knowledge about a person's presence at that location.

In other words, if you are satisfied that the prosecution have proved the first three elements I just described beyond reasonable doubt, but are not satisfied that they have proved either element four or five, then you should find the accused guilty of burglary. However, if you find that any of the first three elements have not been proved beyond reasonable doubt, then you must also find the accused not guilty of burglary.

Last updated: 2 July 2020

7.5.5.6 Checklist: Aggravated Burglary where Person Present

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This checklist includes two possible third elements. Judges must omit or adapt this checklist depending on how the prosecution seeks to prove the third element.

Five elements the prosecution must prove beyond reasonable doubt:

1. The accused entered [part of] a building; and
2. The accused did so as a trespasser; and
3. At the time of entry the accused intended to commit the offence of [theft/common assault/criminal damage etc.] within the [part of the] building; and
4. At the time of entry a person was present in that [part of the] building.
5. The accused knew that a person was present in that [part of the] building, or was reckless as to whether or not a person was present.

Entry into [part of] a building

1. Did the accused enter the [part of the] building?

If Yes, then go to 2

If No, then the accused is not guilty of Burglary or Aggravated Burglary

Entry as a trespasser

2. Did the accused enter as a trespasser?

2.1 Did the accused have a right or authority to enter the [part of the] building?

If Yes, then go to 2.2

If No, then go to 2.3

2.2 Did the accused enter the [part of the] building in circumstances that were not permitted by his or her right or authority to enter?

Consider – Was the accused only permitted to enter for a specific purpose or in specific circumstances, and did he or she in fact enter for a different purpose, or in different circumstances?

If Yes, then go to 2.3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

2.3 Did the accused know or believe it was probable either that he or she had no right to enter the [part of the] building or that he or she was entering in circumstances that were not permitted by his or her right or authority to enter?

If Yes, then go to 3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

The Accused Intended to Steal

3. At the time of entry, did the accused intend to steal property from within the [part of the] building?

3.1 Did the accused intend to appropriate property that belonged to another person?

Consider – ***Did the accused intend to take something without the owner's consent?***

If Yes, then go to 3.2

If No, then the accused is not guilty of Burglary or Aggravated Burglary

3.2 Did the accused intend to permanently deprive another person of that property?

If Yes, then go to 3.3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

3.3 Did the accused believe that s/he had a legal right to take the property?

If Yes, then the accused is not guilty of Burglary or Aggravated Burglary

If No, then go to 4

The Accused Intended to Assault a Person Inside the Building

3. At the time of entry, did the accused intend to assault a person in the [part of the] building?

3.1 Did the accused intend to apply force to the body of a person in the building?

If Yes, then go to 3.3

If No, then go to 3.2

3.2 Did the accused intend to act in a way that would cause a person in the building to apprehend the immediate application of force to his or her body?

If Yes, then go to 3.3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

3.3 Did the accused have a lawful justification to act in this way?

If Yes, then the accused is not guilty of Burglary or Aggravated Burglary

If No, then go to 4.

A Person was Present

4. Was a person present in the [part of the] building?

If Yes, then go to 5

If No, then the accused is not guilty of Aggravated Burglary, but guilty of Burglary (as long as you answered yes to questions 1 to 3)

The Accused's State of Mind

5. Did the accused have the necessary state of mind about the person's presence?

5.1 Did the accused know that a person was present in the [part of the] building?

If Yes, then the accused is guilty of Aggravated Burglary (as long as you answered yes to questions 1 to 4)

If No, then go to 5.2

5.2 Was the accused reckless as to whether or not a person was present in the [part of the] building?

Consider – Did the accused believe it was probable that a person was present in the [*part of the*] *building?*

If Yes, then the accused is guilty of Aggravated Burglary (as long as you answered yes to questions 1 to 4)

If No, then the accused is not guilty of Aggravated Burglary, but guilty of Burglary (as long as you answered yes to questions 1 to 3)

Last updated: 22 May 2009

7.5.5.7 Charge: Aggravated Burglary Combined Bases

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This charge should be used where the prosecution alleges *both* that the accused was *armed* with a firearm, imitation firearm, offensive weapon, explosive, or imitation explosive at the time of the burglary *and* that the accused burgled a building where *a person was present.*

If the prosecution relies on only one of these bases, use either 7.5.5.2 Charge: Aggravated Burglary While Armed or 7.5.5.5 Charge: Aggravated Burglary Where Person Present instead.

The Elements

I must now direct you about the crime of aggravated burglary. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused entered [part of] a building.

Two – the accused did so as a trespasser.

Three – when s/he entered the [part of the] building, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"].

Four – the accused entered the [part of the] building in aggravating circumstances.

I will now explain each of these elements in more detail.[949]

The accused entered a building or part of a building

The first element that the prosecution must prove is that the accused entered [part of] a building.

In this case the [part of the] building it is alleged that NOA entered is [*identify relevant building or part of the building*].

[*If the "building" is an inhabited vehicle or vessel, add the following shaded section.*]

While you may not think that a [*identify relevant class of vehicle or vessel, e.g.* "caravan", "trailer", "houseboat"] is a "building", for the purposes of this offence a vehicle or vessel is treated as a "building" if it was inhabited at the time of the offence.

A vehicle or vessel will have been "inhabited" at the time of the offence if a person was living in it at that time. No-one needs to have actually been present in the vehicle or vessel at the time of the burglary. This requirement will be satisfied as long as someone was living there, even if they were out when the burglary took place.

[*Summarise relevant evidence and/or arguments.*]

It is for you to determine, based on all the evidence, whether NOA entered the [*identify relevant building or part of the building*]. It is only if you are satisfied, beyond reasonable doubt, that s/he did, that this first element will be met.

The accused entered as a trespasser

The second element that the prosecution must prove is that the accused entered the [part of the] building as a trespasser. For this element to be met, there are two things the prosecution must prove.

First, they must prove that NOA entered the [*identify relevant building or part of the building*] without any right or authority to enter. That is, that [part of the] building must have been "off-limits" to him/her.

[*If it is alleged that the accused entered a prohibited part of a building, add the following shaded section.*]

[949] If an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

It is important to note that, in this case, the prosecution did not allege that the entire building was "off-limits" to NOA. They accepted that s/he was authorised to enter certain parts of the building, such as the [*identify authorised parts of the building*]. However, they argued that NOA was forbidden from entering the [*identify prohibited part of the building*]. That is, s/he had no right or authority to be there.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine whether that part of the building really was "off-limits" to NOA. This part of the second element will only be satisfied if you find that it was.

[*If it is alleged that the accused had limited authority to enter, but exceeded that authority, add the following shaded section.*]

In this case the prosecution did not deny that NOA had some authority to enter [*identify building or relevant part of building*]. However, they argued that s/he only had authority to enter [that part of] the building if s/he complied with certain conditions, such as [*identify alleged conditions.*]

The prosecution alleged that when NOA entered the [part of the] building s/he was not complying with these conditions, and so had no right or authority to enter. She was therefore trespassing.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine if NOA's authority to enter [*identify building or relevant part of building*] was subject to any conditions. In making this determination you can consider everything that was said and done by the parties, and also the way that people generally conduct themselves. However, you cannot assume that certain conditions were imposed just because those limits would have been imposed if the issue had been raised. You must be satisfied that those conditions actually were imposed.

If you find that NOA's authority to enter the [*identify building or relevant part of building*] was not subject to any conditions, then the second element will not be met. In such circumstances, the accused will have had unlimited authority to enter the [part of the] building, and so cannot have been trespassing, no matter what s/he intended to do. Even if s/he entered with some undesirable purpose in mind, s/he still had a right to enter.

If you find that NOA's authority to enter was subject to certain conditions, you must then determine whether or not, when s/he entered the [part of the] building, s/he was complying with those conditions. If s/he was, then s/he will not have been trespassing. That is, s/he will have had a right or authority to enter that [part of the] building.

However, if s/he was not complying with those conditions, then s/he will have had no right or authority to enter the building, and this part of the second element will be met.

To summarise, this part of the second element will only be met if you are satisfied that NOA was only authorised to enter [*identify building or relevant part of building*] if s/he complied with certain conditions, and you find that s/he did not comply with those conditions when s/he entered. If you are not satisfied of either of these matters beyond reasonable doubt, then this element will not be met.

The second matter that the prosecution must prove for the second element to be met is that the accused either knew that s/he had no right or authority to enter [*identify building or relevant part of building*], or s/he believed that it was probable that she had no such right or authority.

For this part of the second element to be satisfied, it is not sufficient for NOA to have known that it was possible that she had no right or authority to enter the [part of the] building. S/he must have at least known that this was probably the case.

[*Summarise relevant evidence and/or arguments.*]

It is only if you are satisfied, beyond reasonable doubt, that NOA entered the [*identify relevant building or part of the building*] without any right or authority to enter, and that s/he knew that s/he had no right or authority to enter that [part of the] building, or at least knew that that was probably the case, that this second element will be met. If you are not satisfied about both of these matters, then you must find NOA not guilty of aggravated burglary.

The accused intended to commit an offence

The third element that the prosecution must prove is that, when s/he entered the [part of the] building, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g. "theft", "common assault", "criminal damage"*].

[*Where the relevant offence is theft, add the following shaded section.*]

In order to do this, the prosecution must prove three things.[950]

First, they must prove that the accused intended to appropriate property that belonged to another person. In this case the word "appropriate" simply means to take something without the owner's consent.

Secondly, the prosecution must prove that the accused intended to permanently deprive the owner of the property in question. That is, the accused must have intended that the owner would never get it back.

Thirdly, the prosecution must prove that when s/he entered the [part of the] building, the accused did not believe that s/he had a legal right to take the property in question.

[*If further elaboration is necessary, include any relevant bullet points from the following list.*]

- The prosecution does not need to prove that any property was in fact stolen. They only need to prove that the accused intended to steal.
- The prosecution does not need to prove that the accused intended to steal any particular property. They only need to prove that s/he intended to steal property of some kind from inside the building.
- This element will be met if the prosecution can prove that, although the accused did not know what s/he would find in the [part of the] building, s/he intended to steal anything of value that s/he might come across.

[*Summarise relevant evidence and/or arguments.*]

[*Where the relevant offence is common assault, add the following shaded section.*]

In order to do this the prosecution must prove two things.[951]

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[950] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.5.1.2 Charge: Theft (Extended).

[951] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.4.8.1 Charge: Assault – Application of Force or 7.4.8.3 Charge: Assault – No Application of Force.

First, they must prove that the accused intended either to apply force to a person's body, or to act in a way that would cause a person to apprehend the immediate application of force to his or her body.[952]

[*If further elaboration is necessary, include any relevant directions from the following bullet list*.]

- [*For application of force cases*] It does not matter how much force the accused intended to apply. Nor does it matter whether or not that force would have harmed the person. An intention to merely touch someone is enough.
- [*For application of force cases*] It does not matter whether s/he would have actually been able to apply the force. It is sufficient for the accused to have intended to apply force.
- [*For apprehension cases*] S/he does not need to have intended to actually apply such force. The accused only needs to have intended to cause someone to apprehend that force would be applied.

Secondly, the prosecution must prove that the accused intended to act in this way in circumstances in which there was no lawful justification or excuse for his/her conduct.

[*Possible forms of lawful justification or excuse include consent, self-defence, arrest, the lawful correction of children and ordinary social activity. For guidance on directions for these matters see* 7.4.8 Common Law Assault.]

[*If no lawful justifications or excuses are open on the evidence, add the following darker shaded section*.]

In this case, it has not been suggested that there was a lawful justification or excuse for the accused's alleged actions. You should therefore have no difficulty finding that, if NOA intended to [apply force to a person's body/act in a way that would cause a person to apprehend the immediate application of force to his or her body], that was done without lawful justification or excuse.

[*If any lawful justifications or excuses are open on the evidence, give appropriate directions incorporating reference to the evidence and arguments relevant to the justification or excuse, and concluding with the darker shaded section*.]

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused's behaviour was without lawful [justification/excuse]. The defence does not need to prove that NOA had such a [justification/excuse].

The accused must have had the relevant intention at the time s/he entered the [part of the] building. If you accept that it is reasonably possible that NOA only formed that intention after entering the [part of the] building, then this element will not be satisfied.

The accused entered in aggravating circumstances

The fourth element that the prosecution must prove is that the accused entered the [part of the] building in aggravating circumstances.

The prosecution can meet this element in two ways.

First, it may do this by proving that the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her when s/he entered the [part of the] building.

Alternately, the prosecution can prove this element by proving that a person was present in the building at the time of the accused's entry, and that the accused knew that a person was then present in that [part of the] building, or was reckless as to whether or not a person was then so present.

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[952] If the prosecution relies on only one basis of culpability, directions on the alternative basis should be omitted.

Need for unanimity

For this fourth element to be satisfied, you do not need to find that the prosecution have proved both these aggravating circumstances. It is sufficient if you find one of these matters proven beyond reasonable doubt.

However, all twelve of you must agree that the same aggravating circumstance has been proven. For example, you must all agree that NOA was "armed", in the sense I have outlined and will explain further. Or you must all agree that a person was present in the building and that NOA knew that this person was present, or was reckless as to whether or not a person was then so present.

If some of you find only the first circumstance proven, and others find only the second circumstance proven, then you will not have reached a unanimous verdict, as you are required to do.[953]

I will now explain these two aggravating circumstances in more detail.

The accused was armed

The first way that the prosecution can prove this fourth element is by proving that the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of entering the [part of the] building.

For this element to be met in this way, there are three things that the prosecution must prove.

First, they must prove that, at the time of entering the [part of the] building, NOA had [*identify item*] either on him/her or readily available for use.

Secondly, the prosecution must prove that [*identify item*] falls within the category of [firearm/imitation firearm/offensive weapon/explosive/imitation explosive].

[*Where there is a dispute about whether the article possessed was a firearm, add relevant parts of the following shaded section.*]

The law defines a "firearm" to be any device which is designed or adapted to discharge bullets or other missiles, either by the expansion of gases produced in the device by the ignition of strongly combustible materials, or by compressed air or other gases. The definition of "firearm" also includes anything which looks like such a device.

However, certain things are excluded from the definition of a "firearm". These include [*identify relevant exception, e.g.* "underwater spear guns"].

To be a "firearm", the device does not need to be assembled, complete or operational. If it fits the definition I have just given you, it will be a "firearm", whether or not it actually works.

[*Where it is alleged that the accused had an imitation firearm with him/her, add the following shaded section.*]

An "imitation firearm" is anything which has the appearance of being a firearm, whether or not it is capable of being shot.

[*Where it is alleged that the accused had an offensive weapon with him/her, add the following shaded section.*]

The law defines two different kinds of items as "offensive weapons". First, an item is an offensive weapon if it is specifically made or adapted for the use of injuring or incapacitating a person. Secondly, an ordinarily inoffensive item that does not meet this criterion can also become an

[953] This part of the charge assumes that the jury has been directed about the need for a unanimous verdict. If this has not occurred, the charge will need to be modified accordingly.

"offensive weapon" if the person carrying it intends or threatens to use it to injure or incapacitate a person.

[*If it is alleged that the relevant article was made for the use of injuring or incapacitating a person, add the following darker shaded section*.]

In this case the prosecution argued that the [*identify item*] is an "offensive weapon" because it is made for injuring or incapacitating people. That is, it is an item that is normally used for this purpose.

[*If it is alleged that the relevant article was adapted for the use of injuring or incapacitating a person, add the following darker shaded section*.]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because it was adapted for the use of injuring or incapacitating people. That is, it was physically modified so that it could cause injury or incapacitate a person.

[*If it is alleged that an ordinary article became an offensive weapon because of the accused's use, threats or intention, add the following darker shaded section*.]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because NOA [used/threatened to use/intended to use] it for the purpose of injuring or incapacitating a person.

[*Where it is alleged that the accused had an explosive with him/her, add the following shaded section*.]

An "explosive" is any item which is manufactured for the purpose of producing a practical effect by explosion, or which is intended to have that purpose. Any item that fits this definition will be an "explosive", whether or not it actually works.

[*Where it is alleged that the accused had an imitation explosive with him/her, add the following shaded section*.]

An "imitation explosive" is any item which might reasonably be taken to be, or to contain, an explosive.

Thirdly, the prosecution must prove that the accused had the [*identify item*] with him/her for the purpose of the burglary. This will be the case if NOA had the [*identify item*] with him/her for the purpose of [stealing property from within the [part of the] building/assaulting a person within the [part of the] building/causing criminal damage within the building].

In determining this matter you should focus on NOA's intention at the time s/he entered the [part of] the building. It does not matter what his/her intention was at the time s/he first handled the [*identify item*].

In this case the prosecution argued that all three of these requirements have been met. [*Describe prosecution evidence and/or arguments*.]

The defence [*describe defence case* [*if any*] *in respect of this element, e.g.*

- denied that NOA had a gun with him/her at the time of the burglary;
- denied that the bottle was an offensive weapon;
- denied that NOA had the knife with him/her for the purpose of the burglary].

It is for you to determine, based on all the evidence, whether all three of these matters have been proven beyond reasonable doubt. It is only if you are satisfied that NOA had [*identify item*] with him/her at the time of the entry, that [*identify item*] was a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive], and that NOA had that item with him/her for the purposes of the burglary that this element will be met in this way.

A person was present

However, if you are not satisfied that this first aggravated circumstance has been proven, you should consider whether this element has been met in the alternative way that I will now explain.

For this element to be met in this second way, there are two things that the prosecution must prove.

First, they must prove that when the accused entered the [part of the] building a person was present in that [building/location]; and

Secondly, they must prove that at the time of that entry, the accused knew that a person was then present in that [part of the] building, or was reckless as to whether or not a person was then so present.

The law says that an accused will have been reckless in this way if s/he believed at the time of his/her entry, that another person was probably present in that [building/location].

It is not sufficient for the prosecution to prove that NOA believed that it was possible that a person was present. They must prove that s/he believed that this was probably the case.

In respect of this second matter, it is not sufficient for NOA to have known that it was possible that a person was present. S/he must have at least known that this was probably the case.

[*Summarise relevant evidence and/or arguments.*]

I remind you, for this fourth element to be met, the prosecution must prove that the accused entered the building in one of these aggravating circumstances.

You do not need to find that both of these matters have been proven. It is sufficient if you find one aggravating circumstance proven beyond reasonable doubt.

However, I want to emphasise again that, in order to reach a unanimous verdict, you must all agree that the same aggravating circumstance has been proven. It is not enough for some of you to find the element proven on the first basis, while others find it proven on the second basis.

Summary

To summarise, before you can find NOA guilty of aggravated burglary, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA entered [part of] a building; and

Two – that NOA did so as a trespasser. That is:

- S/he entered [part of] the building without any right or authority to enter; and
- S/he knew that s/he had no right or authority to enter that [part of the] building, or at least knew that that was probably the case; and

Three – that at that time NOA intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"]; and

Four – NOA entered [part of the] building in aggravating circumstances. That is, at the time of his/her entry:

- NOA had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her; or
- A person was present in the [part of the] building, and the NOA knew that a person was then so present or was reckless as to whether or not this was the case.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of aggravated burglary.

Burglary

I must also direct you about the crime of burglary. This is an alternative to the crime of aggravated burglary. That means you only need to return a verdict on the crime of burglary if you were not satisfied that the prosecution have proved all the elements of aggravated burglary beyond reasonable doubt. If you decide that NOA is guilty of aggravated burglary, then you do not need to return a verdict on this alternative.

The offence of burglary is very similar to the offence of aggravated burglary, with one important difference: the prosecution does not need to prove that the accused entered the [part of the] building in aggravating circumstances.

In other words, if you are satisfied that the prosecution have proved the first three elements I just described beyond reasonable doubt, but are not satisfied that they have proved element four, then you should find the accused guilty of burglary. However, if you find that any of the first three elements have not been proved beyond reasonable doubt, then you must also find the accused not guilty of burglary.

Last updated: 2 July 2020

7.5.5.8 Checklist: Aggravated Burglary Combined Bases

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused entered [part of] a building; and
2. The accused did so as a trespasser; and
3. At the time of entry the accused intended to commit the offence of [theft/common assault/criminal damage etc.] within the [part of the] building; and
4. The accused was armed or the offence was aggravated by the presence of a person in the [part of the] building.

Entry into [part of] a building

1. Did the accused enter the [part of the] building?

If Yes, then go to 2

If No, then the accused is not guilty of Burglary or Aggravated Burglary

---

Entry as a trespasser

2. Did the accused enter as a trespasser?

2.1 Did the accused have a right or authority to enter the [part of the] building?

If Yes, then go to 2.2

If No, then go to 2.3

2.2 Did the accused enter the [part of the] building in circumstances that were not permitted by his or her right or authority to enter?

Consider – Was the accused only permitted to enter for a specific purpose or in specific circumstances, and did he or she in fact enter for a different purpose, or in different circumstances?

If Yes, then go to 2.3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

2.3 Did the accused know or believe it was probable either that he or she had no right to enter the [part of the] building or that he or she was entering in circumstances that were not permitted by his or her right or authority to enter?

If Yes, then go to 3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

---

The Accused Intended to Steal

[3rd Element – where the prosecution alleges "intention to steal"]

3. At the time of entry, did the accused intend to steal property from within the [part of the] building?

3.1 Did the accused intend to appropriate property that belonged to another person?

*Consider – **Did the accused intend to take something without the owner's consent?***

If Yes, then go to 3.2

If No, then the accused is not guilty of Burglary or Aggravated Burglary

3.2 Did the accused intend to permanently deprive another person of that property?

If Yes, then go to 3.3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

3.3 Did the accused believe that s/he had a legal right to take the property?

If Yes, then the accused is not guilty of Burglary or Aggravated Burglary

If No, then go to 4

The Accused Intended to Assault a Person Inside the Building

[3rd Element – where the prosecution alleges "intention to assault"]

3. At the time of entry, did the accused intend to assault a person in the [part of the] building?

3.1 Did the accused intend to apply force to the body of a person in the building?

If Yes, then go to 3.3

If No, then go to 3.2

3.2 Did the accused intend to act in a way that would cause a person in the building to apprehend the immediate application of force to his or her body?

If Yes, then go to 3.3

If No, then the accused is not guilty of Burglary or Aggravated Burglary

3.3 Did the accused have a lawful justification to act in this way?

If No, then go to 4.

If Yes, then the accused is not guilty of Burglary or Aggravated Burglary

---

The Accused Entered in Aggravating Circumstances

4.1 Was the accused armed at the time of the entry?

4.1.1 At the time of the entry, did the accused have a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] either on him/her or readily available for use?

If Yes, then go to 4.1.2

If No, then the accused is not guilty of Aggravated Burglary, but guilty of Burglary (as long as you answered yes to questions 1 to 3)

4.1.2 Was the item a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive]?

If Yes, then go to 4.1.3

If No, then the accused is not guilty of Aggravated Burglary, but guilty of Burglary (as long as you answered yes to questions 1 to 3)

4.1.3 Did the accused have this item with him/her for the purpose of the burglary?

Consider – Did the accused intend to use the item for the purpose of [*stealing property from/assaulting a person within*] *the* [*part of the*] *building?*

If Yes, then the accused is guilty of Aggravated Burglary (as long as you answered yes to questions 1 to 3)

If No, then go to 4.2

4.2 Was the offence aggravated by the presence of a person in the [part of the] building?

4.2.1 Was a person present in the [part of the] building?

If Yes, then go to 4.2.2

If No, then the accused is not guilty of Aggravated Burglary, but guilty of Burglary (as long as you answered yes to questions 1 to 3)

4.2.2 Did the accused know that a person was present in the [part of the] building?

If Yes, then the accused is guilty of Aggravated Burglary (as long as you answered yes to questions 1 to 3)

If No, then go to 4.2.3

4.2.3 Was the accused reckless as to whether or not a person was present in the [part of the] building?

Consider – Did the accused believe it was probable that a person was present in the [*part of the*] *building?*

If Yes, then the accused is guilty of Aggravated Burglary (as long as you answered yes to questions 1 to 3)

If No, then the accused is not guilty of Aggravated Burglary, but guilty of Burglary (as long as you answered yes to questions 1 to 3)

Last updated: 22 May 2009

7.5.6 Home Invasion

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1. Home invasion is an offence under the *Crimes Act 1958* s 77A.
2. The offence can be committed in two alternative ways:
   - Home invasion while armed (s 77A(1)(c)(i)); or
   - Home invasion where a person was present (s 77(1)(c)(ii)).

   These are addressed in turn below.

Home invasion while armed

3. Home invasion while armed has the following three elements:

   i) The accused committed burglary of a home;

   ii) The accused entered the home in company with one or more other persons; and

iii) At that time the accused had a firearm, imitation firearm, offensive weapon, explosive or imitation explosive with him or her.

The accused committed burglary of a home

4. The first element that the prosecution must prove is that the accused committed burglary of a home (*Crimes Act 1958* s 77A(1)(a)).

5. The prosecution must prove that the accused:

   i) Entered a home; and

   ii) Did so as a trespasser; and

   iii) Intended to:

   - Steal something from the home; or
   - Commit an offence punishable by imprisonment for a term of five years or more involving either:
     - An assault to a person in the home; or
     - Damage to the home or to property in the home (*Crimes Act 1958* s 77A(1)(a)).

6. 7.5.4 Burglary explains these requirements in more detail. The difference between burglary and home invasion for the purpose of this element is that burglary applies to any building, whereas home invasion is limited to a 'home'.

7. Home is defined in *Crimes Act 1958* section 77A(5) as any building, part of a building or other structure intended for occupation as a dwelling and includes the following –

   (a) any part of commercial or industrial premises that is used as residential premises;

   (b) a motel room or hotel room or other temporary accommodation provided on a commercial basis;

   (c) a rooming house within the meaning of the *Residential Tenancies Act 1997*;

   (d) a room provided to a person as accommodation in a residential care service, hospital or any other premises involved in the provision of health services to the person;

   (e) a caravan within the meaning of the *Residential Tenancies Act 1997* or any vehicle or vessel used as a residence.

The accused entered the home in company with one or more persons

8. The second element the prosecution must prove is that the accused entered the home 'in company' with one or more other persons (*Crimes Act 1958* s 77A(1)(b)).

9. The phrase 'in company' rarely appears in Victorian legislation, but has been considered in other states which contain offences or aggravating factors of offending 'in company'.

10. The following sections explain the meaning of 'in company' as it has been developed in other States, while recognising that such principles have not yet been considered in relation to Victorian legislation.

11. The element of company requires three key components:

    - The offender must share a common purpose to commit the offence with the secondary parties;

- The secondary parties must be physically present;
- The secondary parties must actually contribute or be able to contribute, either by emboldening or reassuring the accused by being in a position to assist, or by intimidating the victim (*R v Button & Griffen* (2002) 54 NSWLR 455, [120] (Kirby J)).

12. Proof of a common purpose requires an express or implied agreement or understanding to achieve an agreed end (*Markou v R* [2012] NSWCCA 64, [28]).
13. It is not necessary that the secondary parties physically assisted in the commission of the offence. It is sufficient if they are present so that the victim is confronted by the combined force of two or more people and the secondary party is in a position to assist if necessary (*R v Brougham* (1986) 43 SASR 187, 191; *R v Galey* [1985] 1 NZLR 230; *WA v Dick* [2006] WASC 81).
14. Where the victim is aware of the presence of the secondary parties and is confronted with that combined force, it is not necessary to show that the secondary parties actually intended to assist (*R v Leoni* [1999] NSWCCA 14, [16]–[20]; *R v Villar & Zugecic* [2004] NSWCCA 302, [68]).
15. In some cases, it is not necessary that the victim of the offence know about the presence of the secondary parties. However, in that situation, the secondary parties must be physically present and intending to assist the accused if necessary (*R v Leoni* [1999] NSWCCA 14, [16]–[20]). However, the concept of assistance is flexible and is not limited to physical assistance (see *FP v R* [2012] NSWCCA 182, [140]).
16. Physical presence is an elastic concept. It depends on the layout, geography and circumstances of the case. The question is whether the secondary parties remain in a location where they are able to exercise a coercive effect, either by continuing to intimidate the victim, or being ready and able to assist the accused if necessary (*R v Button & Griffen* (2002) 54 NSWLR 455, [123]–[125]).
17. Despite the flexibility of the concept of physical presence, a person standing lookout, an accessory before the fact, or a getaway driver, is not physically present for the purpose of offending in company (*R v Button & Griffen* (2002) 54 NSWLR 455, [120]; *R v Brougham* (1986) 43 SASR 187 at 191. See also *WA v Dick* [2006] WASC 81, [33]–[38]).
18. Based on these cases, the approach in this charge book is that this element requires proof that at least one other person was 'involved in the commission of the offence' for the purpose of *Crimes Act 1958* s 323, was physically present when the offence was committed and either directly engaged in the offence, intended to embolden or reassure the accused if necessary or was observed by the victim so that the victim was confronted by a combined presence.
19. For information on when a person is 'involved in the commission of an offence' see Statutory Complicity for more information.
20. It is not necessary that the purported co-offender has been prosecuted for or found guilty of this offence in order to sustain the conviction of the accused (*Crimes Act 1958* s 77A(4)).

The accused was armed

21. The third element that the prosecution must prove for this form of home invasion is that, at the time the accused committed the home invasion, he or she had one of the following five articles with him or her:

    i) A firearm;

    ii) An imitation firearm;

    iii) An offensive weapon;

    iv) An explosive; or

    v) An imitation explosive (*Crimes Act 1958* s 77A(1)(c)).

22. For more information on these items, see 7.5.5 Aggravated Burglary.

The accused had the article "with" him or her

23. For this element to be met, the accused must have had one of the specified articles "with" him or her at the time of the home invasion (*Crimes Act 1958* s 77A(1)(c)).

24. A person will have had the article "with" him or her if, at the time of the home invasion, he or she had the article either on his or her person, or readily available for use (*R v Hartwick* (1985) 17 A Crim R 281).

25. This element will only be met if the accused *knew* that he or she had the article with him or her, or available for use (*R v Kolb & Adams* 14/12/1979 CCA Vic; *R v Cugullere* [1961] 1 WLR 858).

26. A person does not have an article "with" him or her if it is possessed in such a way that it cannot be used (e.g. if it is concealed on his or her person in a sealed package) (*R v Kolb & Adams* 14/12/1979 CCA Vic; *R v Pawlicki* [1992] 3 All ER 902).

27. However, an instrument may be "used" by doing no more than drawing attention to its existence (*R v Kolb & Adams* 14/12/1979 CCA Vic).

28. The ordinary principles of criminal complicity apply to this offence. This means that this element will be met if an accomplice, acting in concert with the accused, had the article "with" him or her (*R v Hartwick* (1985) 17 A Crim R 281; *R v Khammash* (2004) 89 SASR 488). See Part 5: Complicity for further information about the principles of criminal complicity.

Possession must be for the purpose of the home invasion

29. In relation to the offence of armed robbery (*Crimes Act 1958* s 75A), the expression "has with him" has been held to create an implied requirement that the accused possessed the article *for the purpose of the robbery* (*R v Kolb & Adams* 14/12/1979 CCA Vic. See 7.5.3 Armed Robbery).

30. It is likely that the interpretation of the phrase "has with him" in s 75A will guide the interpretation of this phrase in its use in s 77A. However, this conclusion is not wholly certain (see *DPP v Woodward* [2006] VSC 299).

31. If the phrase "has with him" is interpreted in the same way for s 77A as for s 75A, it will create an implied requirement that the accused possessed the article *for the purpose of the home invasion*.

32. It is likely that the "purposes" of home invasion will be determined by reference to the elements of the offence of home invasion. They are therefore unlikely to be the same as the purposes of robbery discussed in 7.5.3 Armed Robbery.

33. It is likely that the "purposes" of home invasion will vary according to the secondary offence that the accused is alleged to have intended to commit. This means that:

    - Where it is alleged that the accused trespassed with intent to steal, this aspect of the element will be met if the accused possessed the item intending to use it to steal;
    - Where it is alleged that the accused trespassed with intent to assault, this aspect of the element will be met if the accused possessed the item intending to use it to assault a person;
    - Where it is alleged that the accused trespassed with intent to damage property, this aspect of the element will be met if the accused possessed the item intending to use it to damage property.

34. The accused will have possessed an article for the purpose of the home invasion if s/he *intended* to use it for that purpose, even if it was not actually used (*R v Nguyen* [1997] 1 VR 551).

35. It is the accused's purpose or intention at the time of the entry that matters:

    - It does not matter what his or her intent was when s/he originally equipped him/herself with the article;
    - It is not sufficient if the accused formed the relevant intent after entering the home or relevant part of the home (*R v Nguyen* [1997] 1 VR 551; *R v Munro* [2006] VSCA 94).

Home invasion where a person was present

36. Home invasion where a person was present has the following three elements:

    i) The accused committed burglary of a home;

    ii) The accused entered the home in company with one or more other persons; and

    iii) A person was present in the home (*Crimes Act 1958* s 77A).

The accused committed burglary

37. The first element that the prosecution must prove is that the accused committed burglary of a home (*Crimes Act 1958* s 77A).

38. See above for a brief outline of the elements of burglary. See 7.5.4 Burglary for more information concerning each of these elements.

Entered the home in company with one or more other persons

39. The second element is common to both forms of home invasion. See above for a discussion of this element (see *Crimes Act 1958* s 77A).

A person was present

40. The third element that the prosecution must prove for this form of the offence is that a person (other than the person the accused entered the home in company with) was present in the home at any time while the accused was present (*Crimes Act 1958* s 77A(1)(c)(ii)).

41. The drafting of this provision indicates that the element may be satisfied either where the third person was present at the time of entry, or arrives while the accused is present in the home as a trespasser.

42. There is no fault element associated with this element. It does not matter whether the accused knew that there was or would be another person in the home (*Crimes Act 1958* s 77A(2)). This distinguishes this form of the offence from aggravated burglary (compare *Crimes Act 1958* s 77).

Agreement about basis of culpability

43. In some cases the prosecution may seek to prove home invasion by presenting both forms of offence in the alternative. The prosecution is likely to do this by alleging the two forms of offence in the one count, relying upon *Criminal Procedure Act 2009* Schedule 1 Clause 3(3).[954]

44. In relation to aggravated burglary, it has been held that the two forms of that offence are proven by evidence of substantially different facts and the jury must be unanimous about the basis of culpability (*R v Secombe* [2010] VSCA 58).

45. It there therefore highly likely that the same principle will apply to home invasion.

46. The jury should give a single verdict, and they should not be asked to identify the basis of their verdict (*R v Ciantar* (2006) 16 VR 26).

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[954] However it is not unlawful to allege the alternative forms of culpability in separate counts. See *R v Davidson; R v Konestabo* [2008] VSCA 188.

47. See Unanimous and Majority Verdicts for further information about this issue.

Last updated: 9 March 2017

7.5.6.1 Charge: Home Invasion (while Armed)

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The Elements

I must now direct you about the crime of home invasion. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused entered [part of] a home.

Two – s/he did so as a trespasser.

Three – when s/he entered the [part of the] home, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault"].

Four – the accused entered the home in company with one or more other people;

Five – the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her when s/he entered the [part of the] home.

I will now explain each of these elements in more detail.[955]

The accused entered a home or part of a home

The first element that the prosecution must prove is that the accused entered [part of] a home.

In this case the [part of the] home it is alleged that NOA entered is [*identify relevant home or part of the home*].

[*If the "home" is an inhabited vehicle or vessel, add the following shaded section.*]

While you may not think that a [*identify relevant class of vehicle or vessel, e.g.* "caravan", "trailer", "houseboat"] is a "home", for the purposes of this offence a vehicle or vessel is treated as a "home" if it was intended for occupation and used as a residence.

A vehicle or vessel will have been used as a residence at the time of the offence if a person was living in it at that time. No-one needs to have actually been present in the vehicle or vessel at the time of the home invasion. This requirement will be satisfied as long as someone was living there, even if they were out when the alleged home invasion took place.

[*Summarise relevant evidence and/or arguments.*]

The accused entered as a trespasser

The second element that the prosecution must prove is that the accused entered the [part of the] home as a trespasser. For this element to be met, there are two things the prosecution must prove.

First, they must prove that NOA entered the [*identify relevant home or part of the home*] without any right or authority to enter. That is, that [part of the] home must have been "off-limits" to him/her.

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[955] If an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

[*If it is alleged that the accused entered a prohibited part of a home, add the following shaded section.*]

It is important to note that, in this case, the prosecution did not allege that the entire home was "off-limits" to NOA. They accepted that s/he was authorised to enter certain parts of the home, such as the [*identify authorised parts of the home*]. However, they argued that NOA was forbidden from entering the [*identify prohibited part of the home*]. That is, s/he had no right or authority to be there.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine whether that part of the home really was "off-limits" to NOA. This part of the second element will only be satisfied if you find that it was.

[*If it is alleged that the accused had limited authority to enter, but exceeded that authority, add the following shaded section.*]

In this case the prosecution did not deny that NOA had some authority to enter [*identify home or relevant part of home*]. However, they argued that s/he only had authority to enter [that part of] the home if s/he complied with certain conditions, such as [*identify alleged conditions.*]

The prosecution alleged that when NOA entered the [part of the] home s/he was not complying with these conditions, and so had no right or authority to enter. She was therefore trespassing.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine if NOA's authority to enter [*identify home or relevant part of home*] was subject to any conditions. In making this decision you can consider everything that was said and done by the parties, and also the way that people generally conduct themselves. However, you cannot assume that certain conditions were imposed just because those limits would have been imposed if the issue had been raised. You must be satisfied that those conditions actually were imposed.

If you find that NOA's authority to enter the [*identify home or relevant part of the home*] was not subject to any conditions, then the second element will not be met. In such circumstances, the accused will have had unlimited authority to enter the [part of the] home, and so cannot have been trespassing, no matter what s/he intended to do. Even if s/he entered with some undesirable purpose in mind, s/he still had a right to enter.

If you find that NOA's authority to enter was subject to certain conditions, you must then determine whether or not, when s/he entered the [part of the] home, s/he was complying with those conditions. If s/he was, then s/he will not have been trespassing. That is, s/he will have had a right or authority to enter that [part of the] home.

However, if s/he was not complying with those conditions, then s/he will have had no right or authority to enter the home, and this part of the second element will be met.

To summarise, this part of the second element will only be met if you are satisfied that NOA was only authorised to enter [*identify home or relevant part of home*] if s/he complied with certain conditions, and you find that s/he did not comply with those conditions when s/he entered. If you are not satisfied of either of these matters beyond reasonable doubt, then this element will not be met.

The second matter that the prosecution must prove for the second element to be met is that the accused either knew that s/he had no right or authority to enter [*identify home or relevant part of home*], or s/he believed that it was probable that she had no such right or authority.

For this part of the second element to be satisfied, it is not sufficient for NOA to have known that it was possible that she had no right or authority to enter the [part of the] home. S/he must have at least known that this was probably the case.

[*Summarise relevant evidence and/or arguments.*]

It is only if you are satisfied, beyond reasonable doubt, that NOA entered the [*identify relevant home or part of the home*] without any right or authority to enter, and that s/he knew that s/he had no right or authority to enter that [part of the] home, or at least knew that that was probably the case, that this second element will be met.

The accused intended to commit an offence

The third element that the prosecution must prove is that, when s/he entered the [part of the] home, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault"].

[*Where the relevant offence is theft, add the following shaded section*.]

In order to do this, the prosecution must prove three things.[956]

First, they must prove that the accused intended to take property that belonged to another person without the owner's consent.

Secondly, the prosecution must prove that the accused intended to permanently deprive the owner of the property in question. That is, the accused must have intended that the owner would never get it back.

Thirdly, the prosecution must prove that when s/he entered the [part of the] home, the accused did not believe that s/he had a legal right to take the property in question.

[*If further elaboration is necessary, include any relevant bullet points from the following list*.]

- – The prosecution does not need to prove that any property was in fact stolen. They only need to prove that the accused intended to steal.
- – The prosecution does not need to prove that the accused intended to steal any particular property. They only need to prove that s/he intended to steal property of some kind from inside the home.
- – This element will be met if the prosecution can prove that, although the accused did not know what s/he would find in the [part of the] home, s/he intended to steal anything of value that s/he might come across.

[*Summarise relevant evidence and/or arguments.*]

[*Where the relevant offence is common assault, add the following shaded section*.]

In order to do this the prosecution must prove two things.[957]

First, they must prove that the accused intended either to apply force to a person's body, or to act in

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[956] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.5.1.2 Charge: Theft (Extended).

[957] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.4.8.1 Charge: Assault – Application of Force or 7.4.8.3 Charge: Assault – No Application of Force.

a way that would cause a person to think that force would immediately be applied to his or her body.[958]

[*If further elaboration is necessary, include any relevant directions from the following list*.]

- [*For application of force cases*] It does not matter how much force the accused intended to apply. Nor does it matter whether or not that force would have harmed the person. An intention to merely touch someone is enough.
- [*For application of force cases*] It does not matter whether s/he would have actually been able to apply the force. It is sufficient for the accused to have intended to apply force.
- [*For apprehension of force cases*] S/he does not need to have intended to actually apply such force. The accused only needs to have intended to cause someone to believe that force would be applied.

Secondly, the prosecution must prove that the accused intended to act in this way in circumstances in which there was no lawful justification or excuse for his/her conduct.

[*Possible forms of lawful justification or excuse include consent, self-defence, arrest, the lawful correction of children and ordinary social activity. For guidance on directions for these matters see* 7.4.8 Common Law Assault.]

[*If no lawful justifications or excuses are open on the evidence, add the following darker shaded text.*]

In this case, it has not been suggested that there was a lawful justification or excuse for the accused's alleged actions. You should therefore have no difficulty finding that, if NOA intended to [apply force to a person's body/act in a way that would cause a person to think that force would immediately be applied to his or her body], that was done without lawful justification or excuse.

[*If any lawful justifications or excuses are open on the evidence, give appropriate directions incorporating reference to the evidence and arguments relevant to the justification or excuse, and concluding with the darker shaded text*.

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused's behaviour was without lawful [justification/excuse]. The defence does not need to prove that NOA had such a [justification/excuse].

The accused must have had the relevant intention at the time s/he entered the [part of the] home. If you accept that it is reasonably possible that NOA only formed that intention after entering the [part of the] home, then this element will not be satisfied.

Entry in company

Warning! *This element has not been considered by Victorian courts. Judges should seek submissions before directing the jury about this element.*

The fourth element the prosecution must prove is that the accused entered the home "in company" with one or more other people.

[958] If the prosecution relies on only one basis of culpability, directions on the alternative basis should be omitted.

In this case, the prosecution says that NOA entered the home "in company" with [*identify those said to be in company*].[959]

To prove this element, the prosecution must prove three matters.

One – NOA must have had a "common purpose" with [*identify those said to be in company*] to commit the home invasion.

This means that s/he must have agreed with [*identify those said to be in company*] to commit the home invasion.[960]

The second matter is that [at least one of] [*identify those said to be in company*] must have been physically present at the home invasion.

This means that [at least one of] [*identify those said to be in company*] must have entered the [part of the] home with NOA. It would not be enough that the other people stood outside as lookouts, or getaway drivers.

The third matter is that [i*dentify those said to be in company*] must have been able to contribute to the offending, by encouraging NOA or intimidating anyone else in the [part of the] home.[961]

[*Refer to relevant evidence and arguments.*]

The accused was armed

The fifth element that the prosecution must prove is that the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of entering the [part of the] home.

For this element to be met, there are three things that the prosecution must prove.

First, they must prove that, at the time of entering the [part of the] home, NOA had [*identify item*] either on him/her or readily available for use.

Secondly, the prosecution must prove that [*identify item*] falls within the category of [firearm/imitation firearm/offensive weapon/explosive/imitation explosive].

[*Where there is a dispute about whether the article possessed was a firearm, add relevant parts of the following shaded section.*]

The law defines a "firearm" to be any device which is designed or adapted to discharge bullets or other missiles, either by the expansion of gases produced in the device by the ignition of strongly combustible materials, or by compressed air or other gases. The definition of "firearm" also includes anything which looks like such a device.

However, certain things are excluded from the definition of a "firearm". These include [*identify relevant exception, e.g.* "underwater spear guns"].

To be a "firearm", the device does not need to be assembled, complete or operational. If it fits the definition I have just given you, it will be a "firearm", whether or not it actually works.

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[959] Where the other offenders cannot be identified, the names of the co-offenders should be replaced with a statement such as "three other people who have not been identified".

[960] Where the scope of the agreement is in issue, this direction may be modified. See Charge: Statutory Complicity (Agreement, Arrangement or Understanding) for guidance.

[961] In cases where any victim of the offence is not aware of the additional people, the discussion of this third requirement must be modified. See 7.5.6 Home Invasion for guidance.

[*Where it is alleged that the accused had an imitation firearm with him/her, add the following shaded section.*]

An "imitation firearm" is anything which has the appearance of being a firearm, whether or not it is capable of being fired.

[*Where it is alleged that the accused had an offensive weapon with him/her, add the following shaded section*]

The law defines two different kinds of items as "offensive weapons". First, an item is an offensive weapon if it is specifically made or adapted for the use of injuring or incapacitating a person. Secondly, an ordinarily inoffensive item that does not meet this criterion can also become an "offensive weapon" if the person carrying it intends or threatens to use it to injure or incapacitate a person.

[*If it is alleged that the relevant article was made for the use of injuring or incapacitating a person, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] is an "offensive weapon" because it is made for injuring or incapacitating people. That is, it is an item that is normally used for this purpose.

[*If it is alleged that the relevant article was adapted for the use of injuring or incapacitating a person, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because it was adapted for the use of injuring or incapacitating people. That is, it was physically modified so that it could cause injury or incapacitate a person.

[*If it is alleged that an ordinary article became an offensive weapon because of the accused's use, threats or intention, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because NOA [used/threatened to use/intended to use] it for the purpose of injuring or incapacitating a person.

[*Where it is alleged that the accused had an explosive with him/her, add the following shaded section*.]

An "explosive" is any item which is manufactured for the purpose of producing a practical effect by explosion, or which is intended to have that purpose. Any item that fits this definition will be an "explosive", whether or not it actually works.

[*Where it is alleged that the accused had an imitation explosive with him/her, add the following shaded section.*]

An "imitation explosive" is any item which might reasonably be taken to be, or to contain, an explosive.

Thirdly, the prosecution must prove that the accused had the [*identify item*] with him/her for the purpose of the home invasion. This will be the case if NOA had the [*identify item*] with him/her for the purpose of [stealing property from within the [part of the] home/assaulting a person within the [part of the] home].

In determining this matter you should focus on NOA's intention at the time s/he entered the [part of] the home. It does not matter what his/her intention was at the time s/he first handled the [*identify item*].

In this case the prosecution argued that all three of these requirements have been met. [*Describe prosecution evidence and/or arguments*.]

The defence [*describe defence case* [*if any*] *in respect of this element, e.g.*

- denied that NOA had a gun with him/her at the time of the home invasion;
- denied that the bottle was an offensive weapon;

- denied that NOA had the knife with him/her for the purpose of the home invasion.]

It is for you to determine, based on all the evidence, whether all three of these matters have been proven beyond reasonable doubt. It is only if you are satisfied that NOA had [*identify item*] with him/her at the time of the entry, that [*identify item*] was a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive], and that NOA had that item with him/her for the purposes of the home invasion that this element will be met.

Summary

To summarise, before you can find NOA guilty of home invasion, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA entered [part of] a home; and

Two – that NOA did so as a trespasser. That is:

- S/he entered the [part of the] home without any right or authority to enter; and
- S/he knew that s/he had no right or authority to enter that [part of the] home, or at least knew that that was probably the case; and

Three – that at that time NOA intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault"]; and

Four – that NOA entered the home in company with at least one other person; and

Five – that NOA had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the entry. That is:

- When s/he entered the [part of the] home, s/he had a [*identify item*] on him/her or readily available; and
- That a [*identify item*] falls within the category of a [*identify category*]; and
- That NOA had the [*identify item*] with him/her for the purpose of the home invasion.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of home invasion.

Last updated: 2 July 2020

7.5.6.2 Checklist: Home Invasion (while Armed)

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The Elements

Five elements the prosecution must prove beyond reasonable doubt:

1. NOA entered a home.
2. NOA entered the home as a trespasser.
3. NOA entered the home intending to [*identify secondary offence*].
4. NOA entered the home in company with one or more other people.
5. NOA had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her when s/he entered the home.

Entered a home

1. Did NOA enter a home?

1.1 Is [*identify premises*] a home?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Home Invasion

1.2 Did NOA enter [*identify premises*]?

If Yes, then go to 2

If No, then the Accused is not guilty of Home Invasion

Entry as a trespasser

2. Did NOA enter the home as a trespasser?

2.1 Did NOA enter the home without any right or authority to enter?

If Yes, then go to 2.2

If No, then the Accused is not guilty of Home Invasion

2.2 Did NOA know that s/he had no right to enter the home or did NOA believe it was probable that s/he had no right to enter?

If Yes, then go to 3

If No, then the Accused is not guilty of Home Invasion

Enter intending to commit an offence

3. Did NOA enter the home intending to commit [*insert offence*]?

If Yes, then go to 4

If No, then the Accused is not guilty of Home Invasion

Entry in company

4. Did NOA enter the home in company with one or more other people?

4.1 Did NOA agree with [*identify alleged co-offenders*] to commit the home invasion?

If Yes, then go to 4.2

If No, then the Accused is not guilty of Home Invasion

4.2 Was at least one of [*identify alleged co-offenders*] physically present in the home with NOA?

If Yes, then go to 4.3

If No, then the Accused is not guilty of Home Invasion

4.3 Was a physically present co-offender able to contribute to the offending?

Consider – A co-offender may be able to contribute by encouraging NOA or by intimidating others in the home

If Yes, then go to 5

If No, then the Accused is not guilty of Home Invasion

[Firearm/imitation firearm/offensive weapon/explosive/imitation explosive]

5. Did NOA have a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the home invasion?

5.1 Did NOA have [*identify item*] on him/her or readily available for use at the time of entering the home?

If Yes, then go to 5.2

If No, then the accused is not guilty of Home Invasion

5.2 Is [*identify item*] a [*firearm/imitation firearm/offensive weapon/explosive/imitation explosive*]?

If Yes, then go to 5.3

If No, then the accused is not guilty of Home Invasion

5.3 Did NOA have [*identify item*] for the purpose of the alleged home invasion?

If Yes, then the accused is guilty of Home Invasion (provided you have answered yes to questions 1, 2 and 3)

If No, then the accused is not guilty of Home Invasion

Last updated: 9 March 2017

7.5.6.3 Charge: Home Invasion (Person Present)

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The Elements

I must now direct you about the crime of home invasion. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused entered [part of] a home.

Two – s/he did so as a trespasser.

Three – when s/he entered the [part of the] home, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault"].

Four – the accused entered the home in company with one or more other people;

Five – a person was present at some stage while NOA was in the [part of the] home.

I will now explain each of these elements in more detail.[962]

The accused entered a home or part of a home

The first element that the prosecution must prove is that the accused entered [part of] a home.

In this case the [part of the] home it is alleged that NOA entered is [*identify relevant home or part of the home*].

[*If the "home" is an inhabited vehicle or vessel, add the following shaded section.*]

While you may not think that a [*identify relevant class of vehicle or vessel, e.g.* "caravan", "trailer", "houseboat"] is a "home", for the purposes of this offence a vehicle or vessel is treated as a "home" if it was intended for occupation and used as a residence.

A vehicle or vessel will have been used as a residence at the time of the offence if a person was living in it at that time. No-one needs to have actually been present in the vehicle or vessel at the time of the home invasion. This requirement will be satisfied as long as someone was living there, even if they were out when the alleged home invasion took place.

[*Summarise relevant evidence and/or arguments.*]

The accused entered as a trespasser

The second element that the prosecution must prove is that the accused entered the [part of the] home as a trespasser. For this element to be met, there are two things the prosecution must prove.

First, they must prove that NOA entered the [*identify relevant home or part of the home*] without any right or authority to enter. That is, that [part of the] home must have been "off-limits" to him/her.

[*If it is alleged that the accused entered a prohibited part of a home, add the following shaded section.*]

It is important to note that, in this case, the prosecution did not allege that the entire home was "off-limits" to NOA. They accepted that s/he was authorised to enter certain parts of the home, such as the [*identify authorised parts of the home*]. However, they argued that NOA was forbidden from entering the [*identify prohibited part of the home*]. That is, s/he had no right or authority to be there.

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[962] If an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine whether that part of the home really was "off-limits" to NOA. This part of the second element will only be satisfied if you find that it was.

[*If it is alleged that the accused had limited authority to enter, but exceeded that authority, add the following shaded section.*]

In this case the prosecution did not deny that NOA had some authority to enter [*identify home or relevant part of home*]. However, they argued that s/he only had authority to enter [that part of] the home if s/he complied with certain conditions, such as [*identify alleged conditions.*]

The prosecution alleged that when NOA entered the [part of the] home s/he was not complying with these conditions, and so had no right or authority to enter. She was therefore trespassing.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine if NOA's authority to enter [*identify home or relevant part of home*] was subject to any conditions. In making this decision you can consider everything that was said and done by the parties, and also the way that people generally conduct themselves. However, you cannot assume that certain conditions were imposed just because those limits would have been imposed if the issue had been raised. You must be satisfied that those conditions actually were imposed.

If you find that NOA's authority to enter the [*identify home or relevant part of the home*] was not subject to any conditions, then the second element will not be met. In such circumstances, the accused will have had unlimited authority to enter the [part of the] home, and so cannot have been trespassing, no matter what s/he intended to do. Even if s/he entered with some undesirable purpose in mind, s/he still had a right to enter.

If you find that NOA's authority to enter was subject to certain conditions, you must then determine whether or not, when s/he entered the [part of the] home, s/he was complying with those conditions. If s/he was, then s/he will not have been trespassing. That is, s/he will have had a right or authority to enter that [part of the] home.

However, if s/he was not complying with those conditions, then s/he will have had no right or authority to enter the home, and this part of the second element will be met.

To summarise, this part of the second element will only be met if you are satisfied that NOA was only authorised to enter [*identify home or relevant part of home*] if s/he complied with certain conditions, and you find that s/he did not comply with those conditions when s/he entered. If you are not satisfied of either of these matters beyond reasonable doubt, then this element will not be met.

The second matter that the prosecution must prove for the second element to be met is that the accused either knew that s/he had no right or authority to enter [*identify home or relevant part of home*], or s/he believed that it was probable that she had no such right or authority.

For this part of the second element to be satisfied, it is not sufficient for NOA to have known that it was possible that she had no right or authority to enter the [part of the] home. S/he must have at least known that this was probably the case.

[*Summarise relevant evidence and/or arguments.*]

It is only if you are satisfied, beyond reasonable doubt, that NOA entered the [*identify relevant home or part of the home*] without any right or authority to enter, and that s/he knew that s/he had no right or authority to enter that [part of the] home, or at least knew that that was probably the case, that this second element will be met.

The accused intended to commit an offence

The third element that the prosecution must prove is that, when s/he entered the [part of the] home, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault"].

[*Where the relevant offence is theft, add the following shaded section*.]

In order to do this, the prosecution must prove three things.[963]

First, they must prove that the accused intended to take property that belonged to another person without the owner's consent.

Secondly, the prosecution must prove that the accused intended to permanently deprive the owner of the property in question. That is, the accused must have intended that the owner would never get it back.

Thirdly, the prosecution must prove that when s/he entered the [part of the] home, the accused did not believe that s/he had a legal right to take the property in question.

[*If further elaboration is necessary, include any relevant bullet points from the following list*.]

- The prosecution does not need to prove that any property was in fact stolen. They only need to prove that the accused intended to steal.
- The prosecution does not need to prove that the accused intended to steal any particular property. They only need to prove that s/he intended to steal property of some kind from inside the home.
- This element will be met if the prosecution can prove that, although the accused did not know what s/he would find in the [part of the] home, s/he intended to steal anything of value that s/he might come across.

[*Summarise relevant evidence and/or arguments.*]

[*Where the relevant offence is common assault, add the following shaded section*.]

In order to do this the prosecution must prove two things.[964]

First, they must prove that the accused intended either to apply force to a person's body, or to act in a way that would cause a person to think that force would immediately be applied to his or her body.[965]

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[963] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.5.1.2 Charge: Theft (Extended).

[964] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.4.8.1 Charge: Assault – Application of Force or 7.4.8.3 Charge: Assault – No Application of Force.

[965] If the prosecution relies on only one basis of culpability, directions on the alternative basis should be omitted.

[*If further elaboration is necessary, include any relevant directions from the following bullet list*.]

- [*For application of force cases*] It does not matter how much force the accused intended to apply. Nor does it matter whether or not that force would have harmed the person. An intention to merely touch someone is enough.
- [*For application of force cases*] It does not matter whether s/he would have actually been able to apply the force. It is sufficient for the accused to have intended to apply force.
- [*For apprehension of force cases*] S/he does not need to have intended to actually apply such force. The accused only needs to have intended to cause someone to believe that force would be applied.

Secondly, the prosecution must prove that the accused intended to act in this way in circumstances in which there was no lawful justification or excuse for his/her conduct.

[*Possible forms of lawful justification or excuse include consent, self-defence, arrest, the lawful correction of children and ordinary social activity. For guidance on directions for these matters see* 7.4.8 Common Law Assault.]

[*If no lawful justifications or excuses are open on the evidence, add the following darker shaded text.*

In this case, it has not been suggested that there was a lawful justification or excuse for the accused's alleged actions. You should therefore have no difficulty finding that, if NOA intended to [apply force to a person's body/act in a way that would cause a person to think that force would immediately be applied to his or her body], that was done without lawful justification or excuse.

[*If any lawful justifications or excuses are open on the evidence, give appropriate directions incorporating reference to the evidence and arguments relevant to the justification or excuse, and concluding with the darker shaded text*.

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused's behaviour was without lawful [justification/excuse]. The defence does not need to prove that NOA had such a [justification/excuse].

The accused must have had the relevant intention at the time s/he entered the [part of the] home. If you accept that it is reasonably possible that NOA only formed that intention after entering the [part of the] home, then this element will not be satisfied.

Entry in company

Warning! *This element has not been considered by Victorian courts. Judges should seek submissions before directing the jury about this element.*

The fourth element the prosecution must prove is that the accused entered the home "in company" with one or more other people.

In this case, the prosecution says that NOA entered the home "in company" with [*identify those said to be in company*].[966]

To prove this element, the prosecution must prove three matters.

One – NOA must have had a "common purpose" with [*identify those said to be in company*] to commit the home invasion.

[966] Where the other offenders cannot be identified, the names of the co-offenders should be replaced with a statement such as "three other people who have not been identified".

This means that s/he must have agreed with [*identify those said to be in company*] to commit the home invasion.[967]

The second matter is that [at least one of] [*identify those said to be in company*] must have been physically present at the home invasion.

This means that [at least one of] [*identify those said to be in company*] must have entered the [part of the] home with NOA. It would not be enough that the other people stood outside as lookouts, or getaway drivers.

The third matter is that [i*dentify those said to be in company*] must have been able to contribute to the offending, by encouraging NOA or intimidating anyone else in the [part of the] home.[968]

[*Refer to relevant evidence and arguments.*]

A person was present

The fifth element that the prosecution must prove is that a person, other than a co-offender, was present in the home at any stage while NOA was trespassing in the [part of the] home.

[*Refer to relevant evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of home invasion, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA entered [part of] a home; and

Two – that NOA did so as a trespasser. That is:

- S/he entered the [part of the] home without any right or authority to enter; and
- S/he knew that s/he had no right or authority to enter that [part of the] home, or at least knew that that was probably the case; and

Three – that at that time NOA intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault"]; and

Four – that NOA entered the home in company with at least one other person; and

Five – that a person was present when NOA was in the [part of the] home as a trespasser.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of home invasion.

Last updated: 2 July 2020

7.5.6.4 Checklist: Home Invasion (Person Present)

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[967] Where the scope of the agreement is in issue, this direction may be modified. See Charge: Statutory Complicity (Agreement, Arrangement or Understanding) for guidance.

[968] In cases where any victim of the offence is not aware of the additional people, the discussion of this third requirement must be modified. See 7.5.6 Home Invasion for guidance.

The Elements

Five elements the prosecution must prove beyond reasonable doubt:

1. NOA entered a home.
2. NOA entered the home as a trespasser.
3. NOA entered the home intending to [*identify secondary offence*]
4. NOA entered the home in company with one or more other people.
5. A person was present while NOA was in the home.

Entered a home

1. Did NOA enter a home?

1.1 Is [*identify premises*] a home?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Home Invasion

1.2 Did NOA enter [*identify premises*]?

If Yes, then go to 2

If No, then the Accused is not guilty of Home Invasion

Entry as a trespasser

2. Did NOA enter the home as a trespasser?

2.1 Did NOA enter the home without any right or authority to enter?

If Yes, then go to 2.2

If No, then the Accused is not guilty of Home Invasion

2.2 Did NOA know that s/he had no right to enter the home or did NOA believe it was probable that s/he had no right to enter?

If Yes, then go to 3

If No, then the Accused is not guilty of Home Invasion

Enter intending to commit an offence

3. Did NOA enter the home intending to commit [*insert offence*]?

If Yes, then go to 4

If No, then the Accused is not guilty of Home Invasion

Entry in company

4. Did NOA enter the home in company with one or more other people?

4.1 Did NOA agree with [*identify alleged co-offenders*] to commit the home invasion?

If Yes, then go to 4.2

If No, then the Accused is not guilty of Home Invasion

4.2 Was at least one of [*identify alleged co-offenders*] physically present in the home with NOA?

If Yes, then go to 4.3

If No, then the Accused is not guilty of Home Invasion

4.3 Was a physically present co-offender able to contribute to the offending?

Consider – A co-offender may be able to contribute by encouraging NOA or by intimidating others in the home

If Yes, then go to 5

If No, then the Accused is not guilty of Home Invasion

Person present in the home

5. Was there a person other than a co-offender present in the home while NOA was trespassing in the home?

If Yes, then the Accused is guilty of Home Invasion (provided you have answered yes to questions 1, 2, 3 and 4)

If No, then the Accused is not guilty of Home Invasion

Last updated: 9 March 2017

7.5.7 Aggravated Home Invasion

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1. Aggravated home invasion is an offence under the *Crimes Act 1958* s 77B.
2. The offence has the following five elements:
   (a) The accused committed burglary of a home;

(b) The accused entered the home in company with two or more other persons;

(c) At the time of entry the accused had with them a firearm, an imitation firearm, an offensive weapon, an explosive or an imitation explosive;

(d) At the time of entry the accused knows or is reckless as to whether there is or will be another person (other than a co-offender) in the home while the accused is present; and

(e) While the accused was in the home, a person (other than a co-offender) was present in the home (Crimes Act 1958 s 77B).

3. These are addressed in turn below.

Burglary of a home

4. The first element is that the accused committed a burglary of a home (*Crimes Act 1958* s 77B(1)(a)).

5. This is the same element as for the basic offence of home invasion. See 7.5.6 Home Invasion and 7.5.4 Burglary for information about this element.

Entry in company with two or more people

6. The second element is that the accused entered the home in company with two or more other people (*Crimes Act 1958* s 77B(1)(b)).

7. For a discussion of the meaning of "entry in company", see 7.5.6 Home Invasion.

8. This offence requires two or more co-offenders, whereas the basic offence of home invasion could be committed with a single co-offender.

The accused was armed

9. The third element that the prosecution must prove is that at the time the accused entered the home he or she had one of the following items with him or her:

i) A firearm;

ii) An imitation firearm;

iii) An offensive weapon;

iv) An explosive; or

v) An imitation explosive (*Crimes Act 1958* s 77B(1)(c)(i)).

10. For more information on this element, see 7.5.5 Aggravated Burglary and 7.5.6 Home Invasion.

Knowledge or recklessness of inhabitants

11. The fourth element the prosecution have to prove is that at the time the accused entered the home he or she either:

i) Knew that a person was present, or would be present, in the home; or

ii) Was reckless about whether a person was present or would be present (*Crimes Act 1958* s 77B(1)(c)(ii)).

12. For this element, the other person present in the home must not be a person with whom the accused entered the home in company with for the purpose of the second element.

13. For more information about this element, see 7.5.5 Aggravated Burglary.

Presence of inhabitants

14. The fifth element the prosecution must prove is that while the accused was present in the home, another person (other than a person with whom the accused entered the home in company with) was present in the home (*Crimes Act 1958* s 77B(1)(d)).

Proceedings against co-offenders

15. Section 77B(3) provides that a person may be found guilty of this offence whether or not the co-offenders have been prosecuted for or found guilty of the offence.

16. This is equivalent to the provision which exists in relation to co-offenders charged under statutory complicity (see *Crimes Act 1958* s 324A).

Alternative verdict

17. The basic offence of home invasion is a statutory alternative to aggravated home invasion (*Crimes Act 1958* s 77C).

Last updated: 9 March 2017

7.5.7.1 Charge: Aggravated Home Invasion

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The Elements

I must now direct you about the crime of aggravated home invasion. To prove this crime, the prosecution must prove the following 7 elements beyond reasonable doubt:

One – the accused entered [part of] a home;

Two – s/he did so as a trespasser;

Three – when s/he entered the [part of the] home, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault"];

Four – the accused entered the home in company with two or more other people;

Five – the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her when s/he entered the [part of the] home;

Six – the accused knew or was reckless as to the presence of another person in the [part of the] home when s/he entered that [part of the] home;

Seven – a person was present at some stage while NOA was in the [part of the] home.

I will now explain each of these elements in more detail.[969]

The accused entered a home or part of a home

The first element that the prosecution must prove is that the accused entered [part of] a home.

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[969] If an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

In this case the [part of the] home it is alleged that NOA entered is [*identify relevant home or part of the home*].

[*If the "home" is an inhabited vehicle or vessel, add the following shaded section.*]

While you may not think that a [*identify relevant class of vehicle or vessel, e.g.* "caravan", "trailer", "houseboat"] is a "home", for the purposes of this offence a vehicle or vessel is treated as a "home" if it was intended for occupation and used as a residence.

A vehicle or vessel will have been used as a residence at the time of the offence if a person was living in it at that time. No-one needs to have actually been present in the vehicle or vessel at the time of the home invasion. This requirement will be satisfied as long as someone was living there, even if they were out when the alleged aggravated home invasion took place.

[*Summarise relevant evidence and/or arguments.*]

The accused entered as a trespasser

The second element that the prosecution must prove is that the accused entered the [part of the] home as a trespasser. For this element to be met, there are two things the prosecution must prove.

First, they must prove that NOA entered the [*identify relevant home or part of the home*] without any right or authority to enter. That is, that [part of the] home must have been "off-limits" to him/her.

[*If it is alleged that the accused entered a prohibited part of a home, add the following shaded section.*]

It is important to note that, in this case, the prosecution did not allege that the entire home was "off-limits" to NOA. They accepted that s/he was authorised to enter certain parts of the home, such as the [*identify authorised parts of the home*]. However, they argued that NOA was forbidden from entering the [*identify prohibited part of the home*]. That is, s/he had no right or authority to be there.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine whether that part of the home really was "off-limits" to NOA. This part of the second element will only be satisfied if you find that it was.

[*If it is alleged that the accused had limited authority to enter, but exceeded that authority, add the following shaded section.*]

In this case the prosecution did not deny that NOA had some authority to enter [*identify home or relevant part of home*]. However, they argued that s/he only had authority to enter [that part of] the home if s/he complied with certain conditions, such as [*identify alleged conditions.*]

The prosecution alleged that when NOA entered the [part of the] home s/he was not complying with these conditions, and so had no right or authority to enter. She was therefore trespassing.

[*Summarise relevant evidence and/or arguments*.]

It is for you to determine if NOA's authority to enter [*identify home or relevant part of home*] was subject to any conditions. In making this decision you can consider everything that was said and done by the parties, and also the way that people generally conduct themselves. However, you cannot assume that certain conditions were imposed just because those limits would have been imposed if the issue had been raised. You must be satisfied that those conditions actually were imposed.

If you find that NOA's authority to enter the [*identify home or relevant part of the home*] was not subject to any conditions, then the second element will not be met. In such circumstances, the accused will have had unlimited authority to enter the [part of the] home, and so cannot have been trespassing, no matter what s/he intended to do. Even if s/he entered with some undesirable purpose in mind, s/he still had a right to enter.

If you find that NOA's authority to enter was subject to certain conditions, you must then determine whether or not, when s/he entered the [part of the] home, s/he was complying with those conditions. If s/he was, then s/he will not have been trespassing. That is, s/he will have had a right or authority to enter that [part of the] home.

However, if s/he was not complying with those conditions, then s/he will have had no right or authority to enter the home, and this part of the second element will be met.

To summarise, this part of the second element will only be met if you are satisfied that NOA was only authorised to enter [*identify home or relevant part of home*] if s/he complied with certain conditions, and you find that s/he did not comply with those conditions when s/he entered. If you are not satisfied of either of these matters beyond reasonable doubt, then this element will not be met.

The second matter that the prosecution must prove for the second element to be met is that the accused either knew that s/he had no right or authority to enter [*identify home or relevant part of home*], or s/he believed that it was probable that she had no such right or authority.

For this part of the second element to be satisfied, it is not sufficient for NOA to have known that it was possible that she had no right or authority to enter the [part of the] home. S/he must have at least known that this was probably the case.

[*Summarise relevant evidence and/or arguments.*]

It is only if you are satisfied, beyond reasonable doubt, that NOA entered the [*identify relevant home or part of the home*] without any right or authority to enter, and that s/he knew that s/he had no right or authority to enter that [part of the] home, or at least knew that that was probably the case, that this second element will be met.

The accused intended to commit an offence

The third element that the prosecution must prove is that, when s/he entered the [part of the] home, the accused intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault", "criminal damage"].

[*Where the relevant offence is theft, add the following shaded section*.]

In order to do this, the prosecution must prove three things.[970]

First, they must prove that the accused intended to take property that belonged to another person without the owner's consent.

Secondly, the prosecution must prove that the accused intended to permanently deprive the owner of the property in question. That is, the accused must have intended that the owner would never get it back.

Thirdly, the prosecution must prove that when s/he entered the [part of the] home, the accused did not believe that s/he had a legal right to take the property in question.

[*If further elaboration is necessary, include any relevant bullet points from the following list*.]

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[970] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.5.1.2 Charge: Theft (Extended).

The prosecution does not need to prove that any property was in fact stolen. They only need to prove that the accused intended to steal.

The prosecution does not need to prove that the accused intended to steal any particular property. They only need to prove that s/he intended to steal property of some kind from inside the home.

This element will be met if the prosecution can prove that, although the accused did not know what s/he would find in the [part of the] home, s/he intended to steal anything of value that s/he might come across.

[*Summarise relevant evidence and/or arguments.*]

[*Where the relevant offence is common assault, add the following shaded section*.]

In order to do this the prosecution must prove two things.[971]

First, they must prove that the accused intended either to apply force to a person's body, or to act in a way that would cause a person to think that force would immediately be applied to his or her body.[972]

[*If further elaboration is necessary, include any relevant directions from the following bullet list*.]

- [*For application of force cases*] It does not matter how much force the accused intended to apply. Nor does it matter whether or not that force would have harmed the person. An intention to merely touch someone is enough.
- [*For application of force cases*] It does not matter whether s/he would have actually been able to apply the force. It is sufficient for the accused to have intended to apply force.
- [*For apprehension of force cases*] S/he does not need to have intended to actually apply such force. The accused only needs to have intended to cause someone to believe that force would be applied.

Secondly, the prosecution must prove that the accused intended to act in this way in circumstances in which there was no lawful justification or excuse for his/her conduct.

[*Possible forms of lawful justification or excuse include consent, self-defence, arrest, the lawful correction of children and ordinary social activity. For guidance on directions for these matters see* 7.4.8 Common Law Assault.]

[*If no lawful justifications or excuses are open on the evidence, add the following darker shaded text.*]

In this case, it has not been suggested that there was a lawful justification or excuse for the accused's alleged actions. You should therefore have no difficulty finding that, if NOA intended to [apply force to a person's body/act in a way that would cause a person to think that force would immediately be applied to his or her body], that was done without lawful justification or excuse.

[*If any lawful justifications or excuses are open on the evidence, give appropriate directions incorporating reference to the evidence and arguments relevant to the justification or excuse, and concluding with the darker shaded text*.]

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[971] This charge is designed for use in cases where this element raises only simple issues. If more complex issues arise, the charge should be expanded accordingly. Guidance can be obtained from 7.4.8.1 Charge: Assault – Application of Force or 7.4.8.3 Charge: Assault – No Application of Force.

[972] If the prosecution relies on only one basis of culpability, directions on the alternative basis should be omitted.

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused's behaviour was without lawful [justification/excuse]. The defence does not need to prove that NOA had such a [justification/excuse].

The accused must have had the relevant intention at the time s/he entered the [part of the] home. If you accept that it is reasonably possible that NOA only formed that intention after entering the [part of the] home, then this element will not be satisfied.

Entry in company

Warning! *This element has not been considered by Victorian courts. Judges should seek submissions before directing the jury about this element.*

The fourth element the prosecution must prove is that the accused entered the home "in company" with two or more other people.

In this case, the prosecution says that NOA entered the home "in company" with [*identify those said to be in company*].[973]

To prove this element, the prosecution must prove three matters.

One – NOA must have had a "common purpose" with [*identify those said to be in company*] to commit the home invasion.

This means that s/he must have agreed with [*identify those said to be in company*] to commit the home invasion.[974]

The second matter is that [at least two of] [*identify those said to be in company*] must have been physically present at the home invasion.

This means that [at least two of] [*identify those said to be in company*] must have entered the [part of the] home with NOA. It would not be enough if one person entered with NOA and others stood outside as lookouts, or getaway drivers.

The third matter is that [i*dentify those said to be in company*] must have been able to contribute to the offending, by encouraging NOA or intimidating anyone else in the [part of the] home.[975]

[*Refer to relevant evidence and arguments.*]

The accused was armed

The fifth element that the prosecution must prove is that the accused had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of entering the [part of the] home.

For this element to be met, there are three things that the prosecution must prove.

---

[973] Where the other offenders cannot be identified, the names of the co-offenders should be replaced with a statement such as "three other people who have not been identified".

[974] Where the scope of the agreement is in issue, this direction may be modified. See Charge: Statutory Complicity (Agreement, Arrangement or Understanding) for guidance.

[975] In cases where any victim of the offence is not aware of the additional people, the discussion of this third requirement must be modified. See 7.5.7 Aggravated Home Invasion for guidance.

First, they must prove that, at the time of entering the [part of the] home, NOA had [*identify item*] either on him/her or readily available for use.

Secondly, the prosecution must prove that [*identify item*] falls within the category of [firearm/imitation firearm/offensive weapon/explosive/imitation explosive].

[*Where there is a dispute about whether the article possessed was a firearm, add relevant parts of the following shaded section.*]

The law defines a "firearm" to be any device which is designed or adapted to discharge bullets or other missiles, either by the expansion of gases produced in the device by the ignition of strongly combustible materials, or by compressed air or other gases. The definition of "firearm" also includes anything which looks like such a device.

However, certain things are excluded from the definition of a "firearm". These include [*identify relevant exception, e.g.* "underwater spear guns"].

To be a "firearm", the device does not need to be assembled, complete or operational. If it fits the definition I have just given you, it will be a "firearm", whether or not it actually works.

[*Where it is alleged that the accused had an imitation firearm with him/her, add the following shaded section.*]

An "imitation firearm" is anything which has the appearance of being a firearm, whether or not it is capable of being fired.

[*Where it is alleged that the accused had an offensive weapon with him/her, add the following shaded section.*]

The law defines two different kinds of items as "offensive weapons". First, an item is an offensive weapon if it is specifically made or adapted for the use of injuring or incapacitating a person. Secondly, an ordinarily inoffensive item that does not meet this criterion can also become an "offensive weapon" if the person carrying it intends or threatens to use it to injure or incapacitate a person.

[*If it is alleged that the relevant article was made for the use of injuring or incapacitating a person, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] is an "offensive weapon" because it is made for injuring or incapacitating people. That is, it is an item that is normally used for this purpose.

[*If it is alleged that the relevant article was adapted for the use of injuring or incapacitating a person, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because it was adapted for the use of injuring or incapacitating people. That is, it was physically modified so that it could cause injury or incapacitate a person.

[*If it is alleged that an ordinary article became an offensive weapon because of the accused's use, threats or intention, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because NOA [used/threatened to use/intended to use] it for the purpose of injuring or incapacitating a person.

[*Where it is alleged that the accused had an explosive with him/her, add the following shaded section.*]

An "explosive" is any item which is manufactured for the purpose of producing a practical effect by explosion, or which is intended to have that purpose. Any item that fits this definition will be an "explosive", whether or not it actually works.

[*Where it is alleged that the accused had an imitation explosive with him/her, add the following shaded section.*]

An "imitation explosive" is any item which might reasonably be taken to be, or to contain, an explosive.

Thirdly, the prosecution must prove that the accused had the [*identify item*] with him/her for the purpose of the home invasion. This will be the case if NOA had the [*identify item*] with him/her for the purpose of [stealing property from within the [part of the] home/assaulting a person within the [part of the] home].

In determining this matter you should focus on NOA's intention at the time s/he entered the [part of] the home. It does not matter what his/her intention was at the time s/he first handled the [*identify item*].

In this case the prosecution argued that all three of these requirements have been met. [*Describe prosecution evidence and/or arguments*.]

The defence [*describe defence case* [*if any*] *in respect of this element, e.g.*

- denied that NOA had a gun with him/her at the time of the burglary;
- denied that the bottle was an offensive weapon;
- denied that NOA had the knife with him/her for the purpose of the home invasion.]

It is for you to determine, based on all the evidence, whether all three of these matters have been proven beyond reasonable doubt. It is only if you are satisfied that NOA had [*identify item*] with him/her at the time of the entry, that [*identify item*] was a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive], and that NOA had that item with him/her for the purposes of the home invasion that this element will be met.

Knowledge or recklessness of inhabitants

The sixth element that the prosecution must prove is that when s/he entered the [part of the] home the accused knew that a person was then present in that [part of the] home, or was reckless as to whether or not a person was then so present.

The law says that an accused will have been reckless in this way if s/he believed at the time of his/her entry, that another person was probably present in that [part of the] home.

It is not sufficient for the prosecution to prove that NOA believed that it was possible that a person was present. They must prove that s/he believed that this was probably the case.

[*Summarise relevant evidence and/or arguments.*]

A person was present

The seventh element that the prosecution must prove is that a person, other than a co-offender, was present in the home at any stage while NOA was trespassing in the [part of the] home.

[*Refer to relevant evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of home invasion, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA entered [part of] a home; and

Two – that NOA did so as a trespasser. That is:

- S/he entered the [part of the] home without any right or authority to enter; and

- S/he knew that s/he had no right or authority to enter that [part of the] home, or at least knew that that was probably the case; and

Three – that at that time NOA intended to commit the offence of [*insert offence relied upon by the prosecution, e.g.* "theft", "common assault"]; and

Four – that NOA entered the home in company with at least two other people; and

Five – that NOA had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her when s/he entered the [part of the] home; and

Six – that NOA knew or was reckless as to the presence of another person in the [part of the] home when s/he entered that [part of the] home; and

Seven – that a person was present while NOA was in the [part of the] home as a trespasser.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of home invasion.

Last updated: 2 July 2020

7.5.7.2 Checklist: Aggravated Home Invasion

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The Elements

Seven elements the prosecution must prove beyond reasonable doubt:

1. NOA entered a home.
2. NOA entered the home as a trespasser.
3. NOA entered the home intending to [*identify secondary offence*].
4. NOA entered the home in company with two or more other people.
5. NOA had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her when s/he entered the home.
6. At the time of entering the home, NOA knew or was reckless as to there being another person present in the home.
7. A person was present while NOA was in the home.

Entered a home

1. Did NOA enter a home?

    1.1 Is [*identify premises*] a home?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Aggravated Home Invasion

    1.2 Did NOA enter [*identify premises*]?

If Yes, then go to 2

If No, then the Accused is not guilty of Aggravated Home Invasion

Entry as a trespasser

2. Did NOA enter the home as a trespasser?

2.1 Did NOA enter the home without any right or authority to enter?

If Yes, then go to 2.2

If No, then the Accused is not guilty of Aggravated Home Invasion

2.2 Did NOA know that s/he had no right to enter the home or did NOA believe it was probable that s/he had no right to enter?

If Yes, then go to 3

If No, then the Accused is not guilty of Aggravated Home Invasion

Enter intending to commit an offence

3. Did NOA enter the home intending to commit [*insert offence*]?

If Yes, then go to 4

If No, then the Accused is not guilty of Aggravated Home Invasion

Entry in company

4. Did NOA enter the home in company with two or more other people?

4.1 Did NOA agree with [*identify alleged co-offenders*] to commit the home invasion?

If Yes, then go to 4.2

If No, then the Accused is not guilty of Aggravated Home Invasion

4.2 Were at least two of [*identify alleged co-offenders*] physically present in the home with NOA?

If Yes, then go to 4.3

If No, then the Accused is not guilty of Aggravated Home Invasion

4.3 Were physically present co-offenders able to contribute to the offending?

Consider – Co-offenders may be able to contribute by encouraging NOA or by intimidating others in the home

If Yes, then go to 5

If No, then the Accused is not guilty of Aggravated Home Invasion

[Firearm/imitation firearm/offensive weapon/explosive/imitation explosive]

5. Did NOA have a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the home invasion?

5.1 Did NOA have [*identify item*] on him/her or readily available for use at the time of entering the home?

If Yes, then go to 5.2

If No, then the accused is not guilty of Aggravated Home Invasion

5.2 Is [*identify item*] a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive]?

If Yes, then go to 5.3

If No, then the accused is not guilty of Aggravated Home Invasion

5.3 Did NOA have [*identify item*] for the purpose of the alleged home invasion?

If Yes, then go to 6

If No, then the accused is not guilty of Aggravated Home Invasion

Knowledge of person present

6. At the time of entering the home, did NOA either know that a person was present in the home or did NOA believe it was probable that a person would be present in the home?

If Yes, then go to 7

If No, then the accused is not guilty of Aggravated Home Invasion

Person present in the home

7. Was there a person other than a co-offender present in the home while NOA was trespassing in the home?

If Yes, then the Accused is guilty of Aggravated Home Invasion (provided you have answered yes to questions 1, 2, 3, 4, 5 and 6)

If No, then the Accused is not guilty of Aggravated Home Invasion

Last updated: 9 March 2017

7.5.8 Carjacking

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Overview

1. Carjacking is an offence under *Crimes Act 1958* s 79.
2. The offence has the following three elements:
   i) The accused stole a vehicle;
   ii) Immediately before or at the time of the theft, the accused:
      (a) Used force on any person; or
      (b) Put any person in fear that s/he or another person would, then and there, be subject to the use of force; or
      (c) Sought to put any person in fear that s/he or another person would, then and there, be subject to the use of force; and
   iii) The accused did so in order to commit the theft (*Crimes Act 1958* s 79(1)).
3. Apart from one difference, this offence is the same as robbery. The one difference is that whereas robbery can involve theft of any property, carjacking must involve theft of a vehicle.
4. A vehicle is defined to include:
   (a) A motor vehicle;
   (b) A vessel within the meaning of the Marine Safety Act 2010 (*Crimes Act 1958* s 79(3)).
5. As noted in 7.5.1 Theft, *Crimes Act 1958* s 73(14) provides that proof that a person uses a vehicle without the consent of the owner is conclusive evidence that the person intends to permanently deprive the owner of that vehicle.
6. Users should refer to 7.5.2 Robbery for details about the elements of this offence.

Last updated: 9 March 2017

7.5.8.1 Charge: Carjacking

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This charge can be used where one or more elements of the offence are in issue. If the only issue relied upon by the accused, or raised by the evidence, is that the accused was not the offender, this charge should be adapted. See 7.5.2.1 Charge: Robbery (Short) for guidance on possible adaptions.

The Elements

I must now direct you about the crime of carjacking. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused committed theft of a vehicle.

Two – immediately before or at the time of the theft, the accused either:

- Used force on a person; or
- Put a person in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put a person in fear that force was going to be used on him/her [or another person], then and there.

Three – the accused acted in that way in order to commit the theft.

I will now explain each of these elements in more detail.[976]

Theft

The first element that the prosecution must prove is that the accused committed theft of a vehicle. In order to do this, the prosecution must prove four things.[977]

First, they must prove that the accused appropriated property that belonged to another person. Although the word "appropriation" has a technical legal meaning, and includes many different types of acts, here it simply means to take something without the owner's consent.

In this case, the prosecution alleged that NOA took [*identify vehicle*] that belonged to [*identify owner*]. [*Summarise prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

Second, the prosecution must prove that the property was a "vehicle". There is no dispute that [*identify vehicle*] is a vehicle.[978]

Third, the prosecution must prove that, when the accused appropriated the vehicle, s/he intended to permanently deprive the owner of it. That is, s/he intended that the owner would never get it back.

For this offence, the law states that the prosecution can prove an intention to permanently deprive by showing that the accused took or used the vehicle without the consent of the owner.

[*Identify prosecution evidence and/or arguments.*]

Fourth, the prosecution must prove that, at the time of the appropriation, the accused was acting dishonestly. In this context, "dishonesty" does not have its ordinary meaning. It is given a special legal meaning, which says that the accused will have acted dishonestly if, when s/he took the vehicle, s/he did not believe that s/he had a legal right to take it.

In this case there is no evidence that the accused believed s/he had a legal right to take the vehicle. So if you are satisfied that NOA took the vehicle, you should have no difficulty finding this requirement proven.

It is for you to determine, based on all the evidence, whether NOA committed theft of a vehicle. This will only be the case if you are satisfied that all four of the requirements I have just outlined have been proven beyond reasonable doubt.

---

[976] If an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

[977] This part of the charge is designed for use in cases where the theft element does not raise any technical issues. If such issues do arise, the charge should be adapted or expanded accordingly. Guidance can be obtained from 7.5.1.2 Charge: Theft (Extended).

[978] If the nature of the property as a vehicle is in issue, or if the jury might be surprised that the relevant property is a vehicle (e.g. a house boat), this direction should be expanded.

Force or fear of force

The second element that the prosecution must prove is that, immediately before or at the time of the theft, the accused either:

- Used force on a person; or
- Put a person in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put a person in fear that force was going to be used on him/her [or another person], then and there.

In this case the prosecution alleged that NOA [*identify relevant ground*[*s*] *and people involved, e.g. "*used force against NOC*"*] when s/he [*describe relevant conduct*]. The defence denied this, arguing [*describe defence evidence and/or arguments*].

[*If it is alleged that the accused put, or sought to put, a person in fear, add the following shaded section.*]

You will note that it is not enough for the prosecution to prove that NOA put, or sought to put, NOC in fear that force was going to be used on him/her/NO3P[979] at some distant or uncertain time. To prove this element on the basis of the threatened use of force, the prosecution must prove that NOA put, or sought to put, NOC in fear that force was going to be used on him/her/NO3P then and there.

You will also note that, while this element will be met if you are satisfied that NOC was actually fearful that such force was going to be used, this is not necessary. This element will be met if the prosecution can prove that NOA sought to put NOC in fear, even if that attempt was unsuccessful.

Conduct was committed "in order" to steal

The third element that the prosecution must prove is that the accused acted in the way s/he did in order to commit the theft of the vehicle. That is, NOA must have [used force on NOC/put NOC in fear of the use of force/sought to put NOC in fear of the use of force] for the purpose of stealing the vehicle, rather than for another reason.

[*Insert any relevant evidence and/or arguments.*]

Summary

To summarise, before you can find NOA guilty of carjacking, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA committed theft of a vehicle, by dishonestly appropriating a vehicle that belonged to another person, intending to permanently deprive the owner of that vehicle; and

Two – that immediately before or at the time of the theft, NOA either:

- Used force on NOC; or
- Put NOC in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put NOC in fear that force was going to be used on him/her [or another person], then and there; and

[979] Name of third party.

Three – that NOA acted in this way in order to commit the theft of the vehicle.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of carjacking.

Last updated: 9 March 2017

7.5.8.2 Checklist: Carjacking

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The Elements

Three elements the prosecution must prove beyond reasonable doubt:

1. NOA committed theft of a vehicle.
2. Immediately before or at the time of the theft NOA:
   (a) Used force on NOC;
   (b) Put NOC in fear that force was going to be used then and there; or
   (c) Sought to put NOC in fear that force was going to be used then and there.
3. NOA acted in this way in order to commit the theft.

Theft of a vehicle

1. Did NOA commit theft of a vehicle?

1.1 Did NOA appropriate property belonging to another?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Carjacking

1.2 Is [*identify vehicle*] a vehicle?

If Yes, then go to 1.3

If No, then the Accused is not guilty of Carjacking

1.3 Did NOA intend to permanently deprive the owner of the vehicle?

Consider – A person intends to permanently deprive the owner of a vehicle if s/he takes or uses the vehicle without the consent of the owner

If Yes, then go to 1.4

If No, then the Accused is not guilty of Carjacking

1.4 Was NOA acting dishonestly?

Consider – For this purpose, "dishonestly" means "without a belief in a legal right to take the vehicle"

If Yes, then go to 2

If No, then the Accused is not guilty of Carjacking

Use of force

2. Has the prosecution proved any of the following uses of force?

2.1 Did NOA use force on NOC?

If Yes, then go to 3

If No, then go to 2.2

2.2 Did NOA put NOC in fear that force was going to be used on him/her/another person then and there?

If Yes, then go to 3

If No, then go to 2.3

2.3 Did NOA seek to put NOC in fear that force was going to be used on him/her/another person then and there?

If Yes, then go to 3

If No, then the Accused is not guilty of Carjacking

Conduct committed in order to steal

3. Did NOA use force, put NOC in fear of force or seek to put NOC in fear of force in order to steal the car?

*Consider – **What was the purpose of NOA's actions?***

If Yes, then the Accused is guilty of Carjacking (provided you have answered yes to questions 1 and 2)

If No, then the Accused is not guilty of Carjacking

Last updated: 9 March 2017

7.5.9 Aggravated Carjacking

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Overview

1. Aggravated carjacking is an offence under *Crimes Act 1958* s 79A.
2. The offence has the following three elements:

   i) The accused commits carjacking; and

   ii) Either

   (a) at the time the person has with them a firearm, an imitation firearm, an offensive weapon, an explosive or an imitation explosive; or

   (b) in the course of the carjacking the person causes injury to another person (*Crimes Act 1958* s 79A(1)).

3. As noted in 7.5.8 Carjacking, the basic offence of carjacking consists of robbery where the property stolen is a car. See 7.5.2 Robbery for information on the first element.
4. The second element consists of two alternatives: Possession of a proscribed weapon; or Causing injury to a person.
5. For information on possession of a proscribed weapon, see 7.5.3 Armed Robbery.
6. In relation to the alternative second element of causing injury to a person, the *Crimes Act 1958* specifies that injury has the same meaning as in section 15 (*Crimes Act 1958* s 79A(3)).
7. Section 15 contains the following relevant definitions:

   > Injury means:
   > a) Physical injury; or
   > b) Harm to mental health;
   > whether temporary or permanent
   > Harm to mental health includes psychological harm but does not include an emotional reaction such as distress, grief, fear or anger unless it results in psychological harm;
   > Physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function.

8. The element requires proof that the accused caused the injury 'in the course of the carjacking'. This likely requires proof that the accused caused the injury as part of, or for the purpose of, the carjacking. It will likely be a matter of fact and degree for the jury to determine whether the prosecution has proved the necessary relationship between the causing injury and the carjacking.
9. The Act is silent on any fault element associated with this alternative second element. Judges will therefore need to engage in a process of statutory construction, taking into account principles relevant to the interpretation of ambiguous penal statutes (see *Coco v R* (1994) 179 CLR 427; *Bropho v State of Western Australia* (1990) 171 CLR 1; *Beckwith v R* (1976) 135 CLR 569).
10. As a matter of prudence, the model charge in this Charge Book assumes for this element that the accused must intend to cause injury.

Last updated: 9 March 2017

7.5.9.1 Charge: Aggravated Carjacking

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This charge can be used where one or more elements of the offence are in issue. If the only issue relied upon by the accused, or raised by the evidence, is that the accused was not the offender, this charge should be adapted. See Charge: Robbery (Short) for guidance on possible adaptions.

This direction is written as if the prosecution relies on both *Crimes Act 1958* s 79A(1)(a) and s 79A(1)(b) as forms of aggravation. It must be modified if the prosecution elects to rely on only one form of aggravation.

The Elements

I must now direct you about the crime of aggravated carjacking. To prove this crime, the prosecution must prove the 4 elements beyond reasonable doubt. The first three make up the crime of carjacking, and the four is what changes carjacking into aggravated carjacking.

One – the accused committed theft of a vehicle.

Two – immediately before or at the time of the theft, the accused either:

- Used force on a person; or
- Put a person in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put a person in fear that force was going to be used on him/her [or another person], then and there.

Three – the accused acted in that way in order to commit the theft.

Four – The accused either had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her or intentionally caused injury to a person during the alleged carjacking.[980]

I will now explain each of these elements in more detail.[981]

Theft

The first element that the prosecution must prove is that the accused committed theft of a vehicle. In order to do this, the prosecution must prove four things.[982]

First, they must prove that the accused appropriated property that belonged to another person. Although the word "appropriation" has a technical legal meaning, and includes many different types of acts, here it simply means to take something without the owner's consent.

In this case, the prosecution alleged that NOA took [*identify vehicle*] that belonged to [*identify owner*]. [*Summarise prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

Second, the prosecution must prove that the property was a "vehicle". There is no dispute that [*identify vehicle*] is a vehicle.[983]

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[980] Where the prosecution only relies on one form of aggravation, this statement of the element should only refer to that form of aggravation.

[981] If an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

[982] This part of the charge is designed for use in cases where the theft element does not raise any technical issues. If such issues do arise, the charge should be adapted or expanded accordingly. Guidance can be obtained from 7.5.1.2 Charge: Theft (Extended).

[983] If the nature of the property as a vehicle is in issue, or if the jury might be surprised that the relevant property is a vehicle (e.g. a house boat), this direction should be expanded.

Thirdly, the prosecution must prove that, when the accused appropriated the vehicle, s/he intended to permanently deprive the owner of it. That is, s/he intended that the owner would never get it back.

For this offence, the law states that the prosecution can prove an intention to permanently deprive by showing that the accused took or used the vehicle without the consent of the owner.

[*Identify prosecution evidence and/or arguments.*]

Fourthly, the prosecution must prove that, at the time of the appropriation, the accused was acting dishonestly. In this context, "dishonesty" does not have its ordinary meaning. It is given a special legal meaning, which says that the accused will have acted dishonestly if, when s/he took the vehicle, s/he did not believe that s/he had a legal right to take it.

In this case there is no evidence that the accused believed s/he had a legal right to take the vehicle. So if you are satisfied that NOA took the vehicle, you should have no difficulty finding this requirement proven.

It is for you to determine, based on all the evidence, whether NOA committed theft of a vehicle. This will only be the case if you are satisfied that all four of the requirements I have just outlined have been proven beyond reasonable doubt.

Force or fear of force

The second element that the prosecution must prove is that, immediately before or at the time of the theft, the accused either:

- Used force on a person; or
- Put a person in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put a person in fear that force was going to be used on him/her [or another person], then and there.

In this case the prosecution alleged that NOA [*identify relevant ground*[*s*] *and people involved, e.g. "*used force against NOC*"*] when s/he [*describe relevant conduct*]. The defence denied this, arguing [*describe defence evidence and/or arguments*].

[*If it is alleged that the accused put, or sought to put, a person in fear, add the following shaded section.*]

You will note that it is not enough for the prosecution to prove that NOA put, or sought to put, NOC in fear that force was going to be used on him/her/NO3P[984] at some distant or uncertain time. To prove this element on the basis of the threatened use of force, the prosecution must prove that NOA put, or sought to put, NOC in fear that force was going to be used on him/her/NO3P then and there.

You will also note that, while this element will be met if you are satisfied that NOC was actually fearful that such force was going to be used, this is not necessary. This element will be met if the prosecution can prove that NOA sought to put NOC in fear, even if that attempt was unsuccessful.

Conduct was committed "in order" to steal

The third element that the prosecution must prove is that the accused acted in the way s/he did in order to commit the theft of the vehicle. That is, NOA must have [used force on NOC/put NOC in fear of the use of force/sought to put NOC in fear of the use of force] for the purpose of stealing the vehicle, rather than for another reason.

[*Insert any relevant evidence and/or arguments.*]

---

[984] Name of third party.

Aggravating element

The fourth element is called the aggravating element. It makes this form of alleged carjacking more serious than other forms of alleged carjacking. The prosecution relies on two alternative aggravating elements. If you find either of these elements proved, then you may find this fourth element proved.[985]

The first aggravating element is that the accused, at the time of the alleged carjacking, had with him/her a [firearm/imitation firearm/offensive weapon/explosive/an imitation explosive].

For this aggravating element to be proved, there are three things that the prosecution must prove.

First, they must prove that, at the time of the alleged carjacking NOA had [*identify item*] either on him/her or readily available for use.

Secondly, the prosecution must prove that [*identify item*] falls within the category of [firearm/imitation firearm/offensive weapon/explosive/imitation explosive].

[*Where there is a dispute about whether the article possessed was a firearm, add relevant parts of the following shaded section.*]

The law defines a "firearm" to be any device which is designed or adapted to discharge bullets or other missiles, either by the expansion of gases produced in the device by the ignition of strongly combustible materials, or by compressed air or other gases. The definition of "firearm" also includes anything which looks like such a device.

However, certain things are excluded from the definition of a "firearm". These include [*identify relevant exception, e.g.* "underwater spear guns"].

To be a "firearm", the device does not need to be assembled, complete or operational. If it fits the definition I have just given you, it will be a "firearm", whether or not it actually works.

[*Where it is alleged that the accused had an imitation firearm with him/her, add the following shaded section.*]

An "imitation firearm" is anything which has the appearance of being a firearm, whether or not it is capable of being fired.

[*Where it is alleged that the accused had an offensive weapon with him/her, add the following shaded section.*]

The law defines two different kinds of items as "offensive weapons". First, an item is an offensive weapon if it is specifically made or adapted for the use of injuring or incapacitating a person. Secondly, an ordinarily inoffensive item that does not meet this criterion can also become an "offensive weapon" if the person carrying it intends or threatens to use it to injure or incapacitate a person.

[*If it is alleged that the relevant article was made for the use of injuring or incapacitating a person, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] is an "offensive weapon" because it is made for injuring or incapacitating people. That is, it is an item that is normally used for this purpose.

[*If it is alleged that the relevant article was adapted for the use of injuring or incapacitating a person, add the*

[985] If the prosecution only relies on one form of aggravation, this paragraph and the directions on this element should be modified to only refer to the form of aggravation in issue.

following darker shaded section.]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because it was adapted for the use of injuring or incapacitating people. That is, it was physically modified so that it could cause injury or incapacitate a person.

[*If it is alleged that an ordinary article became an offensive weapon because of the accused's use, threats or intention, add the following darker shaded section.*]

In this case the prosecution argued that the [*identify item*] was an "offensive weapon" because NOA [used/threatened to use/intended to use] it for the purpose of injuring or incapacitating a person.

[*Where it is alleged that the accused had an explosive with him/her, add the following shaded section.*]

An "explosive" is any item which is manufactured for the purpose of producing a practical effect by explosion, or which is intended to have that purpose. Any item that fits this definition will be an "explosive", whether or not it actually works.

[*Where it is alleged that the accused had an imitation explosive with him/her, add the following shaded section.*]

An "imitation explosive" is any item which might reasonably be taken to be, or to contain, an explosive.

Thirdly, the prosecution must prove that the accused had the [*identify item*] with him/her for the purpose of the alleged carjacking. This will be the case if NOA had the [*identify item*] with him/her for the purpose of stealing the vehicle and either using force on NOC or putting or seeking to put NOC in fear that s/he or another person will then and there be subject to force.

In determining this matter you should focus on NOA's intention at the time s/he is alleged to have stolen the vehicle. It does not matter what his/her intention was at the time s/he first handled the [*identify item*].

In this case the prosecution argued that all three of these requirements have been met. [*Describe prosecution evidence and/or arguments*.]

The defence [*describe defence case* [*if any*] *in respect of this element, e.g.*

- denied that NOA had a gun with him/her at the time of the burglary;
- denied that the bottle was an offensive weapon;
- denied that NOA had the knife with him/her for the purpose of the home invasion.]

It is for you to determine, based on all the evidence, whether all three of these matters have been proven beyond reasonable doubt. It is only if you are satisfied that NOA had [*identify item*] with him/her at the time of the carjacking, that [*identify item*] was a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive], and that NOA had that item with him/her for the purposes of the carjacking that this first aggravating element will be proved.

The second aggravating element is that in the course of the carjacking NOA intentionally caused injury to another person. There are three parts to this aggravating element.

First, NOA must have caused injury to NOC. The law says that injury means a physical injury or harm to mental health, whether temporary or permanent. Physical injury includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function. It also includes all the things that you would, as a matter of ordinary experience, call an injury. Harm to mental health includes psychological harm, but not emotional reactions such as distress, grief, fear or anger which do not result in psychological harm.

To prove this element, the prosecution must show that NOC suffered an injury, rather than some superficial or trivial harm.

Second, NOA must have intended to cause injury to NOC. That is, at the time of the acts which caused the injury, NOA must have intended to injure NOC.

It is not, however, necessary that NOA intended to inflict the injury that NOC actually suffered. This third element will be satisfied even if NOA intended to inflict a different kind of injury.

Third, NOA must have caused the injury in the course of the alleged carjacking. The prosecution must show that NOA causing NOC injury was not separate or unrelated to the alleged carjacking.

[*Refer to relevant evidence and arguments.*]

Remember, the prosecution must prove one of these two aggravating elements beyond reasonable doubt. As this is an element of the offence, you can only find NOA guilty of this offence if you all agree which aggravating element has been proved.

Summary

To summarise, before you can find NOA guilty of aggravated carjacking, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA committed theft of a vehicle, by dishonestly appropriating a vehicle that belonged to another person, intending to permanently deprive the owner of that vehicle; and

Two – that immediately before or at the time of the theft, NOA either:

- Used force on NOC; or
- Put NOC in fear that force was going to be used on him/her [or another person], then and there; or
- Sought to put NOC in fear that force was going to be used on him/her [or another person], then and there; and

Three – that NOA acted in this way in order to commit the theft.

Four – that NOA either had with him/her a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] or in the course of the carjacking NOA intentionally caused injury to another person.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of aggravated carjacking.

Last updated: 20 March 2023

7.5.9.2 Checklist: Aggravated Carjacking

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The Elements

Four elements the prosecution must prove beyond reasonable doubt:

1. NOA committed theft of a vehicle.
2. Immediately before or at the time of the theft NOA:
   (a) Used force on NOC;
   (b) Put NOC in fear that force was going to be used then and there; or
   (c) Sought to put NOC in fear that force was going to be used then and there.
3. NOA acted in this way in order to commit the theft.
4. NOA either:

(a) Had a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her; or

(b) Intentionally caused injury to another person in the course of the carjacking

Theft of a vehicle

1. Did NOA commit theft of a vehicle?

1.1 Did NOA appropriate property belonging to another?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Aggravated Carjacking

1.2 Is [*identify vehicle*] a vehicle?

If Yes, then go to 1.3

If No, then the Accused is not guilty of Aggravated Carjacking

1.3 Did NOA intend to permanently deprive the owner of the vehicle?

Consider – A person intends to permanently deprive the owner of a vehicle if s/he takes or uses the vehicle without the consent of the owner

If Yes, then go to 1.4

If No, then the Accused is not guilty of Aggravated Carjacking

1.4 Was NOA acting dishonestly?

Consider – For this purpose, "dishonestly" means "without a belief in a legal right to take the vehicle"

If Yes, then go to 2

If No, then the Accused is not guilty of Aggravated Carjacking

Use of force

2. Has the prosecution proved any of the following uses of force?

2.1 Did NOA use force on NOC?

If Yes, then go to 3

If No, then go to 2.2

2.2 Did NOA put NOC in fear that force was going to be used on him/her/another person then and there?

If Yes, then go to 3

If No, then go to 2.3

2.3 Did NOA seek to put NOC in fear that force was going to be used on him/her/another person then and there?

If Yes, then go to 3

If No, then the Accused is not guilty of Aggravated Carjacking

Conduct committed in order to steal

3. Did NOA use force, put NOC in fear of force or seek to put NOC in fear of force in order to steal the car?

*Consider – **What was the purpose of NOA's actions?***

If Yes, then go to 4

If No, then the Accused is not guilty of Aggravated Carjacking

Aggravating element – [Firearm/imitation firearm/offensive weapon/explosive/imitation explosive]

4. Did NOA have a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive] with him/her at the time of the carjacking?

4.1 Did NOA have [*identify item*] on him/her or readily available for use at the time of the alleged carjacking?

If Yes, then go to 4.2

If No, then go to 5

4.2 Is [*identify item*] a [firearm/imitation firearm/offensive weapon/explosive/imitation explosive]?

If Yes, then go to 4.3

If No, then go to 5

4.3 Did NOA have [*identify item*] for the purpose of the alleged carjacking?

If Yes, then the accused is guilty of Aggravated Carjacking (provided you have answered yes to questions 1, 2 and 3)

If No, then go to 5

Aggravating element – Intentionally causing injury

5. Did NOA intentionally cause injury to a person in the course of the alleged carjacking?

5.1 Did NOA cause injury to NOC?

Consider – Injury can be "physical injury" or "harm to mental health"

Consider – "Physical injury" includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function

Consider – Harm to mental health includes psychological harm, but not emotional reactions such as distress, grief, fear or anger which do not result in psychological harm

If Yes, then go to 5.2

If No, then the Accused is not guilty of Aggravated Carjacking

5.2 Did NOA cause injury intentionally?

If Yes, then go to 5.3

If No, then the Accused is not guilty of Aggravated Carjacking

5.3 Did NOA cause the injury in the course of the alleged carjacking?

If Yes, then the accused is guilty of Aggravated Carjacking (provided you have answered yes to questions 1, 2 and 3)

If No, then the Accused is not guilty of Aggravated Carjacking

Last updated: 9 March 2017

7.5.10 Handling Stolen Goods

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Overview

1. Handling stolen goods is an offence under *Crimes Act 1958* s 88.
2. The offence has the following four elements:
   i) The accused handled goods;
   ii) The goods were stolen goods at the time that the accused handled them;

iii) The accused knew or believed at the time that he or she handled the goods that they were stolen goods; and

iv) The accused's handling of the goods was dishonest (*Crimes Act 1958* s 88; *R v Henderson & Warwick* (2009) 22 VR 662; *R v Georgiou* [2009] VSCA 57).

Handling of Goods

3. The first element the prosecution must prove is that the accused "handled goods" (*Crimes Act 1958* s 88(1)).

4. "Goods" include:

   - Money;
   - Every other type of property except land; and
   - Things severed from land by stealing (*Crimes Act 1958* s 71(1)).

5. Section 88(1) of the *Crimes Act 1958* states that a person "handles" goods if he or she "receives the goods or brings them into Victoria, or… undertakes or assists in bringing them into Victoria or in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so".

6. This provision specifies 24 different ways in which a person can "handle" goods:

   - By "receiving" the goods (1);
   - By bringing the goods into Victoria (2), or undertaking (3) or assisting in (4) bringing them into Victoria;
   - By undertaking the retention (5), removal (6), disposal (7) or realisation (8) of the goods for the benefit of another person;
   - By assisting in the retention (9), removal (10), disposal (11) or realisation (12) of the goods by another person; or
   - By arranging to do any of the 12 matters listed above (13–24).

7. Not all of these matters have been addressed by the courts. This topic only addresses those areas which have been the subject of judicial guidance.

Receiving goods

8. A person "receives" goods by taking them into his or her possession (*R v Cottrell* [1983] 1 VR 143).

9. To establish that the accused took goods into his or her possession, the prosecution must prove that he or she:

   i) Had custody of or control over the goods; and

   ii) Intended to have custody of or exercise control over the goods (*DPP v Brooks* [1974] AC 862; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Maio* [1989] VR 281; *R v Mateiasevici* [1999] 3 VR 185).

10. The fact that a third party has actual possession of the goods does not mean the accused cannot have "received" the goods. For example, if the accused has sufficient control over the third party, such that the goods are available to him or her upon request, he or she will have "received" them (*R v Cottrell* [1983] 1 VR 143).

11. A person cannot receive goods from him or herself (*R v Seymour* [1954] 1 All ER 1006).

12. For further information concerning possession, see "Common Law Possession" in 7.6.3 Possession of a Drug of Dependence.

Undertaking and assisting

13. There is a difference between "undertaking" and "assisting":
    - When the accused "undertakes" one of the prohibited activities, he or she does it him or herself;
    - When the accused "assists" one of the prohibited activities, he or she helps another person to perform that activity (*R v Bloxham* [1983] 1 AC 109).
14. A person can "assist" in one of the prohibited activities even if that assistance is futile. For example, a person "assists" in the retention of stolen goods by lying to the police about the existence of the goods, even if the police know the person is lying (*R v Kanwar* [1982] 2 All ER 528).

By or for the benefit of another person

15. Where it is alleged that the act of handling involved the retention, removal, disposal or realization of stolen goods, the accused must have either:
    - Undertaken (or arranged to undertake) that activity him or herself *for the benefit of another person*; or
    - Assisted (or arranged to assist) *another person* to carry out that activity (*Crimes Act 1958* s 88(1); *R v Bloxham* [1983] 1 AC 109).
16. Thus, a person who simply retains stolen goods does not "handle" them. He or she must do one of the following:
    - Retain the goods for the benefit of another person;
    - Assist another person to retain the goods; or
    - Arrange to do one of the above activities (*R v Brown* [1970] 1 QB 105).
17. Similarly, a person who sells stolen goods, and keeps all of the proceeds for him or herself, does not "handle" the goods by disposing of or realising them for the benefit of another. The fact that the purchaser has benefited (in the sense of acquiring the goods) is not sufficient. To have "handled" the goods, the accused must have sold them for the benefit of a person other than the purchaser (*R v Bloxham* [1983] 1 AC 109).[986]
18. However, a vendor of stolen goods may have:
    - Committed other acts of handling, such as bringing the goods into Victoria; or
    - Committed other offences, such as obtaining property by deception (see 7.5.12 Obtaining Property by Deception) or aiding and abetting the handling of stolen goods by the purchaser (*Carter Patersons & Pickfords Carriers Ltd v Wessel* [1947] KB 849. See also Aiding, Abetting, Counselling or Procuring).

[986] *R v Bloxham* [1983] 1 AC 109 did not consider the separate question of whether the act of selling stolen goods involves receiving goods that represent the stolen goods under the tracing rules in *Crimes Act 1958* s 90(2), or assisting the purchaser in the disposal of goods that represent the stolen goods. The implications of s 90(2) have not yet been fully explored. See also *Farrugia v R* [2011] VSCA 201 at footnote 3.

19. There is conflict in the authorities about whether the *purchaser* of stolen goods "handles" them by undertaking the *realisation* of goods for the benefit of the vendor (compare *R v Bloxham* [1981] 1 WLR 859 and *R v Deakin* [1972] 3 All ER 803). However, this conflict is unlikely to matter in practice, as a purchaser of stolen goods will usually "handle" the goods by *receiving* them, or by *assisting in the vendor's realisation* of the goods.[987]

20. The "other person" for whose benefit the action must have been committed cannot be a co-accused on the same handling charge (*R v Gingell* (2000) 1 Cr App R 88).

Arranging to do a prohibited activity

21. The closing words of s 88(1) – "or if he arranges to do so" – apply to all of the forms of handling specified in the section (see *R v Bloxham* [1983] 1 AC 109; *Property Offences* (1986), Law Book Co, 2nd ed, 376).

22. These words give rise to a substantive, rather than inchoate, offence of arranging to handle. This requires a bilateral agreement that would amount to a conspiracy to handle stolen goods *(Property Offences* (1986), Law Book Co, 2nd ed, 376).

The prosecution should specify the form of handling alleged

23. While it is not mandatory, the prosecution should specify in the indictment the particular forms of handling alleged (*R v Nicklin* [1977] 2 All ER 444; *R v Ikpong* [1972] Crim LR 432; *Property Offences* (1986), Law Book Company, 2nd ed, 376).

24. While the prosecution may charge the accused with different forms of handling as alternatives, they should generally not use more than two charges to cover the alternatives. One charge will specify handling by receiving, and the other charge will specify any other form of handling that is relevant in the case (e.g. handling by assisting in the disposal of goods for the benefit of another person) (*R v Nicklin* [1977] 2 All ER 444; *R v Ikpong* [1972] Crim LR 432; *Property Offences* (1986), Law Book Company, 2nd ed, 376).

25. The jury may only convict the accused of a type of handling that is specified in the indictment (*R v Nicklin* [1971] 1 WLR 403).

Stolen Goods

26. The second element the prosecution must prove is that the goods were "stolen goods" at the time that the accused handled them (*Crimes Act 1958* s 88(1); *Mabbott v R* [1990] WAR 323; *R v Park* (1988) 87 Cr App R 164).

27. "Stolen goods" include:

    i) Goods stolen in Victoria or elsewhere, whether before or after the commencement of the *Crimes Act 1958*, provided that:

        - The stealing was an offence under the *Crimes Act 1958*; or
        - The stealing amounted to an offence where and at the time when the goods were stolen (*Crimes Act 1958* s 90(1));

    ii) Goods which represent the stolen goods in the hands of the thief or a handler, those goods being the proceeds of any disposal or realisation of the whole or part of the goods stolen or of

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[987] The issue of whether a purchaser undertakes the realisation of goods is only likely to arise if the prosecution particularises an inappropriate form of handling in the indictment.

goods which represent them (*Crimes Act 1958* s 90(2)); and

iii) Goods obtained in Victoria or elsewhere either by blackmail or by deception in the circumstances described in Crimes Act 1958 s 81(1) (*Crimes Act 1958* s 90(4)).

28. Goods which were originally taken by a legally innocent person (such as a child under the age of criminal responsibility, or a person protected by the defence of mental impairment) are not "stolen goods". Consequently, a person who subsequently handles those goods will not be guilty of this offence (*Walters v Lunt* [1951] 2 All ER 645; *Property Offences* (1986), Law Book Co, 2nd ed, 354).

29. This element will not be met where there is an arrangement to handle goods that *will be* stolen. The goods must have been stolen at the time of the handling (*R v Park* (1988) 87 Cr App R 164).[988]

Goods may cease to be "stolen goods"

30. This element will not be met if the goods have ceased to be stolen goods at the time of the handling (see, e.g. *R v Dolan* (1855) 6 Cox CC 449; *R v Villensky* [1892] 2 QB 597).

31. Goods cease to be stolen goods when:

i) They are restored to the person from whom they were stolen;

ii) They are restored to other lawful possession or custody; or

iii) The person from whom they were stolen and any other person claiming through him or her have otherwise ceased to have any right to restitution of those goods in respect of the theft (*Crimes Act 1958* s 90(3)).

32. Goods will have been restored "to the person from whom they were stolen" if that person found them and resumed possession. This element will therefore not be met if the owner subsequently bails the goods to the thief in order to identify who the ultimate receiver was to be (*R v Dolan* (1855) 6 Cox CC 449; *R v Villensky* [1892] 2 QB 597).

33. Goods will have been restored to "other lawful possession or custody" when a police officer, in the course of his or her duty, takes possession or custody of them (*R v Alexander and Keeley* [1981] VR 277; *Attorney-General's Reference (No 1 of 1974)* [1974] QB 744). See "Receiving goods" above for the meaning of "possession".

34. Whether goods have been taken into the lawful possession or custody of a police officer is a question of fact that partly depends on the intention of the officer. It is for the jury to determine whether the officer took custody of the goods (*Attorney-General's Reference (No 1 of 1974)* [1974] QB 744).

35. A person does not take lawful possession of goods merely by:

i) Examining goods to discover whether or not they are stolen (*R v Alexander and Keeley* [1981] VR 277);

ii) Forming an intention to take exclusive control of the goods upon the happening of certain future events (*R v Alexander and Keeley* [1981] VR 277); or

iii) Watching goods with a view to catching the receiver (*Attorney-General's Reference (No 1 of 1974)* [1974] QB 744).

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[988] The appropriate charge where there is an agreement to handle goods that will be stolen is conspiracy to handle stolen goods (*R v Park* (1988) 87 Cr App R 164).

Proving that the goods were stolen

36. The circumstances in which goods were handled may provide sufficient proof that they were stolen (*R v Sbarra* (1919) 13 Cr App R 118; *Mabbott v R* [1990] WAR 323).

37. An accused may also admit that the goods were stolen (*Mabbott v R* [1990] WAR 323; *Ollerton v R* (1989) 40 A Crim R 133).

38. Where the accused admits that goods were stolen, the weight the jury should give to that admission will depend on the reliability of the basis of the accused's knowledge:

    - An admission based on the hearsay statements of others may be unreliable, and have very little probative value;
    - An admission based on the accused's personal knowledge or experience may be reliable, and establish that the goods were stolen (*Parks v Bullock* [1982] VR 258; *DPP v Parsons* [1993] 1 VR 1; *Bailey v Hinch* [1989] VR 78; *Reardon v Baker* [1987] VR 887; *Anglim & Cooke v Thomas* [1974] VR 363).

Knowledge or Belief that the Goods were Stolen

39. The third element requires the prosecution to prove that at the time the accused handled the goods, he or she knew or believed that the goods were stolen goods (*Crimes Act 1958* s 88(1); *R v Grainge* [1974] 1 WLR 619; *De Bono v Nielsen* (1996) 88 A Crim R 46; *R v Henderson & Warwick* (2009) 22 VR 662).

40. This element requires actual knowledge or belief. A suspicion that the goods were stolen is not sufficient (*R v Grainge* [1974] 1 WLR 619; *R v Raad* [1983] 3 NSWLR 344; *R v Henderson & Warwick* (2009) 22 VR 662).

41. "Belief" is an ordinary English word and a judge generally does not need to define it for the jury. If the jury asks what belief means, the judge may explain that it is a state of mind in which the accused accepts the truth of the belief, and that the state of mind characterised by mere suspicion is not sufficient (*R v Smith* (1976) 64 Cr App R 217; *R v Raad* [1983] 3 NSWLR 344).

42. As there is a difference between "belief" and "realisation of a high likelihood or a real chance", a judge must be careful to properly instruct the jury on the meaning of "belief" in any case where that is a real issue (*R v Henderson & Warwick* (2009) 22 VR 662).

43. In determining what the accused knew or believed, the jury may examine the circumstances in which the accused handled the goods. Those circumstances may provide sufficient proof that the accused knew that the goods were stolen (*R v Sbarra* (1919) 13 Cr App R 118; *R v Fuschillo* [1940] 2 All ER 489; *R v Young* [1953] 1 All ER 21; *Mabbott v R* [1990] WAR 323; see also *Bird v Adams* [1972] Crim LR 174; *R v Chatwood* [1980] 1 WLR 874; *R v Pfitzner* (1976) 15 SASR 171).

44. Evidence that the accused knew facts which should have put him or her on notice as to whether the goods were stolen does not necessarily prove that the accused knew or believed that the goods had been stolen. If the jury is satisfied that the accused ignored suspicious circumstances, they must determine whether this was because the accused knew or believed the goods were stolen. They must reject the possibility that the accused was simply gullible, naive or absent-minded (*Atwal v Massey* (1971) 56 Cr App R 6; *R v Grainge* [1974] 1 WLR 619; *R v Bellenie* [1980] Crim LR 437; *R v Park* (1988) 87 Cr App R 164).

45. The judge should clearly explain that the test is subjective, rather than objective. The jury may use the accused's failure to enquire as a basis for inferring the accused's subjective knowledge or belief. The judge should also explain that mere suspicion that the goods are stolen is not sufficient (*R v Dykyj* (1993) 29 NSWLR 672; *R v Schipanski* (1989) 17 NSWLR 618; *R v Pethick* [1980] Crim LR 242; *R v Griffiths* (1974) 60 Cr App R 14).

46. Negligence or gross negligence in handling goods is insufficient to prove knowledge or a belief that the goods were stolen (*R v Dykyj* (1993) 29 NSWLR 672; *R v Havard* (1916) 11 Cr App R 2; *Atwal v Massey* (1971) 56 Cr App R 6; *R v Grainge* [1974] 1 WLR 619).

Dishonesty

47. The fourth element the prosecution must prove is that the accused handled the stolen goods dishonestly (*Crimes Act 1958* s 88(1)).

48. Dishonesty has a special meaning in Division 2 of the *Crimes Act 1958*. It means that the accused acted without any claim of legal right (*R v Salvo* [1980] VR 401; *R v Bonollo* [1981] VR 633; *R v Brow* [1981] VR 783). See 7.5.1 Theft for further information concerning the meaning of dishonesty.

49. In some cases, a finding that the accused acted dishonestly will be inevitable once the jury is satisfied of all other elements of the offence (*R v Henderson & Warwick* (2009) 22 VR 662).

Doctrine of Recent Possession

50. In some circumstances, a jury may be able to infer from the fact that the accused was found in possession of recently stolen property that he or she is guilty of this offence. See 7.5.11 Recent Possession for further information.

Theft and Handling

Insertion of s 88A

51. Prior to 13 October 2004, the prosecution was also required to prove that the handling took place "otherwise than in the course of the stealing".

52. While this requirement prevented people from being convicted of both theft and handling for the same act, it created a difficulty in cases where the jury was satisfied beyond reasonable doubt that the accused was guilty of *either* theft or handling, but were unsure whether or not he or she was the person who stole the goods. In such circumstances the jury was required to acquit the accused of both offences (*R v Bruce* [1988] VR 579; *De Bono v Nielson* (1996) 88 A Crim R 46; *R v Marijancevic* (2001) 2 VR 611).

53. In order to overcome this difficulty, s 88A was inserted into the *Crimes Act 1958*. This section applies to cases in which charges for theft and handling stolen goods are joined in an indictment as alternative charges and tried together. It provides that, in such cases, if the jury is satisfied beyond reasonable doubt that the accused is guilty of either theft or handling but cannot agree which, they must acquit the accused of handling stolen goods and find him or her guilty of theft (*Crimes Act 1958* s 88A).

54. Section 88A applies to any trial that commenced on or after 13 October 2004, regardless of when the offence was alleged to have been committed (*Crimes Act 1958* s 600(2)).

55. Section 88A only applies when charges of theft and handling are joined in one indictment as alternative charges. It is likely that the section does not apply in summary proceedings or where the accused is charged with a more serious offence (e.g. armed robbery or burglary) and theft is left to the jury as a common law alternative (see *Crimes Act 1958* s 88A and *Criminal Procedure Act 2009* ss 239, 240).

Removal of "otherwise than in the course of stealing"

56. At the same time as s 88A was inserted into the *Crimes Act 1958*, the phrase "otherwise than in the course of the stealing" was removed from s 88.

57. Unlike s 88A (which applies to all *trials* commenced on or after 13 October 2004), this amendment only applies to *offences* alleged to have been committed on or after 13 October 2004 (*Crimes Act 1958* s 600(1)).

58. This means that, for offences committed on or after 13 October 2004, the jury do not need to be satisfied that the handling took place otherwise than in the course of the stealing.

Last updated: 1 July 2011

7.5.10.1 Charge: Handling by Receiving

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This charge should be given when it is alleged that the accused handled goods by receiving them. It will need to be modified if it is alleged that the accused handled the goods in any other way.

The Elements

I must now direct you about the crime of handling stolen goods. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused handled goods.

Two – those goods were stolen goods.

Three – the accused knew or believed that they were stolen goods.

Four – the handling was dishonest.

I will now explain each of these elements in more detail.

Handling of goods

The first element that the prosecution must prove is that the accused handled goods. In this case, the goods we are talking about are [*identify goods*].

The word "handling" is a technical legal term, which covers many different types of activities. In this case, it is alleged that the accused "handled" the goods by "receiving" them.

A person "receives" goods if he or she takes them into his or her possession or under his or her control.[989] Thus, for this element to be met you must be satisfied that NOA took possession of [*identify goods*], or had control over them.

[*Summarise relevant evidence and arguments.*]

Goods were Stolen Goods

The second element that the prosecution must prove is that the goods were stolen goods at the time NOA received them.

[989] If possession is in issue, it may be necessary to direct the jury about the requirements of common law possession. See 7.3.30.1 Charge: Possession of Child Pornography for assistance.

This means that someone must have committed the crime of theft in relation to the goods before NOA handled the goods.[990]

[*Where there is a dispute about whether a person had committed the crime of theft, add appropriately modified directions here, based on* 7.5.1.2 Charge: Theft (Extended)]

In this case [*insert relevant evidence and arguments*].

Knowledge or Belief

The third element that the prosecution must prove is that the accused knew or believed that the goods were stolen goods at the time of the handling.

"Knew" and "believed" are ordinary words. A person either knows something or they don't. A belief is less than actual knowledge, but more than a suspicion. It involves being aware of a fact and requires a firm conviction.

When you consider what the accused knew or believed about the goods, you may take into account the circumstances in which the accused acquired the goods. However, it is not enough that the accused should have known that the goods were stolen. This element only looks at what the accused in fact knew or believed.

You must focus on the accused's state of mind at the time of the handling. A person is not guilty of handling stolen goods if s/he receives goods and then later discovers that those goods were stolen goods. The knowledge or belief that the goods were stolen must have existed at the time s/he took possession or control of the goods.

In this case [*insert relevant evidence and arguments*].

Dishonesty

The fourth element that the prosecution must prove is that at the time of the handling, the accused was acting dishonestly.

In this context, "dishonesty" has a special legal meaning. A person acts dishonestly when he or she handles property and does not believe that he or she has a legal right to do so.

In this case there is no evidence that the accused had any honest belief in respect of the handling. You should therefore have no difficulty finding this element proven.[991]

Summary

To summarise, before you can find NOA guilty of handling stolen goods, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA handled goods; and

Two – that those goods were stolen goods at that time; and

Three – that at that time NOA knew or believed those goods were stolen goods; and

Four – that NOA handled the goods dishonestly.

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[990] If the goods may be "stolen goods" for another reason (e.g. because they were obtained through blackmail) this section will need to be modified accordingly. See 7.5.10 Handling Stolen Goods for information concerning the meaning of "stolen goods".

[991] If the issue of dishonesty is disputed, this section of the charge will need to be modified accordingly. See 7.5.1.2 Charge: Theft (Extended) for assistance.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of handling stolen goods.

Section 88A – Handling and Theft as Alternative Offences

[*If the accused is charged with both handling stolen goods and theft in the indictment, add the following shaded section.*]

As you are aware, in this case NOA has been charged with both theft of [*identify goods*] and handling stolen goods. [*Identify relevant counts on the indictment*.] These are alternative charges. It is the prosecution's case that NOA either stole the goods him/herself, and so is guilty of theft, or s/he received them, and so is guilty of handling stolen goods.

There are, then, four possible views you might take about this case.

One – You are satisfied that the accused is guilty of theft;

Two – You are satisfied that the accused is guilty of handling stolen goods;

Three – You are satisfied that the accused is guilty of one of theft or handling stolen goods, but are unable to decide which one;

Four – You are not satisfied that the accused is guilty of either theft or handling.

I must direct you as a matter of law that if each of you are individually satisfied of one of the first three possibilities I just mentioned, but you are unable to unanimously agree on which offence the accused committed, the law requires you in that situation to find the accused guilty of theft and not guilty of handling, as theft is considered the less serious offence.

I emphasise that this only applies if you are all satisfied that the accused is guilty of either theft or guilty of handling. If any juror is not satisfied that the accused is guilty of theft or handling, then you will either return a verdict of not guilty of both offences, if you all take that view, or you will inform me that you are unable to reach a unanimous decision, if that is the case.

Last updated: 3 December 2012

7.5.10.2 Charge: Handling for the Benefit of Another

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This charge should be given when it is alleged that the accused handled goods by undertaking or assisting in their retention, removal, disposal or realization. It will need to be modified if it is alleged that the accused handled the goods in any other way.

The Elements

I must now direct you about the crime of handling stolen goods. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused handled goods.

Two – those goods were stolen goods.

Three – the accused knew or believed that they were stolen goods.

Four – the handling was dishonest.

I will now explain each of these elements in more detail.

Handling of goods

The first element that the prosecution must prove is that the accused handled goods. In this case, the goods we are talking about are [*identify goods*].

The word "handling" is a technical legal term, which covers many different types of activities. In this case, it is alleged that the accused "handled" the goods by [*insert relevant type of handling, e.g.* "assisting another person to dispose of them].

[*If it is alleged that the accused undertook the prohibited activity him or herself, add the following shaded section.*]

A person "undertakes" an activity if he or she does it him or herself. However, to be classified as "handling", that activity must be done for the benefit of another person. It is not sufficient that the accused undertakes the activity for his/her own benefit.

[*If it is alleged that the accused assisted someone else to perform the prohibited activity, add the following shaded section.*]

A person "assists" someone in an activity if s/he acts in a way that is intended to help them to perform that activity. It does not matter whether or not the assistance is successful.

[*If relevant,* add: Passively standing by, failing to speak, or failing to stop another person, is not "assistance" for the purpose of this offence.]

[*If more than one person has been charged with the handling count, add the following shaded section.*]

The person that NOA [assisted/undertook the activity for] cannot have been [*identify co-accused*]. There must have been another person for whose benefit NOA was acting.

[*If it is alleged that the accused undertook or assisted in the realisation of the goods, add the following shaded section.*]

A person "realises" goods if he or she exchanges them for value, such as when a person sells goods.

[*Summarise relevant evidence and arguments.*]

Goods were Stolen Goods

The second element that the prosecution must prove is that the goods were stolen goods at the time NOA handled them.

This means that someone must have committed the crime of theft in relation to the goods before NOA handled the goods.[992]

In this case [*insert relevant evidence and arguments*].

Knowledge or Belief

The third element that the prosecution must prove is that the accused knew or believed that the goods were stolen goods at the time of the handling.

"Knew" and "believed" are ordinary words. A person either knows something or they don't. A belief is less than actual knowledge, but more than a suspicion. It involves being aware of a fact and requires a firm conviction.

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[992] If the goods may be "stolen goods" for another reason (e.g. because they were obtained through blackmail) this section will need to be modified accordingly. See 7.5.10 Handling Stolen Goods for information concerning the meaning of "stolen goods".

When you consider what the accused knew or believed about the goods, you may take into account the circumstances in which the accused handled the goods. However, it is not enough that the accused should have known that the goods were stolen. This element only looks at what the accused in fact knew or believed.

You must focus on the accused's state of mind at the time of the handling. A person is not guilty of handling stolen goods if s/he [*identify type of handling*, *e.g.* assists another person to dispose of them] and then later discovers that those goods were stolen goods. The knowledge or belief that the goods were stolen must have existed at the time s/he handled the goods.

In this case [*insert relevant evidence and arguments*].

Dishonesty

The fourth element that the prosecution must prove is that at the time of the handling, the accused was acting dishonestly.

In this context, "dishonesty" has a special legal meaning. A person acts dishonestly when he or she handles property and does not believe that he or she has a legal right to do so.

In this case there is no evidence that the accused had any honest belief in respect of the handling. You should therefore have no difficulty finding this element proven.[993]

Summary

To summarise, before you can find NOA guilty of handling stolen goods, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA handled goods; and

Two – that those goods were stolen goods at that time; and

Three – that at that time NOA knew or believed those goods were stolen goods; and

Four – that NOA handled the goods dishonestly.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of handling stolen goods.

Section 88A – Handling and Theft as Alternative Offences

[*If the accused is charged with both handling stolen goods and theft in the indictment, add the following shaded section.*]

As you are aware, in this case NOA has been charged with both theft of [*identify goods*] and handling stolen goods. [*Identify relevant counts on the indictment*.] These are alternative charges. It is the prosecution's case that NOA either stole the goods him/herself, and so is guilty of theft, or s/he received them, and so is guilty of handling stolen goods.

There are, then, four possible views you might take about this case.

One – You are satisfied that the accused is guilty of theft;

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[993] If the issue of dishonesty is disputed, this section of the charge will need to be modified accordingly. See 7.5.1.2 Charge: Theft (Extended) for assistance.

Two – You are satisfied that the accused is guilty of handling stolen goods;

Three – You are satisfied that the accused is guilty of one of theft or handling stolen goods, but are unable to decide which one;

Four – You are not satisfied that the accused is guilty of either theft or handling.

I must direct you as a matter of law that if each of you are individually satisfied of one of the first three possibilities I just mentioned, but you are unable to unanimously agree on which offence the accused committed, the law requires you in that situation to find the accused guilty of theft and not guilty of handling, as theft is considered the less serious offence.

I emphasise that this only applies if you are all satisfied that the accused is guilty of either theft or guilty of handling. If any juror is not satisfied that the accused is guilty of theft or handling, then you will either return a verdict of not guilty of both offences, if you all take that view, or you will inform me that you are unable to reach a unanimous decision, if that is the case.

Last updated: 3 December 2012

7.5.10.3 Checklist: Handling Stolen Goods

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused handled goods; and
2. The goods were stolen goods; and
3. The accused knew or believed the goods were stolen goods; and
4. The accused handled the goods dishonestly.

Handling goods

1. Did the accused handle goods?

Consider – Did the accused [*identify goods and relevant form of handling*]*?*

If Yes, then go to 2

If No, then the accused is not guilty of Handling Stolen Goods

Stolen Goods

2. Were the goods the accused handled stolen goods?

If Yes, then go to 3

If No, then the accused is not guilty of Handling Stolen Goods

Knew or believed the goods were stolen

3. Did the accused know or believe that the goods were stolen at the time of the handling?

If Yes, then go to 4

If No, then the accused is not guilty of Handling Stolen Goods

Dishonesty

4. Was the accused acting dishonestly at the time of handling the goods?

Consider – Has the prosecution proved that the accused did not believe that he/she had a legal right to [*identify relevant form of handling*]*?*

If Yes, then the accused is guilty of Handling Stolen Goods (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of Handling Stolen Goods

Last updated: 1 July 2011

7.5.11 Recent Possession

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Overview

1. According to the "doctrine of recent possession", when a person is found in possession of recently stolen property, and cannot provide a reasonable explanation for that fact, the jury may infer that he or she either stole the property or received the property knowing that it was stolen (*Bruce v R* (1987) 74 ALR 219; *Trainer v R* (1906) 4 CLR 126; *R v Langmead* (1864) Le & Ca 427).
2. While referred to as a "doctrine", this is simply a matter of the jury drawing an inference from a common piece of circumstantial evidence (that the accused possessed recently stolen property) (*Raptopoulos v Police* [2005] SASC 374; *Schiffmann v R* (1910) 11 CLR 255; *R v Trifilo* [2009] VSCA 194; *Gilson v R* (1991) 172 CLR 353; *Trainer v R* (1906) 4 CLR 126).
3. Despite being called the doctrine of "recent possession", the inference is drawn from possession of recently stolen property, rather than recently taking possession of stolen property (*R v Smale* NSW CCA 15/8/1986).
4. Evidence that the accused possessed recently stolen property does not give rise to a presumption of guilt, or place any legal or evidentiary burden on the accused. The onus always remains on the prosecution to prove the elements of the relevant offence (*R v Bellamy* [1981] 2 NSWLR 727; *R v Beljajev* [1984] VR 657; *R v Cross* (1995) 84 A Crim R 242; *R v Wanganeen* (1988) 50 SASR 433).

What Inference May the Jury Draw?

5. Evidence that the accused possessed recently stolen property may support an inference that:

   i) the accused stole the property; or

   ii) the accused knowingly received stolen property (*Trainer v R* (1906) 4 CLR 126; *R v Langmead* (1864) Le & Ca 427; *Gilson v R* (1991) 172 CLR 353).

Application of the Doctrine

6. The doctrine of recent possession does *not* only apply to cases where theft and handling stolen goods are charged as alternatives. The doctrine may apply where a person is charged with just one of those offences. The fact that evidence that the accused possessed recently stolen property might also support the uncharged offence does not mean the jury cannot use evidence of recent possession as part of the evidence leading to guilt (see *R v Henstridge & Ors* SA CCA 19/6/1998).

7. While the doctrine of recent possession is most often used in relation to charges of theft or handling stolen goods, the same form of inferential reasoning may also apply to other larceny offences, such as armed robbery and burglary (*R v Schama & Abramovitch* (1914) 11 Cr App R 45; *R v Short & Ors* (1928) St R Qd 246; *R v McCarthy* (1984) 13 A Crim R 13; *Gilson v R* (1991) 172 CLR 353; *R v Connolly (No 2)* [1991] 2 Qd R 661; *R v Ugle* (1989) 43 A Crim R 63).

Requirements

8. Before the jury can draw an inference from the accused's possession of recently stolen property (a "recent possession inference"), it must be satisfied of three matters:

    i) That the accused was in possession of property;

    ii) That the property was recently stolen; and

    iii) That there was no reasonable explanation for the accused's possession of the stolen property.

Possession of property

9. The prosecution must establish that the accused had possession of the property in question (*R v Cross* (1995) 84 A Crim R 242; *R v Khalil* (1987) 44 SASR 23; *R v Cottrell* [1983] 1 VR 143).

10. This requires the prosecution to prove that the accused:

    i) Had custody of or control over that property; and

    ii) Intended to have custody of or exercise control over that property (*DPP v Brooks* [1974] AC 862; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Maio* [1989] VR 281; *R v Mateiasevici* [1999] 3 VR 185. See also *R v Cross* (1995) 84 A Crim R 242; *R v Saleam* (1989) 41 A Crim R 108; *R v Cottrell* [1983] 1 VR 143; *R v Khalil* (1987) 44 SASR 23).

11. The prosecution may *not* rely on principles of deemed possession[994] to prove possession for the purposes of this doctrine (*R v Cross* (1995) 84 A Crim R 242; *R v McCarthy* (1993) 71 A Crim R 395).

12. The fact that a third party has physical possession of the property does not mean it cannot have been "possessed" by the accused. For example, if the accused has sufficient control over the third party, such that the property will be available to him or her upon request, the accused "possesses" that property (*R v McCarthy* (1993) 71 A Crim R 395; *R v Saleam* (1989) 41 A Crim R 108; *R v Cottrell* [1983] 1 VR 143).

13. The prosecution does not need to prove that the accused was actually caught with the property in his or her possession. It is sufficient to prove that the accused possessed the property at a relevant time (*R v Cross* (1995) 84 A Crim R 242; *R v Saleam* (1989) 41 A Crim R 108).

14. While the prosecution will usually rely on direct evidence to establish possession, circumstantial evidence or admissions may also be sufficient (*R v Cross* (1995) 84 A Crim R 242; *R v Saleam* (1989) 41 A Crim R 108).

15. For further information concerning possession, see "Common Law Possession" in 7.6.3 Possession of a Drug of Dependence.

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[994] E.g. Under the *Drugs, Poisons and Controlled Substances Act 1981* s 5, the accused is 'deemed' to be in possession of drugs in certain circumstances.

Recently stolen property

16. The doctrine of recent possession only applies if the jury is satisfied that the property was recently stolen (*Trainer v R* (1906) 4 CLR 126; *R v Trifilo* [2009] VSCA 194; *R v Cross* (1995) 84 A Crim R 242; *R v Sinanovic* [2000] NSWCCA 395; *R v Bruce* [1988] VR 579).

17. There are two aspects to this requirement:

    - The jury must be satisfied that the property was "stolen"; and
    - The jury must be satisfied that the stealing was "recent".

18. For information on when property is stolen, see 7.5.1 Theft.

19. The term "recent" depends on the nature of the property. Frequently circulated property such as bank notes remain "recently stolen" for a far shorter period than less frequently traded objects like cars or clothing (*R v Sinanovic* [2000] NSWCCA 395; *R v McCaffery* (1911) VLR 92; *R v Smale* NSW CCA 15/8/1986; *R v Mahoney* [2000] NSWCCA 256; *R v Khalil* (1987) 44 SASR 23; *R v Beljajev* [1984] VR 657).

20. The judge must initially determine, as a question of law, whether it is open to the jury to find that the property was "recently stolen". Once the judge makes that determination, it is for the jury to determine, based on the facts, whether that was the case (*R v Bellamy* [1981] 2 NSWLR 727; *R v Wanganeen* (1988) 50 SASR 433; *R v Smale* NSW CCA 15/8/1986; *R v Beljajev* [1984] VR 657).

21. The prosecution may prove that goods were recently stolen by direct evidence, or by other circumstantial evidence concerning the nature of the goods and the circumstances of the accused's possession (*R v Trifilo* [2009] VSCA 194).

Absence of a reasonable explanation

22. The jury may draw an inference on the basis of recent possession if there is no other reasonable explanation for the accused's possession of the property that is consistent with innocence (*Bruce v R* (1987) 74 ALR 219).

23. Due to the operation of the common law and statutory provisions associated with the right to silence, the inference is drawn due to the unexplained possession of recently stolen property, rather than the accused's failure to give an explanation for that fact (see, e.g. *Bruce v R* (1987) 74 ALR 219).

24. A distinction can be drawn between cases in which the accused attempts to explain his or her possession of the property, and those in which no explanation is given. These are addressed in turn below.

Attempts to explain possession of recently stolen property

25. Where the accused provides an explanation for his or her possession of recently stolen property, the jury may only draw a recent possession inference if it rejects that explanation as a reasonable possibility (*R v Weetra* SA CCA 7/8/1996; *R v Aves* [1950] 2 All ER 330; *R v Glen* [1973] VR 809; *R v Bellamy* [1981] 2 NSWLR 727).

26. The prosecution must lead evidence of any explanations the accused has offered. Such statements are not excluded on the basis of being self-serving hearsay (*Hudson v R* [2003] WASCA 304; *Rymer v R* [2005] NSWCCA 310. But c.f. *Barry v Police* [2009] SASC 295).

27. The jury should consider all explanations the accused has provided, and whether any of those explanations may be true. There is no principle that the jury may only consider one explanation. However, inconsistencies between various explanations may affect the accused's credit or the plausibility of the explanation (*R v Wanganeen* (1988) 50 SASR 433; *R v Bellamy* [1981] 2 NSWLR 727).

28. The jury cannot use the fact that the accused provided an explanation for the first time at trial as a reason for rejecting that explanation (*R v Beljajev* [1984] VR 657; *Petty v R* (1991) 173 CLR 95). See "Failure to Raise a Defence" in Silence in Response to People in Authority.

29. Rejection of the accused's explanation does not depend on the jury deciding that the explanation was deliberately false. The jury may reject an explanation due to finding that it is mistaken (*R v Weetra* SA CCA 7/8/1996; *R v Aves* [1950] 2 All ER 330; *R v Glen* [1973] VR 809; *R v Bellamy* [1981] 2 NSWLR 727).

30. However, where the jury finds that an explanation was deliberately false, this may also allow the jury to use "consciousness of guilt" reasoning. The judge must be careful when directing the jury about this possibility to ensure that use of a rejected explanation as a lie evidencing consciousness of guilt does not involve "bootstraps" reasoning. For this reason, judges should consider only give both a "recent possession" direction and a "consciousness of guilt" direction in appropriate cases (see *R v Zheng* (1995) 83 A Crim R 572; *R v Laz* [1998] 1 VR 453; *R v Sirillas* [2006] VSCA 234; *R v Beljajev* [1984] VR 657; *R v Wanganeen* (1988) 50 SASR 433). The availability of "consciousness of guilty" reasoning in relation to a rejected explanation will depend on whether the prosecution has given notice of its intention to rely on that evidence and the judge's grant of leave to rely on the evidence for that purpose. See *Jury Directions Act 2015* s 20.

Failure to provide an explanation

31. Where the accused fails to provide an explanation for his or her possession of recently stolen property, the jury may only draw a recent possession inference if it is satisfied that there was no reasonable explanation for that failure (*Bruce v R* (1987) 74 ALR 219; *R v Sinanovic* [2000] NSWCCA 395).

32. It seems that exercising the right to silence does not provide a reasonable explanation for failing to explain the possession of recently stolen goods (see, e.g. *Bruce v R* (1987) 74 ALR 219; *R v Wanganeen* (1988) 50 SASR 433; *Petty v R* (1991) 173 CLR 95 (Brennan J)).

33. The doctrine of recent possession does not constitute an exception to the right to silence. An adverse inference on the basis of recent possession is not drawn from the *exercise of the right to silence*, but from the accused's *unexplained possession of recently stolen property* (*Bruce v R* (1987) 74 ALR 219; *Raviraj v R* (1987) 85 Cr App R 93; *R v Beljajev* [1984] VR 657).

Consequences of Meeting the Requirements

34. Where the jury is satisfied that the three requirements outlined above have been met, they may infer that the accused either stole the property or received the property knowing that it was stolen (*Bruce v R* (1987) 74 ALR 219; *Trainer v R* (1906) 4 CLR 126; *R v Langmead* (1864) Le & Ca 427).

35. Early authorities suggested that the *prima facie* inference was that the accused stole the property (see, e.g. *Trainer v R* (1906) 4 CLR 126 (Griffith CJ)). However, it is now recognised that there is no such presumption (*Maslin v Searle* [2010] WASC 146).

36. The jury is not required to draw any inference. The doctrine of recent possession simply describes a reasoning process that is open to the jury, upon the satisfaction of certain requirements (*R v Schama & Abramovitch* (1914) 11 Cr App R 45; *R v Ugle* (1989) 43 A Crim R 63; *R v Bruce* [1988] VR 579; *R v Bellamy* [1981] 2 NSWLR 727).

37. In determining whether to draw a recent possession inference, and where to draw a further inference that the accused committed one offence rather than another, the jury should look at all of the circumstances of the case, including:

    - The nature of the property;
    - The circumstances in which the accused was found in possession of the property;
    - The time between the alleged theft and the accused acquiring possession of the property, and the likelihood that the property was sold in that period; and
    - The existence of any links between the accused and the victim of the theft (see *Raptopoulos v Police* [2005] SASC 374; *R v Connolly (No 2)* [1991] 2 Qd R 661; *Laurens v Willers* [2002] WASCA 183).

38. The consequences of drawing an inference will depend on what offence(s) the accused is charged with, and the nature of the inference drawn. For example:

    - Where the jury infer that the accused stole the property in question, they may convict him or her of a charge of theft. Where they infer that the accused received the property knowing that it was stolen, they may convict him or her of a charge of handling stolen goods;
    - When charges of theft and handling stolen goods are joined in one indictment as alternative charges, and the jury is satisfied that they can infer that the accused *either* stole the property *or* knowingly received it, but are unsure which was the case, they may convict him or her of theft.[995]
    - Where the accused is charged with another larceny offence, such as robbery, and the jury infer that he or she stole the property in question, the theft-related element of that offence will be met. However, before the jury can convict the accused of that offence, they must also be satisfied that the other elements of the offence (e.g. that the accused used force on a person in order to commit the theft) have been proven.

When to Direct the Jury About Recent Possession

39. A direction about the doctrine of recent possession is not required in all cases in which the accused is found in possession of stolen goods. The need for a direction will depend on:

    - The facts of the case; and
    - The degree to which the prosecution relies on the evidence of recent possession (*R v Weetra* SA CCA 7/8/1996).

Content of the Direction

40. A direction on the doctrine of recent possession should:

    - Explain the three requirements for drawing an inference;
    - Explain the inference the jury may draw if satisfied that those requirements have been met; and
    - Explain the consequences of drawing the relevant inference (see, e.g. *R v Sinanovic* [2000] NSWCCA 395; *R v Wanganeen* (1988) 50 SASR 433; *R v Bellamy* [1981] 2 NSWLR 727).

41. The judge must make it clear that the directions describe an inference the jury *may* draw, and does not describe an inference the jury *must* or *should* draw (*R v Schama & Abramovitch* (1914) 11 Cr App R 45; *R v Ugle* (1989) 43 A Crim R 63; *R v Bruce* [1988] VR 579; *R v Bellamy* [1981] 2 NSWLR 727).

42. The judge should not tell the jury that it may use evidence of recent possession to infer "guilty knowledge". Instead, the judge should explain the specific inference the jury may draw in the case (i.e., that the accused stole the property or knowingly received it) (*Ryman v R* SA CCA 3/10/1991).

43. The judge should direct the jury about the meaning of the words "recent" and "possession" in all cases where the prosecution relies on the doctrine (*R v Khalil* (1987) 44 SASR 23; *R v Beljajev* [1984] VR 657; c.f. *R v Saleam* (1989) 41 A Crim R 108).

44. Where the evidence leaves open two or more dates on which the accused may have possessed the property, the judge must:

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[995] See *Crimes Act 1958* s 88A. This provision only applies to trials that commenced on or after 13 October 2004. See "Theft and Handling" in 7.5.10 Handling Stolen Goods for further information about this issue.

- Identify those possible dates; and
- Instruct the jury that its findings about when the accused was in possession of the property may affect its determination of whether the property was recently stolen (*R v Khalil* (1987) 44 SASR 23; *Tasovac v Lawson* [2009] WASCA 394).

45. The judge must be careful to avoid pre-judging questions of fact. It is a matter for the jury to decide whether the accused had possession of the goods and whether those goods were recently stolen (*R v Beljajev* [1984] VR 657).

Other possible explanations

46. When explaining the third requirement, the judge should direct the jury that they may only draw a recent possession inference if they can exclude other reasonable explanations that are consistent with innocence. This includes any explanations offered by the accused or that arise from the circumstances of the case (*R v Wanganeen* (1988) 50 SASR 433).

47. Where the accused has provided an explanation, the judge must explain that the jury cannot draw a recent possession inference if they find that the explanation may reasonably be true. However, even if the jury cannot exclude the possibility that the accused's explanation is true, they may still convict him or her if there is other evidence which, in conjunction with the evidence of recent possession, establishes his or her guilt (*R v Bellamy* [1981] 2 NSWLR 727, *R v Tribett* NSW CCA 13/6/1991).

48. The judge must ensure the jury does not confuse an explanation for the possession of recently stolen items (requirement three) with a denial that the items were stolen at all (requirement two). This will be particularly important in cases where the property in question has no distinguishing marks, and the accused asserts that he or she acquired the property legitimately. In making such an assertion, the accused may (depending on the circumstances) be arguing:
    - That the property he or she possessed was different from the property in issue, and had not been stolen; or
    - That while the property he or she possessed may be the stolen property in issue, it had been purchased legitimately, and so there was a reasonable explanation for its possession (see, e.g. *Tasovac v Lawson* [2009] WASCA 394).

Identify matters relevant to drawing the inference

49. The judge should identify matters to be considered by the jury when deciding whether or not to draw a recent possession inference. These may include:
    - The temporal proximity between the theft and the possession;
    - What is known of the circumstances in which the accused acquired the goods;
    - The nature and value of the goods; and
    - The circumstances in which the accused was found in possession of the goods (*R v Wanganeen* (1988) 50 SASR 433; *R v Sinanovic* [2000] NSWCCA 395).

Onus of proof

50. Judges must ensure that their directions on recent possession do not undermine the onus of proof. In particular, they must not:
    - Suggest that evidence of recent possession gives rise to a "presumption" of guilt;
    - State that the accused must "rebut" an inference of guilt by providing an explanation;
    - Suggest that the accused must convince the jury to "accept" his or her explanation; or

- Suggest that evidence of recent possession gives rise to a rule of law, or that recent possession is different to circumstantial evidence (see *R v Bellamy* [1981] 2 NSWLR 727; *R v Beljajev* [1984] VR 657; *R v Stafford* (1976) 13 SASR 392; *R v Wanganeen* (1988) 50 SASR 433).

51. Judges should not refer to the "doctrine" of recent possession, as this may suggest that the relevant principle is a rule of law, rather than an application of the general principles of circumstantial evidence (*R v Bellamy* [1981] 2 NSWLR 727 (Reynolds JA); *R v Ugle* (1989) 43 A Crim R 63. See also *R v Wanganeen* (1988) 50 SASR 433).

Standard of proof

52. At common law, judges were required to direct the jury that the three requirements of recent possession must be proved beyond reasonable doubt before the jury could use evidence of recent possession (*R v Cross* (1995) 84 A Crim R 242; *R v Wanganeen* (1988) 50 SASR 433).

53. It is not clear whether this was a special rule of the doctrine of recent possession, or an application of the principles from Shepherd's case to essential intermediate facts (But see *Sartori v Trent*, Unreported, WASC, 23/8/1996; *F v Forbes* [2010] WASC 252).

54. Under the *Jury Directions Act 2015*, the only matters which need to be proved beyond reasonable doubt are the elements and the absence of any defences (*Jury Directions Act 2015* s 61). It therefore appears that judges can no longer require proof of the three requirements of recent possession beyond reasonable doubt before the jury draws an inference from evidence of recent possession. However, as a form of circumstantial evidence, the jury must still exclude hypotheses consistent with innocence.

Right to silence

55. When directing a jury about the doctrine of recent possession, judges must take great care not to breach the common law or statutory prohibitions (*Evidence Act 2008* s 89) on drawing adverse inferences from pre-trial silence (see Silence in Response to People in Authority).

56. To avoid breaching these prohibitions, it is important that judges make it clear that the recent possession inference is based on the unexplained possession of recently stolen property (rather than the accused's failure to give an explanation for that fact) (see, e.g. *Bruce v R* (1987) 74 ALR 219).

57. Depending on the circumstances, a judge may also need to give one of the following charges:

    - Failure to Answer Police Questions;
    - Section 41 Direction.

Last updated: 30 November 2015

7.5.11.1 Charge: Recent Possession

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This charge is drafted for use in cases in which:

i) Charges for theft and handling stolen goods are joined in an indictment as alternative charges and tried together; and

ii) Evidence of recent possession can support a conclusion that the accused either stole or received the property.

It will need to be modified if the accused is solely charged with theft or handling, or is charged with another offence such as robbery or burglary.

This charge should be given after the judge has directed the jury about the elements of theft and handling stolen goods.

In this case, the prosecution has argued that you can conclude from the evidence that [*describe evidence of recent possession, e.g.* "the stolen televisions were found in NOA's house"] that NOA either stole those goods, or that s/he received them knowing they were stolen.

Requirements

There are three matters you must be satisfied of before you may draw this conclusion from that evidence.

First, you must be satisfied that NOA possessed the [*describe goods*]. This requires the prosecution to prove that NOA had custody or control over those goods, and intended to have custody or exercise control.[996]

[*Summarise evidence and/or arguments concerning possession*.]

Second, you must be satisfied that those goods had been recently stolen.[997] In this case, it is alleged that those goods were stolen from [*describe alleged circumstances and date of theft, e.g.* "Mr X's house on 1/1/10"].

It is for you to determine whether the goods the prosecution alleged were found [*describe location, e.g.* "in NOA's house"] were stolen goods, and whether they had been stolen "recently".

The term "recently" is a relative one, that varies with the nature of the goods and how often goods of that kind change hands. Frequently circulated goods like coins or bank notes will only remain "recently stolen" for a short period of time, whereas less frequently traded goods, such as a cars or famous paintings, may remain "recently stolen" for months or even years. You must consider whether NOA acquired the goods so recently after they were stolen that s/he must have either stolen the goods himself/herself, or received them knowing they were stolen.

[*Summarise evidence and/or arguments concerning whether the goods had been recently stolen*.]

Third, you must be satisfied that there is no reasonable explanation for the accused's possession of the [*identify goods*].

[*If the defence has provided an explanation, add the following shaded section*.]

In this case, the defence has argued [*summarise explanation*]. You may not conclude that NOA stole the [*identify goods*], or received them knowing they were stolen, unless you are satisfied that there is no reasonable possibility that this explanation is true.

[*Summarise evidence and/or arguments concerning other possible explanations for the possession of the goods*.]

Conclusions

If you are satisfied that the prosecution has proven these three matters, then you may conclude that the accused either stole the [*identify goods*], or that s/he received them knowing they were stolen.

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[996] Where possession is in issue, further assistance on its requirements may be obtained from 7.6.3.5 Charge: Possession of a Drug of Dependence (Common Law Possession).

[997] Where there is an issue about whether goods have been "stolen", assistance may be obtained from 7.5.1.2 Charge: Theft (Extended).

It is for you to decide whether to draw this conclusion. Even if you are satisfied that the accused was in possession of recently stolen goods and there is no reasonable explanation for that possession, you are not required to draw this conclusion. You will remember what I told you about drawing conclusions earlier.[998]

If you decide that any of the three requirements have not been established, or decide not to draw any conclusion from the accused's possession of the goods, that does not mean that you must acquit NOA of charges [*state charge numbers*]. You may still convict him/her of one of those offences if, based on all of the evidence in the case, you are satisfied that all of the elements of that offence have been met.

In making your decision, you should consider all of the circumstances of the case, including the nature and value of the goods and the circumstances in which NOA was found in possession. You should also consider matters such as the time between the alleged theft and NOA acquiring possession, the likelihood that the goods were sold during that period of time, and the existence of any links between NOA and the owner of the goods.

[*If the accused chose not to explain his/her possession either to the police or in court, add the following shaded section.*]

It is important that you bear in mind the fact that the accused has the right to not answer police questions and to not give evidence in court. It would therefore be wrong for you to use the fact that s/he remained silent against him/her in any way.

The fact that a person chooses not to answer police questions, or to give evidence in court, does not mean that s/he has something to hide, or has admitted his/her guilt. That fact may not be used to fill gaps in the evidence led by the prosecution, and does not add to or strengthen the prosecution's case in any way. It proves nothing at all.

You therefore must not draw any conclusions against the accused for failing to answer police questions or give evidence in court. To use an accused person's silence in such a way would be to undermine a fundamental right provided by the law.

However, that does not mean that you cannot conclude from a person's unexplained possession of recently stolen goods that s/he stole the goods, or received them knowing they were stolen. In such circumstances you are not drawing a conclusion from his/her exercise of the right to silence, but from the fact that, after hearing all the evidence, you find that there is no reasonable explanation for his/her possession of those goods.

Last updated: 30 November 2015

7.5.12 Obtaining Property by Deception

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Overview

1. It is an offence to obtain property by deception (*Crimes Act 1958* s 81).
2. The offence has the following four elements:
    i) The accused obtained property belonging to another;

[998] This charge is based on the assumption that the judge has already instructed the jury about circumstantial evidence. It will need to be modified if that has not been done.

ii) The accused did so with the intention of permanently depriving the other of the property;

iii) The accused used deceit to obtain the property; and

iv) The accused obtained the property dishonestly (*Crimes Act 1958* s 81. See, e.g. *R v Salvo* [1980] VR 401; *R v Jost* (2002) 135 A Crim R 202).

3. The law in this area draws heavily upon the civil law of property. This commentary does not attempt to offer a detailed discussion of that law.

Relationship With Other Property Offences

4. The offences in ss 74, 75, 75A, 76, 77 and 81 of the *Crimes Act 1958* must all be committed:
    - "Dishonestly";
    - Against or in respect of "property belong to another"; and
    - With the "intention of permanently depriving" a person of that property (*R v Salvo* [1980] VR 401).[999]
5. The distinguishing features of s 81 are that the accused must have:
    - "Obtained" the property;
    - "By deception" (*R v Salvo* [1980] VR 401).

Obtaining Property Belonging to Another

6. For the first element to be met, the jury must be satisfied that:
    - The accused *obtained* something;
    - The thing obtained was *property*; and
    - The property *belonged to another person*.

Obtaining

7. The accused "obtains" property by deception if s/he obtains ownership, possession or control of it (*Crimes Act 1958* s 81(2)).
8. This differs from theft, where the accused must have "appropriated" the property by adversely assuming any of the owner's rights (see 7.5.1 Theft).
9. The accused does not need to have obtained the property for him or herself. This element will be satisfied if s/he obtained the property for another person, or enabled another person to obtain or retain the property (*Crimes Act 1958* s 81(2)).
10. Where the accused deceives someone with the intention of obtaining property, but fails to obtain the property, s/he may be guilty of attempting to obtain property by deception (*R v Kalajdic* [2005] VSCA 160; *R v King* [1987] QB 547).

Property

11. The thing that the accused obtained must have been "property" (*Crimes Act 1958* s 81(1)).

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[999] In relation to ss 76 and 77, these requirements only apply when it is alleged that the accused intended to steal something.

12. "Property" is defined to include "money and all other property real or personal including things in action and other intangible property" (*Crimes Act 1958* s 71(1)).

13. This definition includes some things with no physical existence, such as debts (*R v Baruday* [1984] VR 685; *R v Holt* (1983) 12 A Crim R 1, 16–17).

14. However, other intangible items may not be classified as property. For example, in England it has been held that confidential information is not property (*Oxford v Moss* (1978) 68 Cr App R 183), and copyright may not be (*R v Lloyd* [1985] 1 QB 829).

15. Whether the thing obtained by the accused was "property" can involve questions of both law and fact. It is for the judge to determine as a question of law whether a particular circumstance creates a property right. It is for the jury to determine whether that circumstance existed as a question of fact (See *R v Hall* [1973] QB 126; see also *R v Baruday* [1984] VR 685, *Parsons v the Queen* (1999) 195 CLR 619 and cf *R v Preddy* [1996] AC 815).

16. Sections 73(6) and 7 of the *Crimes Act 1958* (concerning when land and wild animals are considered to be "property") do not apply to the offence of obtaining property by deception (*R v Salvo* [1980] VR 401).

Belonging to Another

17. The accused must have obtained property "belonging to another" (*Crimes Act 1958* s 81(1)).

18. Property "belongs" to anyone who has possession or control of it, or who has any other proprietary right or interest in it (*Crimes Act 1958* s 71(2); *R v Salvo* [1980] VR 401).

19. These interests include legal and equitable proprietary interests (*R v Clowes (No 2)* [1994] 2 All ER 316).

20. However, property does *not* "belong" to a person who only has an equitable interest in that property, if that equitable interest arose from an agreement to transfer the property or grant an interest in it (*Crimes Act 1958* s 71(2)).

21. Whether a person has a proprietary right or interest is a question of civil property law (*R v Walker* [1984] Crim LR 112).

22. Sections 73(8)–(11) of the *Crimes Act 1958* ss 73(8)–(11) (which deem certain property to "belong to" people who might not otherwise be regarded as property owners) do not apply to the offence of obtaining property by deception (*R v Salvo* [1980] VR 401).

23. The prosecution needs only to establish that someone other than the accused had the relevant property rights. There is no requirement that the prosecution prove *who* actually held those rights (*Lodge v Lawton* [1978] VR 112).

Abandoned Property

24. Property no longer "belongs" to a person who has intentionally relinquished all ownership rights (abandoned the property) (*R v Small* [1987] Crim LR 777).

25. However, there is a distinction between "losing" and "abandoning" property. Property which is merely lost still "belongs" to the owner and can be obtained by deception(*R v Small* [1987] Crim LR 777).

Intention to Permanently Deprive

26. The second element requires the accused to have intended to permanently deprive the owner of the property when s/he obtained it (*Crimes Act 1958* s 81(1); *R v Salvo* [1980] VR 401).

27. The jury must consider the accused's state of mind at the time s/he obtained the property. If the accused had an intention to permanently deprive the owner of the property at that time then this element will be satisfied – even if the accused later decided to return the property (see, e.g. *R v Jost* (2002) 135 A Crim R 202).

28. If the accused only had an intention to temporarily deprive the owner of his or her property, this element will not be met (subject to the exceptions specified in ss 73(12) and (13)) (*R v Lloyd* [1985] 1 QB 829).

29. Similarly, this element will not be met if the accused had not decided how s/he was going to dispose of the property when s/he obtained it (subject to the exceptions specified in ss 73(12) and (13)). S/he must have already formed the intention to permanently deprive the owner of the property at the time s/he obtained it (*R v Easom* [1971] 2 QB 315; *Sharp v McCormick* [1986] VR 869).

30. A person who takes property (e.g. goods or cash), intending to return equivalent (but not identical) property, will have an intention to permanently deprive the owner of the property (because s/he does not intend to return the exact same coins, notes or goods that s/he took) (*R v Williams* [1953] 1 QB 660; *R v Cockburn* [1968] 1 All ER 466; *R v Pace* [1965] 3 Can CC 55 (NSSC)).

Acting Regardless of the Owner's Rights: ss 73(12)–(13)

31. Sections 73(12) and (13) of the *Crimes Act 1958* apply (with necessary adaptations) to the offence of obtaining property by deception (*Crimes Act 1958* s 81(3); *R v Salvo* [1980] VR 401).

32. The accused is deemed to have an intention to permanently deprive a person of property, despite the fact that s/he did not actually have that intention when s/he obtained the property, if s/he intends to treat the property as his or her own to dispose of regardless of the owner's rights (*Crimes Act 1958* s 73(12)).

33. Section 73(12) will only be relevant in exceptional cases. It is apt to confuse and should only rarely be introduced into a charge (*R v Dardovska* (2003) 6 VR 628).

34. Circumstances in which s 73(12) has been held to be relevant include:

    - Where the accused takes the property, promising to return it only in exchange for payment (*R v Lloyd* [1985] 1 QB 829);
    - Where the accused takes the property, intending to return it only after fundamentally altering its nature (e.g. returning the piece of paper a cheque is written on, after receiving payment from the bank) (*R v Duru* [1974] 1 WLR 2);
    - Where the accused takes the property, while leaving open the possibility that s/he might return it to the owner at a later date, but in the meantime treats it as his/her own (*Sharp v McCormick* [1986] VR 869).

35. Two other circumstances in which s 73(12) may be relevant are:

    - Where the accused borrows the property from its owner, ultimately intending to return it; or
    - Where the accused lends the owner's property to a third party, intending to return it to the owner upon retrieving it.

36. In such cases, the accused will only be deemed to have an intention to permanently deprive the owner of the property if the borrowing or lending was for a period, or in circumstances, which made it equivalent to an outright taking or disposal (*Crimes Act 1958* s 73(12)).

37. Section 73(12) may also be relevant where the accused parts with property belonging to another, under a condition as to its return which s/he may not be able to perform (e.g. pawning it). If this was done for the accused's own purposes, and without the consent of the owner, the accused will be deemed to have treated the property as his or her own to dispose of regardless of the owner's rights (*Crimes Act 1958* s 73(13)). By virtue of s 73(12), s/he will be regarded as having had an intention to permanently deprive the owner of that property.

Deception

38. The third element requires the accused to have obtained the property *by deception* (*Crimes Act 1958* s 81(1); *R v Salvo* [1980] VR 401).

39. For this element to be met, the prosecution must prove that:
    - The accused made a representation by words or conduct;
    - The representation was about existing or past facts or law;
    - The representation was false;
    - The accused knew the representation was false, or was reckless as to whether it was true or false;
    - The accused intended to obtain the property by making the representation;
    - The false representation was believed by the victim (who was thereby deceived); and
    - The accused obtained the property as a result of the deception.
40. The jury must be unanimous about the particular representation which the accused made (*Magnus v R* (2013) 41 VR 612; *R v Brown* (1984) 79 Cr App R 115; *R v Holmes* [2006] VSCA 73).
41. As "deception" has the same meaning in relation to the offence of obtaining a financial advantage by deception as it does for the offence of obtaining property by deception (*Crimes Act 1958* s 82(2)), cases decided in relation to that offence will be applicable to s 81.

Representation by Words or Conduct

42. The accused must have made a representation in words (spoken or written) or by conduct (*Crimes Act 1958* s 81(4)(a); *R v Benli* [1998] 2 VR 157).
43. The representation may be constituted by a number of statements or a course of conduct (*R v Lo Presti* (2005) 158 A Crim R 54).
44. The representation does not need to be explicit. It can be implied from the accused's words or conduct (*DPP v Ray* [1974] AC 370; *Smith v R* (1982) 7 A Crim R 437 (Vic CCA); *R v Vasic* (2005) 11 VR 380).
45. There will often be implicit representations in ordinary transactions. For example:
    - When a person orders food in a restaurant, s/he implicitly agrees to pay for the food if it is provided properly (*DPP v Ray* [1974] AC 370).
    - When a person proffers a cheque to another person in payment of a debt, s/he implies that ordinarily the cheque will be honoured by a bank upon presentation at the bank upon which it has been drawn (*Smith v R* (1982) 7 A Crim R 437 (Vic CCA); *R v Vasic* (2005) 11 VR 380).
    - When a person uses a credit card, s/he implies that s/he is acting within the terms of the contract with the card provider (*R v Lambie* [1982] AC 449; *Metropolitan Police Commissioner v Charles* [1977] AC 177).

Representation About Existing or Past Facts or Law

46. The representation must have been about existing or past facts or law. This is defined to include representations about a person's present intentions (*Crimes Act 1958* s 81(4)(a); *R v Lo Presti* (2005) 158 A Crim R 54).
47. This element will not have been met if the representation was about something that was going to happen in the future (e.g. a promise). Representations about what will occur in the future cannot amount to a "fact" (*R v Lo Presti* (2005) 158 A Crim R 54).

48. However, most promises implicitly carry with them a representation that it is the person's present intention to bring about the predicted event. This aspect of the third element will be satisfied if it can be shown that the accused made such a representation when s/he made the promise (*R v Lo Presti* (2005) 158 A Crim R 54; *R v Dent* [1955] 2 QB 590; *R v Gilmartin* [1983] QB 953).[1000]

49. As it is unlikely that the accused will have explicitly stated that s/he had an "intention" to do anything, it will usually be left to the jury to infer that the promise implied that the accused intended to do what was promised (*R v Lo Presti* (2005) 158 A Crim R 54).

50. The jury must be able to infer, beyond reasonable doubt, that when the accused made the promise, s/he was stating his or her current intention to carry out the promise (*R v Lo Presti* (2005) 158 A Crim R 54).

51. Service of an unverified statement of claim is not to be treated as a positive representation regarding the truth of the facts contained in the statement (*Jamieson v the Queen* (1993) 177 CLR 574).

Falsity of the Representation

52. A person only deceives someone if s/he induces them to believe that something which is actually false is true (*DPP v Ray* [1974] AC 370; *In re London and Globe Financing Corporation Ltd* [1903] 1 Ch 728).

53. The prosecution must therefore demonstrate that the alleged representation was false at the time it was made (*R v Lo Presti* (2005) 158 A Crim R 54).

Deception by Silence about Changed Circumstances

54. Difficulties can arise where:

    - The accused made a representation which was initially true;
    - That representation subsequently became false; and
    - The accused knew the representation had become false, but did not advise the other party prior to obtaining the property (see, e.g. *DPP v Ray* [1974] AC 370).

55. In such circumstances, it may appear that the accused has not made a false representation. However, it has been held that the accused's silence in such circumstances can be considered to be an implicit (false) representation that the situation remains the same as initially represented (*DPP v Ray* [1974] AC 370; *R v Firth* (1989) 91 Cr App R 217).[1001]

Broken Promises

56. Where a case is based on a promise made by the accused (see "Representation About Existing or Past Facts or Law" above), it is not sufficient for the prosecution to prove that the promise was not fulfilled. The prosecution must prove that, at the time the representation was made and acted upon, the accused had no intention to carry out the promise (*R v Lo Presti* (2005) 158 A Crim R 54; *Johnston v The Queen* [2021] VSCA 11, [26]–[29]).

57. The non-fulfilment of the promise may be used as evidence that, when s/he made the promise, the accused had no intention to carry it out (*R v Lo Presti* (2005) 158 A Crim R 54).

58. It is important to instruct the jury clearly about this issue, as without such instruction the jury may wrongly think that a bare broken promise, without more, is sufficient (*R v Lo Presti* (2005) 158 A Crim R 54).

[1000] In such cases, the count and the particulars should refer to the accused's (implicit) representation about his or her intentions when s/he made the promise, rather than the promise itself (*R v Lo Presti* (2005) 158 A Crim R 54).

[1001] In *R v Vasic* (2005) 11 VR 380 the court held that it was Parliament's intention that the English cases in this area, including *DPP v Ray*, would be followed in Victoria.

Knowledge or Recklessness as to Falsity

59. The deception must have been deliberate or reckless (*Crimes Act 1958* s 81(4)(a)).

60. This requires the false representation to have been made:

    - With knowledge of its falsity; or
    - Recklessly without an honest belief in its truth, careless of whether it were true or false (*R v Salvo* [1980] VR 401; *Mattingley v Tuckwood* (1989) 43 A Crim R 11 (ACT SC)).

61. This element will not be satisfied if the accused made an innocent misrepresentation which misled the victim (*R v Salvo* [1980] VR 401; *Mattingley v Tuckwood* (1989) 43 A Crim R 11 (ACT SC)).

Reckless Deception

62. In this context, "recklessness" is a subjective concept. It focuses on the accused's state of mind at the relevant time (*R v Smith* (1982) 7 A Crim R 437; *Pollard v Cth DPP* (1992) 28 NSWLR 659).

63. For the deception to have been reckless, the accused must have known that the representation was *probably* untrue (*R v Kalajdic* [2005] VSCA 160, [31]. See also *R v Campbell* [1997] 2 VR 585; *R v Nuri* [1990] VR 641; *DPP Reference No 1 of 2019* [2020] VSCA 181; *DPP Reference No 1 of 2019* [2021] HCA 26).

64. Some authorities have applied a weaker "substantial risk" test. Under this test, an accused makes a false representation recklessly if he or she makes a representation knowing that there is a *substantial risk* that the representation is untrue (*R v Kalajdic* [2005] VSCA 160, [31]; *Mattingley v Tuckwood* (1989) 43 A Crim R 11 (ACT SC); *Smith v R* (1982) 7 A Crim R 437 (Vic CCA)).

65. It is likely that the "substantial risk" test understates the *mens rea* requirement for this element. It is also inconsistent with the recklessness test that is now required in more settled areas of the law – see 7.1.3 Recklessness. As a result the Charge Book Deception charges adopt only the "probably untrue" test.

66. It is not sufficient that the accused knew that the representation was *possibly* untrue (*R v Kalajdic* [2005] VSCA 160, [31]; *R v Campbell* [1997] 2 VR 585; *R v Nuri* [1990] VR 641).

67. Mere carelessness or negligence is not sufficient. The accused must have known that the representation was probably false but been indifferent as to whether the representation was true or false (*Smith v R* (1982) 7 A Crim R 437 (Vic CCA); *Mattingley v Tuckwood* (1989) 43 A Crim R 11 (ACT SC); *Pollard v Cth DPP* (1992) 28 NSWLR 659).

Accused's Intention

68. At the time s/he made the representation, the accused must have intended to obtain the property by his or her words or conduct (*DPP v Stonehouse* [1978] AC 55; *Mattingley v Tuckwood* (1989) 43 A Crim R 11 (ACT SC); *R v Lo Presti* (2005) 158 A Crim R 54).

69. In most cases[1002] this requires the accused, at the time s/he made the representation, to have intended that:

    - The representation would be communicated to a person;
    - That person would believe that the representation was true;
    - That belief would cause someone to part with ownership, possession or control of property; and

[1002] An exception occurs where it is a computer or a machine that is deceived: see "Deception of Computers and Machines" below.

- The accused would thereby obtain that property (for him or herself or someone else) (*DPP v Stonehouse* [1978] AC 55; *Mattingley v Tuckwood* (1989) 43 A Crim R 11 (ACT SC)).

The False Representation was Believed

70. In most cases[1003] a person or persons must have believed the false representation, and thus been deceived (*DPP v Ray* [1974] AC 370; *R v Salvo* [1980] VR 401).

71. Even where the victim is a company, the prosecution must prove that a natural person was deceived (*R v Jenkins* (2002) 6 VR 81.

72. The person deceived does not need to be the same as the person from whom the property is ultimately obtained. This element will be satisfied as long as the accused deceives someone, and that deception causes the accused to obtain the property (see "The Property was Obtained as a Result of the Deception" below) (*R v Benli* [1998] 2 VR 157; *R v Clarkson* [1987] VR 962).

Deception of Computers and Machines

73. "Deception" is defined to include acts or omissions done with the intention of causing a computer system, or a machine that is designed to operate by means of payment or identification, to make a response which the accused is not authorised to cause the computer or machine to make (*Crimes Act* 1958 s 81(4)(b)).

74. This provision allows this element to be met even if the accused has not made a false representation to a person, and no person has been deceived. As long as the accused intended to cause the computer or machine to respond in an unauthorised matter s/he will have engaged in "deception".

75. Accordingly, the element of deception will be satisfied where a person:

    - Uses his or her own card to withdraw money from an ATM, despite having closed his or her account; or
    - Uses another person's card to withdraw money from an ATM without their authority (see, e.g. *Kennison v Daire* (1986) 160 CLR 129).

76. The fact that an ATM is programmed to give out money if a card is inserted and the correct password used does not mean that the bank consents to the withdrawal of money in that way by a person who does not have an account with the bank. The bank only consents to the withdrawal of money by people with current accounts (*Kennison v Daire* (1986) 160 CLR 129).

The Property was Obtained as a Result of the Deception

77. The property must have been obtained as a result of the deception. That is, there must have been a causal connection between the deception used and the obtaining of the property (*R v Jenkins* (2002) 6 VR 81; *R v Clarkson* [1987] VR 962; *R v King* [1987] QB 547).

78. For this requirement to be met, the prosecution must prove that the deception operated on the mind of the person deceived (*R v Jenkins* (2002) 6 VR 81).

79. It is a question of fact for the jury to decide whether the deception was an "operative cause" of the obtaining (*R v King* [1987] QB 547).

80. As long as this causal connection is proved, the property does not need to have been obtained from the same person who was deceived (*R v Benli* [1998] 2 VR 157; *R v Clarkson* [1987] VR 962; *R v Jenkins* (2002) 6 VR 81).

[1003] It is also possible for a computer or a machine to have been deceived: see "Deception of Computers and Machines".

81. It is not necessary to prove that the person deceived suffered a loss (*R v Jenkins* (2002) 6 VR 81).

Proving Causation

82. Direct evidence should ordinarily be used to prove that the deception operated on the mind of the person deceived (*R v Jenkins* (2002) 6 VR 81; *R v Laverty* (1970) 54 Cr App R 495).[1004]

83. However, direct evidence need not be given if the facts are such that the alleged false representation is the only reason which could be suggested as having been the operative inducement (*R v Jenkins* (2002) 6 VR 81; *R v Sullivan* (1945) 30 Cr App R 132).

84. In such circumstances, it is for the jury to determine whether the only inference which could be reasonably drawn is that the relevant party would not have parted with the property had the true position been known, and thus the deception was the cause of the obtaining (*R v Jenkins* (2002) 6 VR 81; *R v Lambie* [1982] AC 449).

Dishonesty

85. The fourth element requires the property to have been obtained "dishonestly" (*Crimes Act* 1958 s 81(1); *R v Salvo* [1980] VR 401).

86. This requirement is additional to the requirement that the property be obtained "by deception". The prosecution must prove that when the accused, by deception, obtained the property, s/he was acting dishonestly (*R v Salvo* [1980] VR 401; *Pollard v Cth DPP* (1992) 28 NSWLR 659).

87. Whilst in a loose sense any form of deception might be characterised as "dishonest", that is not the meaning which "dishonestly" bears in s 81 (*R v Salvo* [1980] VR 401; *Pollard v Cth DPP* (1992) 28 NSWLR 659).

88. Dishonesty has a special meaning in s 81. It means that the accused acted without a belief in a legal right to obtain the property (*R v Salvo* [1980] VR 401; *R v Bonollo* [1981] VR 633; *R v Brow* [1981] VR 783; *R v Todo* (2004) 10 VR 244).

89. This interpretation of "dishonesty" differs from the interpretation of "dishonesty" in the equivalent provision of the English *Theft Act* and the interpretation of "dishonesty" in s 86 of the Commonwealth *Crimes Act 1914*. In those jurisdictions, "dishonesty" has its ordinary meaning, and is assessed according to the standards of the ordinary person (*Peters v the Queen* (1998) 192 CLR 493; *Macleod v R* (2003) 214 CLR 230; *R v Ghosh* [1982] QB 1053).[1005]

90. The claim of legal right must extend to all of the property taken, not just to part of it (*R v Bedford* (2007) 98 SASR 514).

91. A moral belief in the right to obtain the property is not sufficient (*R v Salvo* [1980] VR 401; *R v Bonollo* [1981] VR 633).

92. The relevant belief is not a belief in ownership or in a right to possession or control. The accused must have believed that s/he had a legal right *to obtain possession* of the property. That is, s/he must have believed that s/he had legal right to take the property and deprive the other person of possession (*R v Salvo* [1980] VR 401).

[1004] In most cases the person deceived will give evidence that s/he believed the representation, and that is why s/he parted with the property (*R v Sullivan* (1945) 30 Cr App R 132; *R v Jenkins* (2002) 6 VR 81).

[1005] Other Australian jurisdictions adopt different approaches to dishonesty, and their authorities should be approached with caution.

93. If the accused did not believe that s/he had a legal right to obtain the property, then s/he will have acted dishonestly, even if s/he intended to prevent the true owner from suffering any loss (*R v Brow* [1981] VR 783).

Subjective Concept

94. Dishonesty is a subjective concept. It relates to the accused's mental state (*R v Salvo* [1980] VR 401; *R v Bonollo* [1981] VR 633; *R v Brow* [1981] VR 783).

95. The prosecution must prove that the accused himself or herself did not believe that s/he had, in all the circumstances, a legal right to obtain the property (*R v Salvo* [1980] VR 401; *R v Bonollo* [1981] VR 633; *R v Brow* [1981] VR 783).

96. It does not matter if the accused's belief was based on a mistake of fact[1006] or a mistake of law.[1007] If the accused genuinely believed s/he had a legal claim of right, s/he will not have acted dishonestly (*R v Langham* (1984) 36 SASR 48; *R v Lopatta* (1983) 35 SASR 101).

97. The accused's belief does not need to have been reasonable (*R v Salvo* [1980] VR 401; *R v Dardovska* (2003) 6 VR 628).

98. If the jury is left in doubt whether the accused in fact believed that s/he had a legal right in the circumstances to obtain the property, the element will not be established (*R v Salvo* [1980] VR 401).

Exhaustive Definition

99. The word "dishonestly" in s 81 is to be defined exclusively as meaning without belief by the accused that s/he had a legal right to obtain the property (*R v Salvo* [1980] VR 401; *R v Bonollo* [1981] VR 633; *R v Brow* [1981] VR 783).

100. As this definition of "dishonestly" is exhaustive, if the accused did not believe s/he had a legal right to the property, then s/he will have acted "dishonestly" (*R v Brow* [1981] VR 783).

101. The provisions of ss 73(2) and (3), which state that in certain circumstances an accused person's appropriation of property is not to be regarded as dishonest, do not apply to s 81 (*R v Salvo* [1980] VR 401).

No Need to Believe in Right to Deceive

102. The accused does not need to have believed that s/he had a legal right to obtain the property *by deception*, or by the particular means employed. S/he merely needs to have believed that s/he had a legal right to *obtain the property*. The deception was simply his or her means of achieving that goal (*R v Salvo* [1980] VR 401; *R v Bedford* (2007) 98 SASR 514).

103. So even if the accused used violent measures to take the property, s/he should not be convicted of obtaining property by deception if s/he genuinely believed s/he had a legal right to the property. However, s/he may be convicted of an offence relating to the violence used (*R v Bedford* (2007) 98 SASR 514; *R v Salvo* [1980] VR 401).

104. It will therefore be a misdirection to tell the jury that the prosecution must prove that the accused believed s/he had a right to take the property by the deception actually employed. The jury should instead be directed that the prosecution must prove that the accused did not believe s/he had a legal right to obtain the property (*R v Salvo* [1980] VR 401).

[1006] A mistaken belief that certain facts existed, which would have created a legal claim if true.

[1007] A mistaken belief that certain interests create legal rights.

Relationship Between "Dishonesty" and "Deception"

105. There may be cases where property belonging to another has been obtained by deception, with the intention of permanently depriving the other of it, but which has not been done dishonestly (*R v Salvo* [1980] VR 401; *Pollard v Cth DPP* (1992) 28 NSWLR 659).[1008]

106. Thus, the mere fact that the accused obtained the property by deception is not enough to prove that s/he acted dishonestly. The prosecution must prove that the accused acted without a claim of legal right (*R v Salvo* [1980] VR 401).

107. However, in many cases the practising of a deception will be strongly evidentiary of whether the acts charged were done dishonestly. The jury may be able to infer from the fact that the accused acted deceitfully that s/he was not making a claim of right (*R v Salvo* [1980] VR 401; *Pollard v Cth DPP* (1992) 28 NSWLR 659).

108. While in many cases the deception practised will be highly relevant to the element of dishonesty, this will not always be the case. For example, where the accused admits engaging in deception, but advances an explanation for why s/he did so, the jury may not be able to infer anything about the accused's dishonesty from the fact that s/he was deceitful (*R v Salvo* [1980] VR 401).

Need for Jury Directions

109. Due to the difficulty in understanding the relationship between deception and dishonesty, and the special sense in which "dishonestly" is used in this context, the judge must explain the concept of "dishonestly" to the jury (*R v Salvo* [1980] VR 401; *R v Bonollo* [1981] VR 633; *R v Todo* (2004) 10 VR 244).

110. In such cases, the judge must:

- Tell the jury that the prosecution must prove that the property had been obtained dishonestly, in the sense that the accused did not believe that s/he had a legal right to it; and
- Assist the jury by relating the facts to the law, and the facts and issues raised by counsel to the actual charges (*R v Todo* (2004) 10 VR 244).

111. In some cases it may be desirable to point out that the question as to what constitutes "dishonestly" is not to be answered by considering the *morality* of the accused's actions, but by considering whether the accused believed that s/he had a *legal right* to obtain the relevant property (*R v Salvo* [1980] VR 401).

Offences Committed by Bodies Corporate

112. The offence of obtaining property by deception may be committed by a body corporate (*Crimes Act 1958* s 84).

[1008] In *R v Salvo* [1980] VR 401 the court gives the example of a robber who forcibly detains goods from the true owner. Because the robber has possession or control of the goods, they are deemed to belong to him by virtue of s 71(2). If the true owner, by a stratagem of deception, obtains the goods from the robber, he will not have acted dishonestly – as he believes he has a legal claim to the goods (and in fact does have a legal right to regain the goods by seizure).

113. Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, that person will also be guilty of the offence (*Crimes Act 1958* s 84(1)).

114. Where the affairs of the body corporate are managed by its members, the members may also be found guilty of the offence (if they acted in connection with their management function) (*Crimes Act 1958* s 84(2)).

Extraterritorial Offences

115. It is not necessary that the property was obtained in Victoria. Section 81 applies where there is a "real and substantial link" between the relevant act and Victoria *(Crimes Act 1958* s 80A).

116. The concept of a "real and substantial link" is defined in s 80A(2). It includes cases where:

- A "significant part" of the conduct relating to, or constituting, the relevant act occurred in Victoria; or
- The act was done with the intention that substantial harmful effects arise in Victoria, and such effects did arise.

117. The words in s 80A should be given their natural meaning (*R v Keech* (2002) 5 VR 312).

118. An act which forms an essential link in the chain of deception (rather than merely being part of the surrounding circumstances) is a "significant part" of the relevant conduct (*R v Keech* (2002) 5 VR 312).

Last updated: 27 October 2022

7.5.12.1 Charge: Obtaining Property by Deception

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The Elements

I must now direct you about the crime of obtaining property by deception. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – the accused obtained property that belonged to another person.

Two – the accused intended to permanently deprive that person of his or her property.

Three – the accused obtained the property by deception.

Four – the accused obtained the property dishonestly.

I will now explain each of these elements in more detail.[1009]

Obtaining Property Belonging to Another

The first element that the prosecution must prove is that the accused obtained property that belonged to another person.

There are three parts to this element:

[1009] If an element or part of an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

- First, the accused must have obtained something;
- Second, the thing obtained must have been property; and
- Third, that property must have belonged to another person when it was obtained.

Obtaining

For the first part of this element to be met, the prosecution must prove that the accused obtained the [*identify property*].

The law says that a person "obtains" something if s/he obtains ownership, possession or control of it.

[*If the accused did not obtain the property for him or herself, add the following shaded section*.]

The accused does not need to have obtained the property for him/herself. This requirement will be satisfied if s/he [obtained the property for another person/enabled another person to obtain the property/enabled another person to retain the property].

In this case the prosecution alleged that NOA obtained the [*identify property*] because s/he [*describe prosecution arguments and evidence concerning the way in which the accused obtained the property*]. The defence denied this, arguing [*describe defence arguments and evidence*].

It is for you to determine, based on all the evidence, whether NOA obtained the [*identify property*]. If you are not satisfied that s/he did, then s/he will be not guilty of obtaining property by deception.

Property

The second part of this element requires the thing obtained to be "property".

"Property" is a technical legal term, which includes many different things. It does not only refer to physical objects.

Of relevance to this case, [*describe relevant type of property*] is a type of "property". This means that this part of the first element will be met if you are satisfied that what NOA obtained was [*describe type of property*].

The prosecution argued [*insert prosecution evidence and/or arguments*]. The defence denied that this was the case, arguing [*insert defence evidence and/or arguments*].

For this element to be satisfied, you must find that [*explain findings necessary for the relevant item to be classified as property*]. If you are not satisfied that this was the case, then the accused will be not guilty of obtaining property by deception.

Belonging to Another

[*If there is an issue about whether the property* belonged to another*, add the following shaded section.*]

The third part of this element requires the thing obtained to have belonged to another person at the time it was obtained.

The law says that property "belongs" to anyone who has possession or control of that property, or who has any other proprietary right or interest in it. This includes [*insert relevant example*].

In this case the prosecution alleged that the [*describe property*] belonged to NOC. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

[*If there is uncertainty about which third party the property belonged to, add the following shaded section.*]

The prosecution does not need to prove who the property actually belonged to, as long as they can prove that it belonged to someone other than the accused.

[*If it is alleged that the accused had a proprietary right in the relevant property, add the following shaded section.*]

It does not matter if you find that the accused had [*describe property right*]. If another person also had [*describe property right*] that was obtained, then for the purposes of this element the property belonged to another person.

It is for you to determine, based on all the evidence, whether [*identify property*] belonged to another person. It is only if you are satisfied beyond reasonable doubt that it did that this element will be met. If you are not satisfied that this is the case, then NOA will be not guilty of obtaining property by deception.

Intention to Permanently Deprive

The second element that the prosecution must prove is that, when the accused obtained the property, s/he intended to permanently deprive the owner of it. That is, s/he intended that the owner would never get the property back.

It does not matter whether the accused intended to keep, sell, give away, destroy or hide the property. If his/her intention was that the owner would not get it back, then s/he will have had the necessary intention.

[*If the accused may not yet have formed the relevant intention when s/he obtained the property, add the following shaded section.*]

For this element to be met, the accused must have already decided not to return the property to its owner when s/he obtained it. This element will not be satisfied if, when the accused obtained the property, s/he was not yet certain whether or not s/he would give it back – only deciding later that s/he was going to keep it.

[*If the accused may have only had an intention to temporarily deprive the owner of his/her property, add the following shaded section.*]

The accused's intention must have been to permanently deprive the owner of the property. This element will not be met if s/he only meant to deprive the owner of his/her property temporarily, and then to give it back to him/her.

[*If it is alleged that the accused was only going to return the property after its nature had been fundamentally changed, add the following darker shaded section.*]

However, if the accused was only planning on returning the property after its nature had been fundamentally changed, you may find that s/he intended to permanently deprive the owner of that property. This is because, although it may seem that s/he intended to return the owner's property, in reality s/he did not intend to give back what s/he took – s/he intended to return something that was completely different.

That is what the prosecution argued happened here. [*Insert prosecution evidence and/or arguments.*] The defence denied this, alleging [*insert defence evidence and/or arguments*].

[*If it is alleged that the accused was only borrowing the property, add the following shaded section.*]

In this case the defence alleged that the accused did not intend to keep the property in question, but was merely borrowing it. [*Identify relevant evidence and/or arguments.*]

This element will not be met if you find that NOA intended to return the [*identify property*]. This is true even if s/he borrowed it without permission.

[*If the borrowing may have amounted to an outright taking, add the following darker shaded section.*]

Warning: this direction will only be relevant in exceptional cases. See the discussion of s 73(12) in 7.5.12 Obtaining Property by Deception.

However, if the accused borrowed the property for a period, or in circumstances, which made it equivalent to an outright taking or disposal, then the law says that s/he will have had an intention to permanently deprive the owner of the property. This will be the case even if s/he intended to give the property back eventually.

That is what the prosecution alleged happened here. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

[*If it is alleged that the accused intended to replace the money or goods obtained, add the following shaded section.*]

In this case, you have heard evidence that although NOA received [money/*describe object*] from NOC, s/he intended to replace it.

Even if you find this to be the case, that does not mean that NOA did not intend to permanently deprive NOC of his/her property. Unless s/he was planning on returning to NOC the exact same [notes/coins/object] that s/he obtained, NOA will have had an intention to permanently deprive NOC of his/her property. Returning an equivalent [amount of money/item] is not sufficient.

[*If the accused did not have an intention to permanently deprive, but may have had an intention to treat the property as his/her own, add the following shaded section.*]

[*This direction is based* Crimes Act 1958 *s 73(12). It should only be used in exceptional cases. See* 7.5.12 Obtaining Property by Deception *for further information.*]

There is one exception to the rule that the accused had to intend to permanently deprive the owner of his/her property. This arises where, despite not having such an intention, the accused intended to treat the property as his/her own to dispose of regardless of the owner's rights.

[*If it is alleged that the accused parted with the property under a condition as to its return that s/he may not have been able to perform (e.g. by pawning the property), add the following darker shaded section.*]

The law says that a person will have done this if, for his/her own purposes and without the owner's consent, s/he parted with the property under a condition that s/he may not be able to meet.

The prosecution alleged that that was the case here. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

If you are satisfied beyond reasonable doubt that the accused did intend to treat the [*describe property*] as his/her own to dispose of regardless of NOC's rights, then this element will be proven, even if NOA ultimately intended to give back the property.

Deception

The third element that the prosecution must prove is that the accused obtained the property by deception.

There are four parts to this element, all of which must be proven beyond reasonable doubt:

- First, the accused must have made a false representation;
- Second, the accused must have known the representation was false or was probably false when s/he made it;
- Third, the accused must have intended that the false representation be acted upon; and

- Fourth, the accused must have obtained the property as a result of making that false representation.

I will now explain each of these parts in more detail.

False Representation

For the first part of this element to be met the accused must have made a false representation.

The representation can have been made in words or by conduct, and does not need to have been explicit. That is, you may be able to infer the representation from the accused's words or conduct. You will remember what I have told you about inferences.[1010]

[*If it is alleged that the representation only became false after it was made, add the following shaded section.*]

The representation must have been false at the time it was made. This part of the third element will not be satisfied if the representation was true at that point in time, but later became false.[1011]

In this case it is alleged that the accused falsely represented that [*describe alleged false representation*].[1012]

[*If the representation is to be implied from a promise, add the following shaded section.*]

You will notice that although it is alleged that the accused promised [*describe promise*], that promise is not the representation that I just mentioned. Instead, the alleged representation that you must focus on is [*describe implicit representation*].

This is because the law says that the false representation must be about existing or past facts. It cannot be a representation about something that is going to happen in the future.

This part of the third element will therefore not be satisfied simply because a person makes a promise which they do not keep. A broken promise is not a false representation about an existing of past fact.

However, when a person makes a promise s/he may make an implicit or unspoken representation that s/he intends to act in a certain way. For example, s/he may represent that s/he intends to keep the promise by performing specific actions. As such a representation is about that person's present intentions, it meets the requirement that the representation be about an existing fact.

So in this case, it is not enough for you to find that NOA promised to [*describe promise*] and broke that promise. You must also be able to infer, beyond reasonable doubt, that when NOA made the promise, s/he was stating his/her current intention to [*describe alleged intention*] – and that that representation was false.

[*Insert prosecution evidence and/or arguments concerning the making of the representation and its falsity*].

[*If the defence denied that the accused made the alleged representation, add the following shaded section.*]

[1010] This charge assumes that the jury has already been charged about inferences. If this has not been done, the charge will need to be modified accordingly.

[1011] If it is alleged that the accused knew that his or her original representation had become false, and kept silent about it – thereby implicitly representing that the situation remained the same – it will be necessary to explain that it is that implicit representation that forms the basis of the charge, not the original representation. See 7.5.12 Obtaining Property by Deception for guidance.

[1012] If the representation is to be implied from a promise, care must be taken to refer to the accused's implicit representation about his or her intentions when s/he made the promise, rather than the promise itself: see 7.5.12 Obtaining Property by Deception.

The defence denied that NOA made that representation, arguing [*insert defence evidence and/or arguments*].

[*If the defence denied that the representation was false, add the following shaded section.*]

While the defence agreed that NOA made that representation, they denied that it was false at the time it was made. [*Insert defence evidence and/or arguments.*]

It is for you to determine whether or not NOA represented that [*describe representation*], and whether that representation was false when it was made. It is only if you are satisfied that s/he did make a false representation that this part of the third element will be satisfied.

Knowledge of Falsity/Recklessness

For the second part of this element to be met the accused must have known that the representation was false or was probably false when s/he made it.

It is not sufficient for NOA to have known that it was possible that the representation was false. S/he must have at least known that it was probably false.

In determining this part of the element, you must be satisfied that NOA him/herself knew of the likelihood that the representation was untrue. It is not enough that you or a reasonable person would have recognised that probability in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*].

Intention That Representation Be Acted Upon

For the third part of this element to be met the accused must have intended that the false representation be acted upon by NOC.

If you consider that it is reasonably possible that NOA did not intend NOC to act upon that representation and thereby permit NOA to obtain the [*describe property*], then NOA will not be guilty of this offence.

[*Insert any relevant evidence or arguments.*]

Causation

For the fourth part of this element to be met the accused must have obtained the property as a result of making the false representation.

In this case, that requires you to find that NOC would not have acted in the way s/he did had it not been for NOA's representation [*describe representation*].

[*If it is not alleged that the property was obtained from the same person who was deceived, add the following shaded section.*]

In this case you will notice that it was not NOC's property that NOA is alleged to have obtained as a result of the deception. That does not matter. You do not need to find that the property was obtained from the same person who was deceived. This part of the third element will be satisfied as long as you find that the accused deceived someone, and that as a result the accused obtained the property.

The prosecution alleged that that was the case here. [*Insert prosecution evidence and/or arguments, identifying who it is alleged believed the representation and how that led to the accused obtaining the property.*]

The defence denied this, arguing [*insert defence evidence and/or arguments*].

It is only if you are satisfied that NOA made a false representation despite knowing it was false or probably false, and that s/he intended that representation would be acted upon, and that s/he obtained the property as a result of making that false representation, that this third element will be met. If any of these matters have not been proven beyond reasonable doubt, then NOA will be not guilty of obtaining property by deception.

Dishonesty

The fourth element that the prosecution must prove is that when the accused obtained the property, s/he was acting dishonestly.

In this context, "dishonesty" has a special legal meaning. The law says that people act dishonestly when they obtain property if they do not believe that they have a legal right to obtain that property.

In this case, the defence alleged that NOA did believe that s/he had a legal right to obtain the property. [*Describe defence evidence and/or arguments.*]

To prove this element, the prosecution must prove that NOA did not have this belief.

The issue here is whether the prosecution have proved that NOA did not believe s/he had a legal right to obtain the property. This is solely a question about NOA's state of mind about his/her legal entitlement to the property. This is not a question about whether or not NOA believed s/he was entitled to use deception to obtain the property. Even if NOA knew that s/he should not have obtained the property in the way that s/he did, s/he will only be guilty of obtaining property by deception if the prosecution prove that s/he did not believe s/he had a legal right to the property.

[*If the accused may have believed s/he had a moral right to take the property, add the shaded section.*]

The prosecution need only prove that NOA did not believe that s/he had a legal right to take the property. It is no defence for NOA to have believed that s/he had a moral right to the property.

[*If the accused's belief may have been incorrect or unreasonable, add the following darker shaded section.*]

It is important to note that NOA's belief does not need to have been correct, or even reasonable. However, the reasonableness of the accused's alleged belief is not irrelevant. In determining whether the prosecution have proved that NOA did not in fact believe s/he had a legal right to obtain the property, you may consider whether his/her asserted belief was reasonable in all the circumstances.

I want to reiterate that it is for the prosecution to prove that the accused did not believe that s/he had a legal right to obtain the property. It is not for the defence to prove that s/he did have such a belief.

In determining whether NOA did not have this belief, your sole focus should be on his/her state of mind at the time s/he [*describe relevant act*]. The issue is not whether you think s/he was right or wrong to do what s/he did, but whether s/he did not believe s/he had a right to obtain the property.

It is only if you are satisfied, beyond reasonable doubt, that the accused did not believe [*describe relevant belief*] that this fourth element will be met.

Summary

To summarise, before you can find NOA guilty of obtaining property by deception, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA obtained property that belonged to NOC; and

Two – that NOA intended to permanently deprive NOC of that property; and

Three – that NOA obtained the property by deception. That is:

- S/he made a false representation; and
- S/he knew that representation was false or probably false; and
- S/he intended that the false representation be acted upon; and

- S/he obtained the property as a result of making that false representation; and

Four – that NOA obtained the property dishonestly.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of obtaining property by deception.

Last updated: 3 December 2012

7.5.12.2 Checklist: Obtaining Property by Deception

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused obtained property belonging to another; and
2. The accused did so with the intention of permanently depriving the other of that property; and
3. The accused obtained the property by deception; and
4. The accused obtained the property dishonestly.

Obtaining Property Belonging to Another

1. Did the accused obtain property that belonged to another person?

Consider – Did the accused obtain ownership, possession or control of property belonging to another person?

If Yes, then go to 2

If No, then the accused is not guilty of Obtaining Property by Deception

Intention to Permanently Deprive

2. Did the accused intend to permanently deprive another person of that property?

Consider – Did the accused intend that the owner would never get the property back?

If Yes, then go to 3

If No, then the accused is not guilty of Obtaining Property by Deception

Deception

3. Did the accused obtain the property by deception?

3.1 Did the accused make a false representation?

Consider – Did the accused make the representation alleged by the prosecution. Was that representation false when it was made?

If Yes, then go to 3.2

If No, then the accused is not guilty of Obtaining Property by Deception

3.2 At the time of making the representation, did the accused know that the representation was false, or that it was probably false?

If Yes, then go to 3.3

If No, then the accused is not guilty of Obtaining Property by Deception

3.3 Did the accused intend that the false representation would be acted upon?

If Yes, then go to 3.4

If No, then the accused is not guilty of Obtaining Property by Deception

3.4 Did the accused obtain the property as a result of making the false representation?

Consider – Did the false representation cause a relevant person to give the accused ownership, possession or control of the property?

If Yes, then go to 4

If No, then the accused is not guilty of Obtaining Property by Deception

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Dishonesty

4. Did the accused obtain the property dishonestly?

Consider – Has the prosecution proved that the accused did not believe that he/she had a legal right to obtain the property?

If Yes, then the accused is guilty of Obtaining Property by Deception (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of Obtaining Property by Deception

Last updated: 4 June 2009

7.5.13 Obtaining a Financial Advantage by Deception

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Overview

1. It is an offence to obtain a financial advantage by deception (*Crimes Act 1958* s 82).
2. The offence has the following three elements:
   i) The accused obtained a financial advantage for himself or herself or another;
   ii) The accused used deceit to obtain the financial advantage; and
   iii) The accused obtained the financial advantage dishonestly (*Crimes Act 1958* s 82. See, e.g. *R v Vasic* (2005) 11 VR 380; *Anile v The Queen* [2018] VSCA 235R, [187]).

Relationship With Other Property Offences

3. The offence of obtaining a financial advantage by deception was created for cases where the accused dishonestly obtained credit or services – circumstances not covered by the offences of theft (*Crimes Act 1958* s 72) or obtaining property by deception (*Crimes Act 1958* s 81) (*R v Vasic* (2005) 11 VR 380).
4. Like the offences in ss 74, 75, 75A, 76, 77 and 81 of the *Crimes Act 1958*, the offence of obtaining a financial advantage by deception must be committed "dishonestly".
5. However, unlike those offences, s 82 does *not* require the offence to have been committed:
    - Against or in respect of property "belonging to another"; or
    - With the "intention of permanently depriving" a person of that property.

Obtaining a Financial Advantage

6. For the first element to be met, the jury must be satisfied that:
    - The accused *obtained* something; and
    - The thing obtained was a *financial advantage*.

Obtaining

7. The accused must have "obtained" a financial advantage (*Crimes Act 1958* s 82(1)).
8. This differs from theft, where the accused must have "appropriated" the property by adversely assuming any of the owner's rights (see 7.5.1 Theft).
9. The word "obtains" is not defined for the purposes of s 82.[1013] It should be given its ordinary meaning.
10. The accused does not need to have obtained the financial advantage for him or herself. This element will be satisfied if s/he obtained the financial advantage for another person (*Crimes Act 1958* s 82(1). See, e.g. *Richardson v Skells* [1976] Crim LR 448; *Anile v The Queen* [2018] VSCA 235R, [187]).
11. Where the accused deceives someone with the intention of obtaining a financial advantage, but fails to obtain the financial advantage, s/he may be guilty of attempting to obtain a financial advantage by deception (*R v Kalajdic* [2005] VSCA 160; *R v King* [1987] QB 547).

Financial Advantage

12. The thing that the accused obtained must have been a "financial advantage" (*Crimes Act 1958* s 82(1)).
13. The Act does not define "financial advantage". The words should be given their plain meaning, and should not be narrowly construed (*R v Walsh* (1990) 52 A Crim R 80; *Matthews v Fountain* [1982] VR 1045).
14. If the term "financial advantage" needs to be elaborated upon, then it occurs where a person obtains a more favourable economic, monetary or commercial position than otherwise (*Fisher v Bennett* (1987) 85 FLR 469, 472; *Taylor v The Queen* [2019] VSCA 162, [99]).

[1013] This is in contrast to the offence of obtaining property by deception (*Crimes Act 1958* s 81), for which "obtains" is defined to mean obtaining ownership, possession or control (see 7.5.12 Obtaining Property by Deception).

15. The term "financial advantage" was intended to be broader than the term "pecuniary advantage" (which is used in s 16 of the *Theft Act 1968* (UK)), and to cover at least all of the things covered by that term (*R v Vasic* (2005) 11 VR 380).

16. Thus, a "financial advantage" includes (but is not limited to) the following circumstances (which were covered by s 16 of the *Theft Act 1968* (UK) at the time s 82 was introduced):

    - When a debt or charge for which the accused is or may become liable (including one which is not legally enforceable) is reduced or in whole or part evaded or deferred;
    - When the accused is allowed to borrow by way of overdraft or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; and
    - When the accused is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting (*R v Vasic* (2005) 11 VR 380).

17. A financial advantage may include a situation where a person obtains the opportunity to earn remuneration in employment (*Taylor v The Queen* [2019] VSCA 162, [99]–[101]).

Evading Debts

18. A person obtains a financial advantage by evading a debt, even if the evasion is only temporary (*R v Vasic* (2005) 11 VR 380; *R v Turner* [1974] AC 357).

19. A financial advantage is obtained whenever a debt is deferred, no matter how poor the accused is. This is because the accused is relieved of a claim upon such money or ability to generate it as they may have, for the period of the deferral (*R v Vasic* (2005) 11 VR 380).

20. A financial advantage will therefore be obtained when a creditor is given a cheque which the debtor knows to be worthless, in pretended payment of the debt. In such circumstances, the debtor gains the advantage of having the debt deferred (*R v Vasic* (2005) 11 VR 380; *Matthews v Fountain* [1982] VR 1045).

21. A person will not be guilty of obtaining a financial advantage by deception simply because s/he cannot repay a debt. S/he will only be guilty if s/he evades the debt by deception (e.g. by falsely telling the debtor that s/he is not able to repay the debt) (*R v Vasic* (2005) 11 VR 380).

Deception

22. The second element requires the accused to have obtained the financial advantage by deception (*Crimes Act 1958* s 82(1)).

23. "Deception" has the same meaning as it does for the offence of obtaining property by deception (*Crimes Act 1958* s 82(2); *Smith v R* (1982) 7 A Crim R 437 (Vic CCA)).

24. See 7.5.12 Obtaining Property by Deception for further information concerning this element.

25. The judge must direct the jury about the need for unanimity on the particular deception used (*Magnus v R* (2013) 41 VR 612; *R v Brown* (1984) 79 Cr App R 115; *R v Holmes* [2006] VSCA 73).

Dishonesty

26. The third element requires the financial advantage to have been obtained "dishonestly" (*Crimes Act* 1958 s 82(1); *R v Salvo* [1980] VR 401).

27. This requirement is additional to the requirement that the financial advantage be obtained "by deception". The prosecution must prove that when the accused, by deception, obtained the financial advantage, s/he was acting dishonestly (*R v Salvo* [1980] VR 401; *Pollard v Cth DPP* (1992) 28 NSWLR 659).

28. See 7.5.12 Obtaining Property by Deception for information concerning this element.

Offences Committed by Bodies Corporate

29. The offence of obtaining property by financial advantage may be committed by a body corporate (*Crimes Act 1958* s 84).

30. Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, that person will also be guilty of the offence (*Crimes Act 1958* s 84(1)).

31. Where the affairs of the body corporate are managed by its members, the members may also be found guilty of the offence (if they acted in connection with their management function) (*Crimes Act 1958* s 84(2)).

Extraterritorial Offences

32. It is not necessary that the financial advantage was obtained in Victoria. Section 82 applies where there is a "real and substantial link" between the relevant act and Victoria *(Crimes Act 1958* s 80A).

33. The concept of a "real and substantial link" is defined in s 80A(2). It includes cases where:

    - A "significant part" of the conduct relating to, or constituting, the relevant act occurred in Victoria; or
    - The act was done with the intention that substantial harmful effects arise in Victoria, and such effects did arise.

34. The words in s 80A should be given their natural meaning (*R v Keech* (2002) 5 VR 312).

35. An act which forms an essential link in the chain of deception (rather than merely being part of the surrounding circumstances) is a "significant part" of the relevant conduct (*R v Keech* (2002) 5 VR 312).

Last updated: 28 August 2019

7.5.13.1 Charge: Obtaining a Financial Advantage by Deception

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The Elements

I must now direct you about the crime of obtaining a financial advantage by deception. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – the accused obtained a financial advantage.

Two – the accused obtained the financial advantage by deception.

Three – the accused obtained the financial advantage dishonestly.

I will now explain each of these elements in more detail.[1014]

[1014] If an element or part of an element is not in issue it should not be explained in full. Instead, the element should be explained briefly, and followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meet the element*], and you should have no difficulty finding this element proven."

Obtaining a Financial Advantage

The first element that the prosecution must prove is that the accused obtained a financial advantage.

In this case the prosecution alleged that NOA obtained the following financial advantage: [*describe financial advantage and prosecution evidence and/or arguments*].

[*If the accused did not obtain the financial advantage for him or herself, add the following shaded section.*]

You will notice that it is not alleged that the accused obtained a financial advantage for him/herself. That does not matter. This element will be satisfied if s/he obtained a financial advantage for another person.

The defence denied that [*describe defence argument, e.g.* "that any financial advantage was obtained" *or* "that what the accused obtained was a "financial advantage"". *Insert defence evidence.*]

[*If there is an issue about whether a "financial advantage" was obtained, add the following shaded section.*]

In determining whether the accused obtained a financial advantage, you should give the words "financial advantage" their plain meaning. They cover any type of financial advantage, including [*insert relevant example*]. This means that the first element will be met if you are satisfied that [*explain findings necessary for the relevant accused to have obtained a financial advantage*].

It is for you to determine, based on all the evidence, whether NOA obtained a financial advantage. If you are not satisfied that s/he did, then s/he will be not guilty of obtaining a financial advantage by deception.

Deception

The second element that the prosecution must prove is that the accused obtained the financial advantage by deception.

There are four parts to this element, all of which must be proven beyond reasonable doubt:

- First, the accused must have made a false representation;
- Second, the accused must have known the representation was false or was probably false when s/he made it;
- Third, the accused must have intended that the false representation be acted upon; and
- Fourth, the accused must have obtained the financial advantage as a result of making that false representation.

I will now explain each of these parts in more detail.

False Representation

For the first part of this element to be met the accused must have made a false representation.

The representation can have been made in words or by conduct, and does not need to have been explicit. That is, you may be able to infer the representation from the accused's words or conduct. You will remember what I have told you about inferences.[1015]

[*If it is alleged that the representation only became false after it was made, add the following shaded section.*]

[1015] This charge assumes that the jury has already been charged about inferences. If this has not been done, the charge will need to be modified accordingly.

The representation must have been false at the time it was made. This part of the second element will not be satisfied if the representation was true at that point in time, but later became false.[1016]

In this case it is alleged that the accused falsely represented that [*describe alleged false representation*].[1017]

[*If the representation is to be implied from a promise, add the following shaded section.*]

You will notice that although it is alleged that the accused promised [*describe promise*], that promise is not the representation that I just mentioned. Instead, the alleged representation that you must focus on is [*describe implicit representation*].

This is because the law says that the false representation must be about existing or past facts. It cannot be a representation about something that is going to happen in the future.

This part of the second element will therefore not be satisfied simply because a person makes a promise which they do not keep. A broken promise is not a false representation about an existing of past fact.

However, when a person makes a promise s/he may make an implicit or unspoken representation that s/he intends to act in a certain way. For example, s/he may represent that s/he intends to keep the promise by performing specific actions. As such a representation is about that person's present intentions, it meets the requirement that the representation be about an existing fact.

So in this case, it is not enough for you to find that NOA promised to [*describe promise*] and broke that promise. You must also be able to infer, beyond reasonable doubt, that when NOA made the promise, s/he was stating his/her current intention to [*describe alleged intention*] – and that that representation was false.

[*Insert prosecution evidence and/or arguments concerning the making of the representation and its falsity*].

[*If the defence denied that the accused made the alleged representation, add the following shaded section.*]

The defence denied that NOA made that representation, arguing [*insert defence evidence and/or arguments*].

[*If the defence denied that the representation was false, add the following shaded section.*]

While the defence agreed that NOA made that representation, they denied that it was false at the time it was made. [*Insert defence evidence and/or arguments*].

It is for you to determine whether or not NOA represented that [*describe representation*], and whether that representation was false when it was made. It is only if you are satisfied that s/he did make a false representation that this part of the second element will be satisfied.

[1016] If it is alleged that the accused knew that his or her original representation had become false, and kept silent about it – thereby implicitly representing that the situation remained the same – it will be necessary to explain that it is that implicit representation that forms the basis of the charge, not the original representation. See 7.5.12 Obtaining Property by Deception for guidance.

[1017] If the representation is to be implied from a promise, care must be taken to refer to the accused's implicit representation about his or her intentions when s/he made the promise, rather than the promise itself: see 7.5.12 Obtaining Property by Deception.

Knowledge of Falsity/Recklessness

For the second part of this element to be met the accused must have known that the representation was false or was probably false when s/he made it.

It is not sufficient for NOA to have known that it was possible that the representation was false. S/he must have at least known that it was probably false.

In determining this part of the element, you must be satisfied that NOA him/herself knew of the likelihood that the representation was untrue. It is not enough that you or a reasonable person would have recognised that probability in the circumstances.

In this case, the following evidence is relevant to your assessment of NOA's state of mind: [*Identify relevant evidence and the inferences to be drawn from that evidence*].

Intention that Representation be Acted Upon

For the third part of this element to be met the accused must have intended that the false representation be acted upon by NOC.

If you consider that it is reasonably possible that NOA did not intend NOC to act upon that representation and thereby permit NOA to obtain the financial advantage, then NOA will not be guilty of this offence.

[*Insert any relevant evidence or arguments*.]

Causation

For the fourth part of this element to be met the accused must have obtained the financial advantage as a result of making the false representation.

In this case, that requires you to find that NOC would not have acted in the way s/he did had it not been for NOA's representation that [*describe representation*].

[*If it is not alleged that the financial advantage was obtained from the same person who was deceived, add the following shaded section.*]

In this case you will notice that NOA did not obtain the financial advantage directly from NOC. That does not matter. You do not need to find that the financial advantage was obtained from the same person who was deceived. This part of the second element will be satisfied as long as you find that the accused deceived someone, and that as a result the accused obtained a financial advantage.

The prosecution alleged that that was the case here. [*Insert prosecution evidence and/or arguments, identifying who it is alleged believed the representation and how that led to the accused obtaining the financial advantage*.]

The defence denied this, arguing [*insert defence evidence and/or arguments*].

It is only if you are satisfied that NOA made a false representation despite knowing it was false or probably false, and that s/he *intended* that representation would be acted upon, and that s/he obtained the financial advantage as a result of making that false representation, that this second element will be met. If any of these matters have not been proven beyond reasonable doubt, then NOA will be not guilty of obtaining a financial advantage by deception.

Dishonesty

The third element that the prosecution must prove is that when the accused obtained the financial advantage, s/he was acting dishonestly.

In this context, "dishonesty" does not have its ordinary meaning. The law says that a person acts dishonestly when obtaining a financial advantage if that person does not believe that he or she has a legal right to obtain that financial advantage.

In this case, the defence alleged that NOA did believe that s/he had a legal right to obtain the financial advantage. [*Describe defence evidence and/or arguments.*]

To prove this element, the prosecution must prove that NOA did not have this belief.

The issue here is whether the prosecution have proved that NOA did not believe s/he had a legal right to obtain the financial advantage. This is solely a question about NOA's state of mind about his/her legal entitlement to the financial advantage. This is not a question about whether or not NOA believed s/he was entitled to use deception to obtain the financial advantage. Even if NOA knew that s/he should not have obtained the financial advantage in the way that s/he did, s/he will only be guilty of obtaining financial advantage by deception if the prosecution prove that s/he did not believe s/he had a legal right to the financial advantage.

[*If the accused may have believed s/he had a moral right to the financial advantage, add the shaded section.*]

The prosecution need only prove that NOA did not believe that s/he had a legal right to the financial advantage. It is no defence for NOA to have believed that s/he had a moral right to the financial advantage.

[*If the accused's belief may have been incorrect or unreasonable, add the following shaded section.*]

It is important to note that NOA's belief does not need to have been correct, or even reasonable. However, the reasonableness of the accused's alleged belief is not irrelevant. In determining whether the prosecution have proved that NOA did not in fact believe s/he had a legal right to obtain the financial advantage, you may consider whether his/her asserted belief was reasonable in all the circumstances.

I want to reiterate that it is for the prosecution to prove that the accused did not believe that s/he had a legal right to obtain the financial advantage. It is not for the defence to prove that s/he did have such a belief.

In determining whether NOA did not have this belief, your sole focus should be on his/her state of mind at the time s/he [*describe relevant act*]. The issue is not whether you think s/he was right or wrong to do what s/he did, but whether s/he did not believe s/he had a right to obtain the financial advantage.

It is only if you are satisfied, beyond reasonable doubt, that the accused did not believe [*describe relevant belief*] that this third element will be met.

Summary

To summarise, before you can find NOA guilty of obtaining a financial advantage by deception, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA obtained a financial advantage; and

Two – that NOA obtained the financial advantage by deception. That is:

- S/he made a false representation; and
- S/he knew that representation was false or probably false; and
- S/he intended that the false representation be acted upon; and
- S/he obtained the financial advantage as a result of making that false representation; and

Three – that NOA did not believe that s/he had a legal right to obtain the financial advantage.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of obtaining a financial advantage by deception.

Last updated: 3 December 2012

7.5.13.2 Checklist: Obtaining a Financial Advantage by Deception

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Three elements the prosecution must prove beyond reasonable doubt:

36. The accused obtained a financial advantage; and
37. The accused obtained that financial advantage by deception; and
38. The accused obtained the financial advantage dishonestly.

Obtaining a Financial Advantage

1. Did the accused obtain a financial advantage?

If Yes, then go to 2

If No, then the accused is not guilty of Obtaining a Financial Advantage by Deception

Deception

2. Did the accused obtain the financial advantage by deception?

2.1 Did the accused make a false representation?

Consider – Did the accused make the representation alleged by the prosecution? Was that representation false when it was made?

If Yes, then go to 2.2

If No, then the accused is not guilty of Obtaining a Financial Advantage by Deception

2.2 At the time of making the representation, did the accused know that the representation was false, or that it was probably false?

If Yes, then go to 2.3

If No, then the accused is not guilty of Obtaining a Financial Advantage by Deception

2.3 Did the accused intend that the false representation would be acted upon?

If Yes, then go to 2.4

If No, then the accused is not guilty of Obtaining a Financial Advantage by Deception

2.4 Did the accused obtain the financial advantage as a result of making the false representation?

Consider – Did the false representation cause a relevant person to give the accused ownership, possession or control of the property?

If Yes, then go to 3

If No, then the accused is not guilty of Obtaining a Financial Advantage by Deception

Dishonesty

3. Did the accused obtain the financial advantage dishonestly?

Consider – Has the prosecution proved that the accused did not believe that he/she had a legal right to obtain the financial advantage?

If Yes, then the accused is guilty of Obtaining a Financial Advantage by Deception (as long as you also answered Yes to Questions 1 and 2)

If No, then the accused is not guilty of Obtaining a Financial Advantage by Deception

Last updated: 4 June 2009

7.5.14 Making or Using a False Document

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Offences

1. In 1988–89 the common law offences of forgery and uttering were replaced by the statutory offences contained in *Crimes Act 1958* s 83A.[1018] This section now codifies the offences arising out of the making and use of false documents (*R v Gatzka* (2004) 9 VR 459).
2. Section 83A creates a series of offences which include:
    - Making a false document (s 83A(1));
    - Using a false document (s 83A(2));
    - Making a copy of a false document (s 83A(3)); and
    - Using a copy of a false document (s 83A(4)).[1019]
3. Due to the substantial overlap in elements between the offences, this commentary addresses all of them. They are, however, discrete offences, and the judge must correctly instruct the jury on the specific offence alleged in the indictment.

Elements

4. Each offence has five elements, which address the following issues:

    i) The creation or use of the document;

[1018] Section 83A commenced operation on 1 June 1988. The offences of forgery and uttering were abolished on 25 June 1989 (but continue to apply to offences committed before that date) (*Crimes Act 1958* s 83B).

[1019] Four further offences are created by ss 83A(5)–(5C). It is not anticipated that those offences will be addressed in the Charge Book. However, some aspects of this commentary (e.g. the meaning of "false") will be relevant to those offences.

ii) The false nature of the document;

iii) The accused's knowledge of the falsity;

iv) The accused's intention that someone be induced to accept the document as genuine; and

v) The accused's intention that acceptance of the document as genuine will result in prejudice to a person.

5. It is not necessary to show that the accused achieved his or her intended purpose. The gist of the offence lies in intention, rather than consequence. The offence is similar to inchoate offences, in that it punishes preparatory acts (*R v Ceylan* (2002) 4 VR 208; *Attorney-General's Reference (No 1 of 2000)* [2001] 1 WLR 331; *R v Garcia* (1988) 87 Cr App R 175; *R v O'Hara* [2005] VSCA 62).

Making or using a document

6. The requirements of the first element differ depending on which offence has been charged:
    - For two of the offences (ss 83A(1) and (3)) the accused must have "made" something, while for the other offences (ss 83A(2) and (4)) he or she must have "used" something; and
    - For two of the offences (ss 83A(1) and (2)) the thing made or used must have been an "original document", while for the other offences (ss 83A(3) and (4)) it must have been a "copy of a document".

When does a person "make" or "use" a document?

7. A person "makes" a document if he or she is ultimately responsible for it coming into existence (*Nikolaidis v R* [2008] NSWCCA 323 (Simpson J)).

8. A person "makes" a new document when he or she alters an existing document (Crimes Act 1958 s 83A(7). See also *Nikolaidis v R* [2008] NSWCCA 323; *R v Ondhia* [1998] 2 Cr App R 150).

9. A person "uses" a document when he or she deploys the document (*Sultan v R* [2008] NSWCCA 175).

10. Mere presence at the time a document is deployed by another does not constitute "use". There must be a direct link between the accused and the deployment (*Sultan v R* [2008] NSWCCA 175).

When is a document "copied"?

11. A person "copies" a document by making an exact replica of that document.

12. If a person makes any modifications to a document in the course of copying it, he or she has not made a copy. He or she has made an original document and should be charged with an offence under s 83A(1) (*Nikolaidis v R* [2008] NSWCCA 323; *R v Ondhia* [1998] 2 Cr App R 150. See also *Crimes Act 1958* s 83A(7)).

13. Thus, in deciding whether the accused has made or used an original document or a copy of a document, the fact that the document appears to be a copy is not determinative. The question is whether the accused made or used a copy of an existing document, or created a false copy of a document him or herself. This may depend on the way in which the accused used or intended to use the document (see *Nikolaidis v R* [2008] NSWCCA 323; *R v Ondhia* [1998] 2 Cr App R 150; *R v Harris* [1966] 1 QB 184).

What is a "document"?

14. A "document" includes:

    (a) any book, map, plan, graph or drawing;

    (b) any photograph;

    (c) any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever;

(d) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;

(e) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

(f) anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them (Interpretation of Legislation Act 1984 s 38).

15. This definition is substantially broader than the common law definition of "document", or the term "instrument" that is used in the section in the *Forgery and Counterfeiting Act 1981* (UK) on which s 83A is based. Cases from other jurisdictions must therefore be treated with caution.

16. This definition may therefore include:

- A painter's signature in a painting (c.f. *R v Closs* (1858) Dears & B 460);
- Data in a computer system (see, e.g. *DPP v Murdoch* [1993] 1 VR 406).

False documents

17. The second element the prosecution must prove is that the document the accused made or used (either the original or the copy, depending on the offence charged) was "false".

18. Section 83A(6) exhaustively defines the ways in which a document may be "false" for the purpose of these offences. According to this section, a document is "false" if it purports:

(a) to have been made in the form in which it is made by a person who did not in fact make it in that form; or

(b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or

(c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or

(d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or

(e) to have been altered in any respect by a person who did not in fact alter it in that respect; or

(f) to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or

(g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or

(h) to have been made or altered by an existing person who did not in fact exist.

19. Where the accused is charged with "making" a false document by altering an existing document, it does not matter if that original document was already false. If the accused alters it so as to make it "false" in any of the respects outlined above, he or she will have made a false document (*Crimes Act 1958* s 83A(7)).

The document must "tell a lie about itself"

20. A document is not "false" simply because it contains untruths. To be "false", the document must purport to be something which it is not (*R v Ceylan* (2002) 4 VR 208; *Brott v R* (1992) 173 CLR 426; *HKSAR v Muoi* [2001] HKCA 95).

21. While traditionally this has been referred to as a requirement that the document must "tell a lie about itself", that phrase is best avoided as it can be unhelpful and misleading (*Brott v R* (1992) 173 CLR 426 (Deane J)).[1020]

22. The distinction between a document that contains falsehoods and a document that purports to be something which it is not may, in some cases, depend on the manner in which the document was created (see, e.g. *Attorney-General's Reference (No 1 of 2000)* [2001] 1 WLR 331).[1021]

Types of falsity

Non-authorised documents

23. One way in which a document will be "false" is if it purports to have been made in the form or terms in which it is made, on the authority of a person who did not in fact authorise its making in that form or terms (*Crimes Act 1958* ss 83A(6)(b), (d)).

24. This meaning of "false" may be relevant where a document is created in the name of a company. For example, where an employee of a company is not authorised to issue an invoice or receipt in the name of that company, but nevertheless does so, he or she will have made a false document (*DPP v Logan-Pye* [2007] NSWSC 1492).

False circumstances

25. Another way in which a document will be "false" is if it purports to have been made or altered "in circumstances in which it was not in fact made or altered" (s 83A(6)(g)).

26. This definition of falsity applies where:

    - There are circumstances that need to exist before a document can properly be made or altered; and
    - Those circumstances did not exist at the time the document was made or altered (*Attorney-General's Reference (No 1 of 2000)* [2001] 1 WLR 331).

27. For example, the following documents have been held to be "false" under s 83A(6)(g):

    - A valuation of non-existent goods (as the goods needed to exist before the valuation could properly be made) (*R v Donnelly* [1984] 1 WLR 1017);
    - A fake employment reference (as an employment relationship needed to exist before a reference could be made) (Secretary for *Justice v Keung* [2007] HKCA 392; *Attorney-General's Reference (No 1 of 2000)* [2001] 1 WLR 331);
    - A document that purported to be made in the presence of people who were not present (*R v Warneford* [1994] Crim LR 753. See also *Brott v R* (1992) 173 CLR 426 at 443).

Documents made by a non-existent person

28. A third way in which a document will be "false" is if it purports "to have been made or altered by an existing person who did not in fact exist" (s 83A(6)(h)).

[1020] For example, Deane J notes that a biased document that describes itself as "unbiased" may "tell a lie about itself", but is not a "false" document for the purpose of this section.

[1021] For example, in *Attorney-General's Reference (No 1 of 2000)* [2001] 1 WLR 331 a bus driver operated a machine that created an automated record suggesting that someone else had been driving at a certain time, when in fact he had been. It was held that if the accused had hand-written a record wrongly noting that someone else had been driving at that time, that would not have been a "false" document. However, because of the use of the machine, the driver had purported to make a document in circumstances in which it was not in fact made, and so fell within the scope of the English equivalent of s 83A(6)(g).

29. It is not clear precisely what documents are covered by this meaning of "false". While it would appear to include documents made using a false identity, an alias or nom de plume, decided cases do not support that proposition (see *R v More* [1987] 1 WLR 1578; *R v Fischetti & Sharma* (2003) 192 FLR 119; *Brott v R* (1992) 173 CLR 426 at 446).

The false document must be clearly identified

30. The indictment should clearly identify the document that is said to be false. The prosecution cannot expand its case to rely on the falsity of other documents that are attached or annexed to the document specified in the indictment (e.g. supporting documentation for a loan application) (*R v Ceylan* (2002) 4 VR 208).

Directing the jury about the meaning of "false"

31. It is not appropriate for a judge to merely read out the text of s 83A(6), or provide the jury with a copy of the statute, and expect the jury to choose an appropriate form of falsity. The judge must instruct the jury on how it may find that a document is "false" (*R v O'Hara* [2005] VSCA 62; *Nikolaidis v R* [2008] NSWCCA 323).

32. The judge should only direct the jury about the types of falsity that are relevant to the circumstances of the case (*R v O'Hara* [2005] VSCA 62; *Nikolaidis v R* [2008] NSWCCA 323).

33. In cases where the nature of the alleged falsity is clear, the judge may instruct the jury that if they accept the prosecution case that the accused fabricated the document, and that the document was not what it purported to be, then they may find this element proven (*R v O'Hara* [2005] VSCA 62).

Knowledge that the Document is False

34. The third element the prosecution must prove is that the accused knew about the falsity (*Crimes Act 1958* s 83A; *R v O'Hara* [2005] VSCA 62; *Nikolaidis v R* [2008] NSWCCA 323).

35. Precisely which document the accused must have known was false will vary depending on the offence charged:

    - Where the offence involves the accused making or using an original document (ss 83A(1) and (2)), the prosecution must prove that the accused knew that that document was false;
    - Where the offence involves the accused making or using a copy of a document (ss 83A(3) and (4)), the prosecution must prove that the accused knew that the original document (i.e., the document that was copied) was false.

Intention

36. The fourth and fifth elements both focus on the accused's intention:

    - The fourth element requires the accused to have intended that somebody (the "victim") would be induced to accept the false document as genuine;
    - The fifth element requires the accused to have intended that, due to accepting the document as genuine, the victim would act (or not act) in a way that prejudices somebody.

37. The prosecution must prove that these intentions existed at the time the accused made or used the document, depending on which offence is charged (*R v Gatzka* (2004) 9 VR 459; *R v Ondhia* [1998] 2 Cr App R 150; *R v Tobierre* [1986] 1 WLR 125).

Intention that the document be accepted as genuine

38. The requirements of the fourth element differ depending on whether the accused is charged with making or using a false document:

- Where the accused is charged with making the document (ss 83A(1) and (3)), the prosecution must prove that he or she did so with the intention that someone (including, potentially, the accused him or herself) would use it to induce another person to accept it as genuine (see *R v Utting* [1987] 1 WLR 1375; *R v Johnson* [1997] 8 Archbold News 1 (CA)).
- Where the accused is charged with using the document (ss 83A(2) and (4)), the prosecution must prove that he did so with the intention of personally inducing another person to accept it as genuine.

39. This element may be satisfied where the accused intended to cause a machine to respond to a false document (e.g. by using a false credit card or ATM card) (*Crimes Act 1958* s 83A(9)(a)).

40. The prosecution does not need to prove that the accused intended that any particular person would accept the document as genuine. The intention may be directed generally, at prospective victims of the accused's plan (*Crimes Act 1958* s 83A(10); *R v O'Hara* [2005] VSCA 62).

41. Where the accused is charged with making a false document:
    - The prosecution does not need to prove that the accused knew precisely how the document was going to be used. For example, this element may be met even if the accused was uncertain, when making the document, about how it was going to be provided to the intended victim; and
    - This element may be met where the accused planned to communicate the false document by fax. In such a case, the accused may be found to have intended to induce the recipient to accept the original false document (c.f. the faxed copy) as genuine, even though the recipient would never actually see that version of the document (*R v Ondhia* [1998] 2 Cr App R 150).

Intention that the victim act to somebody's prejudice

42. The fifth element requires the accused to have intended that, due to accepting the document as genuine, or as a copy of a genuine document, the victim would act (or not act) in a way that prejudices somebody other than the accused (*Crimes Act 1958* s 83A(1)–(4); *Nikolaidis v R* [2008] NSWCCA 323; *R v Gatzka* (2004) 9 VR 459; *R v Garcia* (1988) 87 Cr App R 175; *R v Utting* [1987] 1 WLR 1375).

43. Where it is alleged that the accused intended that the victim not act in a certain way, it must be proved that he or she intended that omission to cause prejudice to somebody. It is not an offence to make or use a false document with the intention of inducing a person to refrain from causing prejudice (*R v Utting* [1987] 1 WLR 1375).

44. This element will be satisfied where it is intended that a machine will respond in a manner which, if a person did so, would be to a person's prejudice (*Crimes Act 1958* s 83A(9)(b)).

Meaning of "prejudice"

45. The meaning of "prejudice" is defined in *Crimes Act 1958* s 83A(8):

For the purposes of this section, an act or omission is to a person's prejudice if, and only if, it is one that, if it occurs:

(a) will result–

(i) in the person's temporary or permanent loss of property; or

(ii) in the person's being deprived of an opportunity to earn remuneration or greater remuneration; or

(iii) in the person's being deprived of an opportunity to obtain a financial advantage otherwise than by way of remuneration; or

(b) will result in any person being given an opportunity-

(i) to earn remuneration or greater remuneration from the first-mentioned person; or

(ii) to obtain a financial advantage from the first-mentioned person otherwise than by way of remuneration; or

(c) will be the result of the person's having accepted a false document as genuine, or a copy of a false document as a copy of a genuine one, in connection with the person's performance of a duty.

46. This definition is exhaustive (*R v Gatzka* (2004) 9 VR 459).

Prejudice in connection with a duty

47. To prove that the accused intended to cause the kind of prejudice specified in s 83A(8)(c) (prejudice in connection with a duty), the prosecution must prove that the accused intended that:
    - The victim would accept the document as genuine; and
    - As a result of accepting the document as genuine, the victim[1022] would perform (or fail to perform) his or her duties in a particular way (*R v Utting* [1987] 1 WLR 1375).
48. This type of prejudice primarily (if not exclusively) concerns acts or omissions which represent a deviation from the victim's existing duties (*DPP v Murdoch* [1993] 1 VR 406).
49. Consequently, there may be no prejudice where the victim was already legally bound to commit the act which the accused intended to induce through the use of the false document (see, e.g. *DPP v Murdoch* [1993] 1 VR 406).
50. Where it is alleged that there was a pre-existing duty to commit the relevant act, care must be taken to examine the precise scope of the legal obligation. It is possible that the victim will only be legally bound to commit the relevant act if certain requirements are satisfied.[1023] Attempting to circumvent those requirements through the use of a false document may constitute an intention to cause prejudice (see, e.g. *R v Winston* [1999] 1 Cr App R 337).

[1022] Contrary to the situation with other forms of prejudice (see below), where the prosecution relies on the definition of prejudice in s 83A(8)(c), the person who is induced to perform an act or omission (the victim) must be the person who performs the duty (*R v Winston* [1999] 1 Cr App R 337).

[1023] For example, while the accused may be entitled to payment of a certain benefit, he or she may only be entitled to that payment upon provision of the appropriate documentation (see *R v Winston* [1999] 1 Cr App R 337).

Prejudice "will result"

51. The use of the words "will result" in the definition of prejudice means that it is not sufficient for the accused to intend to induce an act or omission that, if it occurs, may cause prejudice. The accused must intend to induce an act or omission that, if it occurs, must result in prejudice (*R v Garcia* (1988) 87 Cr App R 175).

52. It is not, however, necessary to show that the false document was successfully used, or that successful use was imminent or even likely. The focus of the offence is on the creation or use of false documents with the prescribed intention, rather than the outcome of giving effect to that intention (*Brott v R* (1992) 173 CLR 426; *R v Ondhia* [1998] 2 Cr App R 150; *R v O'Hara* [2005] VSCA 62).

53. The fact that the document succeeded in causing prejudice may be used as evidence of the accused's intention. Depending on the circumstances, the jury may be able to infer the requisite intention from that fact (*Brott v R* (1992) 173 CLR 426; *R v Ondhia* [1998] 2 Cr App R 150; *R v O'Hara* [2005] VSCA 62).

The victim may not be the person prejudiced

54. Unless the accused intends to cause prejudice in connection with a duty (see above), the person who it is intended will be prejudiced does not need to have been the victim (i.e., the person who it is intended will be induced to accept the document as genuine). This element may be met where it is intended that the victim act (or not act) in a way that prejudices a third party (*Crimes Act 1958* s 83A(1)–(4)).

55. However, the accused must intend that prejudice will be caused to another person. This element will not be met where the accused intends to cause prejudice to him or herself (*R v Utting* [1987] 1 WLR 1375).

56. The prosecution must identify the person who it is intended will be prejudiced. This can be done by either nominating a specific individual, or by specifying a certain class of people who will be prejudiced if they act (or fail to act) due to accepting the document as genuine (see, e.g. *R v O'Hara* [2005] VSCA 62).[1024]

57. Where a class of people is specified, the prosecution must show that the accused intended that all the people in that class will inevitably suffer prejudice if they act (or fail to act) in reliance on the false document. It is not sufficient that they may suffer such prejudice (*R v Garcia* (1988) 87 Cr App R 175).

58. The judge must clearly direct the jury about:

    - Which person (or people) the accused intended would be induced to accept the false document as genuine; and
    - Which person (or people) the accused intended would be prejudiced by acceptance of the document (*Nikolaidis v R* [2008] NSWCCA 323).

Need for a causal connection

59. The accused must have intended that the victim would act (or not act) to a person's prejudice "by reason of" accepting the document as genuine, or as a copy of a genuine document. This requires the accused to have intended that acceptance of the false document would cause that prejudice to result.

Directing the jury about prejudice

60. When directing the jury about this element, a judge should not read out the whole of s 83A(8) and leave it to the jury to identify which forms of prejudice are relevant in the case. He or she should:

[1024] For example, where the accused has falsely created documents designed to convince prospective purchasers about the provenance of an item that is for sale, the prosecution may identify the prospective purchasers as the people who it is intended will be prejudiced (see *R v O'Hara* [2005] VSCA 62).

- Direct the jury only about the particular forms of prejudice that are relevant in the case; and
- Explain how those forms of prejudice may be relevant in the case (*R v O'Hara* [2005] VSCA 62).

61. As the definition of prejudice in s 83A(8) is exhaustive, the judge must not specify any forms of harm that are outside that definition (*R v Garcia* (1988) 87 Cr App R 175).

No Need to Prove Dishonesty

62. Unlike offences such as theft and obtaining property by deception, making or using a false document does not require proof of a dishonest intent (*R v Gatzka* (2004) 9 VR 459).

63. The lack of any need to prove dishonesty means that the accused cannot rely on a defence of claim of right (*R v Gatzka* (2004) 9 VR 459).

64. However, in exceptional circumstances, the existence of a claim of right may be relevant to proof of the fifth element (compare *R v Gatzka* (2004) 9 VR 459 and *Attorney-General's Reference (No 1 of 2001)* [2003] 1 WLR 395. See also *DPP v Murdoch* [1993] 1 VR 406; *R v Winston* [1999] 1 Cr App R 337).

Last updated: 3 June 2011

7.5.14.1 Charge: Make False Document

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This charge should be used when the accused is charged with making a false document under *Crimes Act 1958* s 83A(1).

The charge may be adapted if the accused is charged with making a copy of a false document under *Crimes Act 1958* s 83A(3).

The Elements

I must now direct you about the crime of making a false document. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – That the accused made a document;

Two – That the document the accused made was false;

Three – That the accused knew that s/he was making a false document;

Four – That the accused intended that somebody would use the document to deceive another person to accept that it was genuine;

Five – That the accused intended that, as a result of accepting the document as genuine, that person would act in a way that prejudices somebody.[1025]

I will now explain each of these elements in more detail.[1026]

[1025] Where the prosecution alleges that the accused intended that a person would cause prejudice by failing to act, the description (and discussion) of this element should be modified.

[1026] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

The Accused Made a Document

The first element that the prosecution must prove is that the accused made a document.

[*If it is alleged that the accused altered an existing document, add the following shaded section.*]

This does not require the accused to have created a new document from scratch. The law says that any time a person alters an existing document, he or she "makes" a new document.

In this case it is alleged that the accused made [*identify document*]. I direct you as a matter of law that [*describe document, e.g.* "a photograph"] is a document.[1027] This element will therefore be satisfied if you find that [*identify document*] was made by NOA.

[*Summarise relevant evidence and arguments.*]

The Document was False

The second element that the prosecution must prove is that the document NOA made was false.

The law says that a document is not "false" merely because it contains untrue or incorrect information. To be "false" for the purposes of this offence, the document must purport to have been:

[*Select the relevant form*[*s*] *of falsity from the list below. Only include types of falsity that are relevant to the circumstances of the case:*

- Made in the *form* in which it was made *by a person* who did not in fact make it in that form;
- Made in the *form* in which it was made *on the authority of a person* who did not in fact authorise it to be made in that form;
- Made in the *terms* in which it was made *by a person* who did not in fact make it in those terms;
- Made in the *terms* in which it was made *on the authority of a person* who did not in fact authorise it to be made in those terms;
- *Altered* in any respect *by a person* who did not in fact alter it in that respect;
- *Altered* in any respect *on the authority of a person* who did not in fact authorise it to be altered in that respect;
- Made or altered on a *date* on which it was not in fact made or altered;
- Made or altered at a *place* at which it was not in fact made or altered;
- Made in *circumstances* in which it was not in fact made or altered;
- Made or altered by a *person who did not in fact exist*.]

The word "purports" means "pretends". So what the prosecution must prove is that the document pretends to be something that it is not. In this case, the prosecution argued that [*describe relevant document*] is "false" because it pretends [*describe relevant form of falsity in terms of the facts of the case, e.g.* "to have been made by John Smith"] when in fact [*describe true state of affairs, e.g.* "it was made by the accused"].

[*If it is alleged that the accused altered a existing document that may already have been false, add the following shaded section.*]

[1027] This charge is based on the assumption that it is clear that the relevant item is a "document". It should be adapted if that matter is in dispute. See 7.5.14 Making or Using a False Document for guidance on the meaning of the term "document".

It does not matter if the document already purported to be something that it was not before the accused altered it. If s/he altered it to make it false in some other respect, s/he will have made a "false document".

[*Summarise relevant evidence and arguments.*]

The Accused Knew the Document was False

The third element that the prosecution must prove is that, when the accused made the [*identify document*], s/he knew that s/he was making a false document.

For this element to be met, it is not enough for the prosecution to prove that NOA should have known that s/he was making a false document. They must prove that NOA was aware that the document s/he was making was false.

[*Summarise relevant evidence and arguments.*]

Intention that the Document be Accepted as Genuine

The fourth element that the prosecution must prove is that, when the accused made the false document, s/he intended to use it to deceive someone to accept that it was genuine, or intended that someone else would do so.

[*If the accused intended to induce a machine to accept it as genuine, add the following shaded section.*]

The law says that this includes intending to cause a machine to accept the document as genuine.

[*If it is not alleged that accused intended to induce a particular person, add the following shaded section.*]

The prosecution does not need to prove that the accused intended that any particular person would be deceived into accepting the document was genuine. The intention may be directed generally, at prospective victims of his or her plan.

In this case it is alleged that when NOA made the [*identify document*], s/he intended that he/she/NO3P would use it to deceive [*identify intended victim or class of victims*] to accept that it was genuine.

[*Summarise relevant evidence and arguments.*]

Intention that the Victim Act to Somebody's Prejudice

The fifth element also focuses on the accused's intention. The prosecution must prove that s/he intended that [*describe intended victim or class of victim of the* deception] would, as a result of accepting the document as genuine, act to somebody's prejudice.[1028]

The term "prejudice" has a technical legal meaning. An act will prejudice someone if it will:

[*Select and explain the relevant form*[*s*] *of prejudice from the list below. Only include types of prejudice that are relevant to the circumstances of the case:*

- Result in their temporary or permanent loss of property;
- Result in them being deprived of an opportunity to [earn *remuneration*/earn *greater remuneration*/obtain a *financial advantage*];

[1028] Where the accused intends that the victim of the deception would act to his or her own prejudice, the judge may tell the jury that "the accused intended that, due to accepting the document as genuine, a person would act to his/her prejudice."

- Result in any other person being given an opportunity to [earn remuneration/earn greater remuneration/obtain a financial advantage] from them;
- Be the result of them having accepted a false document as genuine in connection with his or her *performance of a duty*.]

The person the accused intended would be prejudiced may be the same person s/he intended would be deceived into accepting the document was genuine, or may be someone else.

[*If the accused intended to cause a machine to respond to a document, add the following shaded section.*]

The law says that this element will be satisfied if the accused intended to cause a machine to respond in a manner which, if a person did so, would be to that person's prejudice.

[*If it is not alleged that accused intended that a particular person would be prejudiced, add the following shaded section.*]

The prosecution does not need to prove that the accused intended that any particular person would be prejudiced. The intention may be directed generally, at prospective victims of his or her plan.

For this element to be satisfied, it is not sufficient for the accused to have intended that someone would act in a way that may cause prejudice. The accused must intend that someone would act in a way that must result in prejudice.

However, that does not mean that you must find that someone actually was prejudiced as a result of accepting the document as genuine. The focus here is on the accused's intention at the time s/he made the document. If s/he intended that, due to accepting the document as genuine, a person would act in a way that would prejudice somebody, this element will be met regardless of whether that in fact happened.

In this case, it is alleged that NOA intended that, as a result of accepting that [*identify document*] was genuine, [*identify intended victim*] would act in a way that would prejudice [him/herself/NO3P], because it would result in [*explain nature of prejudice*].

[*Summarise relevant evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of making a false document the prosecution must prove to you beyond reasonable doubt:

One – That NOA made a document;

Two – That the document NOA made was false;

Three – That NOA knew that s/he was making a false document;

Four – That NOA intended that [s/he/*identify relevant person*] would use the document to deceive [*identify intended victim*] to accept that the document was genuine; and

Five – That NOA intended that, as a result of accepting the document as genuine, [*identify intended victim*] would act in a way that would prejudice [*identify intended target*].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of making a false document.

Last updated: 3 December 2012

7.5.14.2 Checklist: Make False Original Document

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused made a document; and

2. The document the accused made was false; and
3. The accused knew that s/he was making a false document; and
4. The accused intended someone would use the document to deceive another person into accepting the document as genuine; and
5. The accused intended that as a result of accepting the document as genuine, that person would act in a way that prejudices somebody.

Making a document

1. Did the accused make a document?

If Yes, go to question 2

If No, then the accused is not guilty of making a false document

False document

2. Was the document a false document?

Consider – A false document is one that purports to have been [*insert relevant form of falsity*].

If Yes, go to question 3

If No, then the accused is not guilty of making a false document

Knew the document was false

3. Did the accused know that s/he was making a false document?

If Yes, go to question 4

If No, then the accused is not guilty of making a false document

Intention that document be accepted as genuine

4. Did the accused intend that someone would use the document to deceive another to accept it as genuine?

Consider – The accused may intend to use the document himself/herself.

If Yes, go to question 5

If No, then the accused is not guilty of making a false document

Intention to cause prejudice

5. Did the accused intend that a person would, due to accepting the document as genuine, act to somebody's prejudice?

Consider – ***A person acts to somebody's prejudice if*** [*insert relevant form of prejudice*].

Consider – The person the accused intended to be prejudiced may be the person deceived by the

document or may be somebody else.

If Yes, then the accused is guilty of making a false document (as long as you answered yes to questions 1 to 4)

If No, then the accused is not guilty of making a false document

Last updated: 3 June 2011

7.5.14.3 Checklist: Make False Copy Document

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused made a copy of a document; and
2. The document the accused made a copy of was false; and
3. The accused knew that s/he was making a copy of a false document; and
4. The accused intended someone would use the copy document to deceive another person into accepting it as a copy of a genuine document; and
5. The accused intended that as a result of accepting the document as a copy of a genuine document, that person would act in a way that prejudices somebody.

Making a document

1. Did the accused make a copy of a document?

If yes, go to question 2

If no, then the accused is not guilty of making a false document

False document

2. Was the original document a false document?

Consider – A false document is one that purports to have been [*insert relevant form of falsity*]*.*

If yes, go to question 3

If no, then the accused is not guilty of making a false document

Knew the document was false

3. Did the accused know that s/he was making a copy of a false document?

If yes, go to question 4

If no, then the accused is not guilty of making a false document

Intention that document be accepted as genuine

4. Did the accused intend that someone would use the copy document to deceive another to accept it as a copy of a genuine document?

If yes, go to question 4

If no, then the accused is not guilty of making a false document

Intention to cause prejudice

5. Did the accused intend that a person would, due to accepting the document as a copy of a genuine document, act to somebody's prejudice?

*Consider – **A person acts to another's prejudice if** [insert relevant form of prejudice].*

Consider – The person the accused intended to be prejudiced may be the person deceived by the document or may be somebody else.

If yes, then the accused is guilty of making a false document (as long as you answered yes to questions 1 to 4)

If no, then the accused is not guilty of making a false document

Last updated: 3 June 2011

7.5.14.4 Charge: Use False Document

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This charge should be used when the accused is charged with using a false document under *Crimes Act 1958* s 83A(2).

The charge may be adapted if the accused is charged with using a copy of a false document under *Crimes Act 1958* s 83A(4).

The Elements

I must now direct you about the crime of using a false document. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – That the accused used a document;

Two – That the document the accused used was false;

Three – That the accused knew that s/he was using a false document;

Four – That the accused used the document with the intention of deceiving a person to accept that it was genuine;

Five – That the accused intended that, as a result of accepting the document as genuine, that person would act in a way that prejudices somebody.[1029]

[1029] Where the prosecution alleges that the accused intended to cause prejudice by failing to act, the description (and discussion) of this element should be modified.

I will now explain each of these elements in more detail.[1030]

The Accused Used a Document

The first element that the prosecution must prove is that the accused used a document.

In this case it is alleged that the accused used [*identify document*] by [*identify alleged use*]. I direct you as a matter of law that [*describe document, e.g.* "a photograph"] is a document.[1031] This element will therefore be satisfied if you find that [*summarise necessary findings*].

[*Summarise relevant evidence and arguments.*]

The Document was False

The second element that the prosecution must prove is that the document NOA used was false.

The law says that a document is not "false" merely because it contains untrue or incorrect information. To be "false" for the purposes of this offence, the document must purport to have been:

[*Select the relevant form*[*s*] *of falsity from the list below. Only include types of falsity that are relevant to the circumstances of the case:*

- Made in the *form* in which it was made *by a person* who did not in fact make it in that form;
- Made in the *form* in which it was made *on the authority of a person* who did not in fact authorise it to be made in that form;
- Made in the *terms* in which it was made *by a person* who did not in fact make it in those terms;
- Made in the *terms* in which it was made *on the authority of a person* who did not in fact authorise it to be made in those terms;
- *Altered* in any respect *by a person* who did not in fact alter it in that respect;
- *Altered* in any respect *on the authority of a person* who did not in fact authorise it to be altered in that respect;
- Made or altered on a *date* on which it was not in fact made or altered;
- Made or altered at a *place* at which it was not in fact made or altered;
- Made in *circumstances* in which it was not in fact made or altered;
- Made or altered by a *person who did not in fact exist*.]

The word "purports" means "pretends". So what the prosecution must prove is that the document pretends to be something that it is not. In this case, the prosecution argued that [*describe relevant document*] is "false" because it pretends [*describe relevant form of falsity in terms of the facts of the case, e.g.* "to have been made by John Smith"] when in fact [*describe true state of affairs, e.g.* "it was made by the accused"].

[*Summarise relevant evidence and arguments.*]

[1030] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[1031] This charge is based on the assumption that it is clear that the relevant item is a "document". It should be adapted if that matter is in dispute. See 7.5.14 Making or Using a False Document for guidance on the meaning of the term "document".

The Accused Knew the Document was False

The third element that the prosecution must prove is that, when the accused used the [*identify document*], s/he knew that s/he was using a false document.

For this element to be met, it is not enough for the prosecution to prove that NOA should have known that s/he was using a false document. They must prove that NOA was aware that the document s/he was using was false.

[*Summarise relevant evidence and arguments.*]

Intention that the Document be Accepted as Genuine

The fourth element that the prosecution must prove the accused used the document intending to deceive someone to accept that it was genuine.

[*If the accused intended to induce a machine to accept it as genuine, add the following shaded section.*]

The law says that this includes intending to cause a machine to accept the document as genuine.

[*If it is not alleged that accused intended to induce a particular person, add the following shaded section.*]

The prosecution does not need to prove that the accused intended that any particular person would be persuaded to accept the document as genuine. The intention may be directed generally, at prospective victims of his or her plan.

In this case it is alleged that NOA used the [*identify document*] with the intention of persuading [*identify intended victim or class of victims*] that it was genuine.

[*Summarise relevant evidence and arguments.*]

Intention that the Victim Act to Somebody's Prejudice

The fifth element also focuses on the accused's intention. The prosecution must prove that s/he intended that [*describe intended victim or class of victim of the* deception] would, as a result of accepting the document as genuine, act to somebody's prejudice.[1032]

The term "prejudice" has a technical legal meaning. An act will prejudice someone if it will:

[*Select and explain the relevant form*[*s*] *of prejudice from the list below. Only include types of* prejudice *that are relevant to the circumstances of the case:*

- Result in their *temporary or permanent loss of property;*
- Result in them being deprived of an opportunity to [earn *remuneration*/earn *greater remuneration*/obtain a *financial advantage*];
- Result *in any other person* being given an opportunity to [earn *remuneration*/earn *greater remuneration*/obtain a *financial advantage*] from them;
- Be the result of them having accepted a false document as genuine in connection with his or her *performance of a duty.*]

[1032] Where the accused intends that the victim of the deception would act to his or her own prejudice, the judge may tell the jury that "the accused intended that, due to accepting the document as genuine, a person would act to his/her prejudice.

The person the accused intended would be prejudiced may be the same person s/he intended would be deceived to accept the document as genuine, or may be someone else.

[*If it is possible that the accused would be prejudiced, add the following shaded section.*]

However, it is not sufficient for you to find that the accused intended that s/he would be prejudiced him/herself. S/he must have intended that another person would be prejudiced.

[*If the accused intended to cause a machine to respond to a document, add the following shaded section.*]

The law says that this element will be satisfied if the accused intended to cause a machine to respond in a manner which, if a person did so, would be to that person's prejudice.

[*If it is not alleged that accused intended that a particular person would be prejudiced, add the following shaded section.*]

The prosecution does not need to prove that the accused intended that any particular person would be prejudiced. The intention may be directed generally, at prospective victims of his or her plan.

For this element to be satisfied, it is not sufficient for the accused to have intended that someone would act in a way that may cause prejudice. The accused must intend that someone would act in a way that must result in prejudice.

However, that does not mean that you must find that someone actually was prejudiced as a result of accepting the document as genuine. The focus here is on the accused's intention at the time s/he used the document. If s/he intended that, due to accepting the document as genuine, a person would act in a way that would prejudice somebody, this element will be met regardless of whether that in fact happened.

In this case, it is alleged that NOA intended that, as a result of accepting that [*identify document*] was genuine, [*identify intended victim*] would act in a way that would prejudice [him/herself/NO3P], because it would result in [*explain nature of prejudice*].

[*Summarise relevant evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of using a false document the prosecution must prove to you beyond reasonable doubt:

One – That NOA used a document;

Two – That the document NOA used was false;

Three – That NOA knew that s/he was using a false document;

Four – That NOA intended to use the document to deceive [*identify intended victim*] to accept that the document was genuine; and

Five – That NOA intended that, as a result of accepting the document as genuine, [*identify intended victim*] would act in a way that would prejudice [*identify intended target*].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of using a false document.

Last updated: 3 December 2012

7.5.14.5 Checklist: Use False Original Document

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused used a document; and

2. The document the accused used was false; and
3. The accused knew that s/he was using a false document; and
4. The accused used the document intending to deceive another person into accepting the document as genuine; and
5. The accused intended that as a result of accepting the document as genuine, that person would act in a way that prejudices somebody.

Using a document

1. Did the accused use a document?

If yes, go to question 2

If no, then the accused is not guilty of using a false document

False document

2. Was the document a false document?

Consider – A false document is one that purports to have been [*insert relevant form of falsity*].

If yes, go to question 3

If no, then the accused is not guilty of using a false document

Knew the document was false

3. Did the accused know that s/he was using a false document?

If yes, go to question 4

If no, then the accused is not guilty of using a false document

Intention that document be accepted as genuine

4. Did the accused use the document intending to deceive another to accept the document as genuine?

If yes, go to question 4

If no, then the accused is not guilty of using a false document

Intention to cause prejudice

5. Did the accused intend that a person would, due to accepting the document as genuine, act to somebody's prejudice?

Consider – ***A person acts to another's prejudice if*** [*insert relevant form of prejudice*].

Consider – The person the accused intended to be prejudiced may be the person deceived by the document or may be somebody else.

If yes, then the accused is guilty of using a false document (as long as you answered yes to

questions 1 to 4)

If no, then the accused is not guilty of using a false document

Last updated: 3 June 2011

7.5.14.6 Checklist: Use False Copy Document

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused used a copy of a document; and
2. The document the accused used a copy of was false; and
3. The accused knew that s/he was using a copy of a false document; and
4. The accused used the copy document intending to deceive another person into accepting the document as a copy of a genuine document; and
5. The accused intended that as a result of accepting the document as a copy of a genuine document, that person would act in a way that prejudices somebody.

Using a document

1. Did the accused use a copy of a document?

If yes, go to question 2

If no, then the accused is not guilty of using a false document

False document

2. Was the original document a false document?

Consider – A document is false if it purports to have been [*insert relevant form of falsity*].

If yes, go to question 3

If no, then the accused is not guilty of using a false document

Knew the document was false

3. Did the accused know that s/he was using a copy of a false document?

If yes, go to question 4

If no, then the accused is not guilty of using a false document

Intention that document be accepted as genuine

4. Did the accused use the copy document intending to deceive another to accept it as a copy of a genuine document?

If yes, go to question 4

If no, then the accused is not guilty of using a false document

Intention to cause prejudice

5. Did the accused intend that a person would, due to accepting the document as a copy of a genuine document, act to somebody's prejudice?

Consider – ***A person acts to another's prejudice if*** [*insert relevant form of prejudice*]

Consider – The person the accused intended to be prejudiced may be the person deceived by the document or may be somebody else.

If yes, then the accused is guilty of using a false document (as long as you answered yes to questions 1 to 4)

If no, then the accused is not guilty of using a false document

Last updated: 3 June 2011

7.5.15 Blackmail

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Overview

1. Blackmail is an offence under the *Crimes Act 1958* s 87.
2. The offence has the following five elements:
   i) The accused made a demand;
   ii) The demand was made with a view to gain for the accused or another, or with intent to cause loss to another;
   iii) The demand was made with menaces;
   iv) The demand was unwarranted;
   v) The accused intended to make an unwarranted demand with menaces.

Making a Demand

3. The first element the prosecution must prove is that the accused made a demand of the victim (*Crimes Act 1958* s 87(1)).
4. The nature of the demand is immaterial (*Crimes Act 1958* 87(2)).[1033]
5. The demand may be implicit or explicit (*R v Clear* [1968] 1 QB 670; *R v Collister* (1955) 39 Cr App R 100; *R v Lambert* [2010] 1 Cr App R 21; *R v Akhmatov* [2004] EWCA Crim 1004; *R v Studer* (1915) 11 Cr App R 307; *R v Jessen* [1997] 2 Qd R 213).

[1033] Although there is no requirement that the demand be for money or property, the second element requires the demand to have been made with a view to gain money or property, or with an intention to cause its loss: see below.

6. It is for the jury to determine whether, in all the circumstances of the case, there was a demand. The test is whether a reasonable person in the victim's circumstances would have understood that a demand was being made *(R v Collister* (1955) 39 Cr App R 100).

7. In determining this issue, the jury should consider matters such as the accused's demeanour and the circumstances that existed at the time of the alleged demand (*R v Collister* (1955) 39 Cr App R 100).

8. A statement phrased as a request may, in some cases, constitute a demand, such as where it is backed up by a threat (*R v Clear* [1968] 1 QB 670; *R v Collister* (1955) 39 Cr App R 100; *R v Lambert* [2010] 1 Cr App R 21; *R v Akhmatov* [2004] EWCA Crim 1004; *R v Studer* (1915) 11 Cr App R 307; *R v Jessen* [1997] 2 Qd R 213).

9. The offence does not require proof that the demand was successfully communicated. It is sufficient if the demand was made in circumstances in which it was likely that the demand would reach the intended recipient (*Austin v The Queen* (1989) 166 CLR 669; *Treacy v DPP* [1971] AC 537; *Bank of Valletta PLC v NCA* [1999] FCA 791).[1034]

10. Principles of agency should not be used when analysing or explaining the process of making a demand (*Latorre v R* [2012] VSCA 280). If the prosecution argues that the accused committed the offence in conjunction with another person, the judge should explain the principles of complicity or the doctrine of innocent agency.

11. Where a person is able to recall or rescind a demand before it is received by the recipient, it may not be appropriate to find that the demand has been made. This may occur, for example, when the person uses a courier to deliver a letter and retains control over whether the courier completes the process (see *Austin v The Queen* (1989) 166 CLR 669; *Treacy v DPP* [1971] AC 537).

Demand made with a View to Gain or Intent to Cause Loss

12. The second element the prosecution must prove is that the demand was made with:
    - A view to gain for the accused or another; or
    - An intention to cause loss to another (*Crimes Act 1958* s 87(1)).

13. "Gain" and "loss" are to be construed as extending only to gains or losses in money or other property (*Crimes Act 1958* s 71).

14. Consequently, while the demand itself does not need to be for money or property (see above), the accused must make that demand with a view to gain money or property for him/herself or another, or with an intention of causing another person to lose money or property.

15. Demands for custody of a child, sexual intercourse or the withholding of evidence therefore do not satisfy the second element (E Griew, The Theft Acts, 7th ed, London, Sweet & Maxwell, 1995. See *Crimes Act 1958* s 71(1)).

16. Unlike theft, blackmail does not require proof of an intention to permanently deprive. The definition of "gain" and "loss" in the *Crimes Act 1958* includes temporary gains and losses (s 71).

17. "Gain" includes keeping what one has, as well as obtaining something one does not (*Crimes Act 1958* s 71).

[1034] It is unlikely that a person can be charged with attempted blackmail, as the demand is either made or it is not made (see *Austin v The Queen* (1989) 166 CLR 669; *R v Moran* (1952) 36 Cr App R 10). However, some authors have suggested that an attempted demand may arise where the accused is interrupted while making the demand, such as by being stopped while attempting to post a letter.

18. This element will therefore be met even if the accused demands payment of a debt owed to him or her, as the realisation of a debt involves obtaining something one does not have (i.e., "hard cash" rather than a mere right of action) (*R v Parkes* [1973] Crim LR 358. See also *R v Lawrence* (1973) 57 Cr App R 64; *Attorney-Generals Reference (No 1 of 2001)* [2002] 3 All ER 840).

19. "Loss" includes not getting what one might, as well as parting with what one has (*Crimes Act 1958* s 71).

The Demand was made with Menaces

20. The third element the prosecution must prove is that the demand was made with menaces (*Crimes Act 1958* s 87(1)).

21. The words "menaces" and "threats" have substantially the same meaning (*R v Clear* [1968] 1 QB 670).[1035]

22. It is for the jury to determine whether the demand was made with menaces (*R v Clear* [1968] 1 QB 670; *R v Tomlinson* [1895] 1 QB 706; *DPP v Kuo* (1999) 49 NSWLR 226).

23. The menaces must have been of such a nature and extent that they might have influenced the mind of an ordinary person of normal stability and courage (*R v Clear* [1968] 1 QB 670).

24. The question of whether the demand was made with menaces is an objective one. While the response of the victim is relevant, it is not determinative (*R v Rasmussen* (1928) 28 SR (NSW) 349; *Benasic and Malavetas v R* (1987) 77 ALR 340; *R v Harry* [1974] Crim LR 32).

25. The word "menaces" should be interpreted liberally and is not limited to threats of violence. It includes threats of any unpleasant or detrimental action (*Thorne v Motor Trade Association* [1937] AC 797; *R v Tomlinson* [1895] 1 QB 706; *Director of Public Prosecutions v Kuo* (1999) 49 NSWLR 226; *R v Boyle* [1914] 3 KB 339; *R v Collister* (1955) 39 Cr App R 100).

26. The following have been held to be "menaces":

    i) Threats to steal property (*Director of Public Prosecutions v Kuo* (1999) 49 NSWLR 226);

    ii) Threats to damage a corporation's share price by revealing damaging information (*R v Boyle* [1914] 3 KB 339);

    iii) Threats to injure a third person (*R v Collister* (1955) 39 Cr App R 100);

    iv) Threats to accuse a person of a crime or non-criminal misconduct, or to withhold evidence in a legal proceeding (*R v Tomlinson* [1895] 1 QB 706; *R v Clear* [1968] 1 QB 670; *R v Jessen* [1997] 2 Qd R 213).

27. A demand may be made with menaces even though there were circumstances unknown to the accused that rendered the threat ineffective (*R v Clear* [1968] 1 QB 670).

28. A threat may be a "menace" even if the action threatened is legal (e.g. a threat to reveal criminal conduct to the police) (*Thorne v Motor Trade Association* [1937] AC 797; *R v Alexander* (2005) 206 CCC (3d) 233);

[1035] While the Criminal Law Revision Committee agree that "menaces" and "threats" have very similar meanings, they suggest that the word "menaces" is stronger than "threats", and so slightly restricts the scope of the offence: *Eighth Report: Theft and Related Offences* (Cmnd 2977), p60.

29. A false statement that a third party will harm the accused if the victim fails to comply with the demand may be a "menace". It does not matter that it is the accused him or herself that is being (falsely) "threatened" (*R v Lambert* [2010] 1 Cr App R 21).

30. Behaviour or words which would not intimidate any person into complying with the demand are not "menaces" (*Benasic & Malavetas v R* (1987) 77 ALR 340; *R v Clear* [1968] 1 QB 670; *R v Boyle* [1914] 3 KB 339; *R v Harry* [1974] Crim LR 32).

31. Judicial guidance may be required if the victim was not intimidated by the threat, but an ordinary person might have been. In such circumstances, the judge should explain that this element will be met if the threat may have caused a person of ordinary firmness of mind to comply with the demand (see *R v Garwood* [1987] 1 WLR 319; *R v Clear* [1968] 1 QB 670; *R v Lawrence* (1973) 57 Cr App R 64; *R v Tomlinson* [1895] 1 QB 706; *Benasic and Malavetas v R* (1987) 77 ALR 340; *R v Rasmussen* (1928) 28 SR (NSW) 349; *R v Clear* [1968] 1 QB 670; *R v Walton* (1863) 9 Cox CC 268).

32. Guidance may also be required where the victim is especially timid and was overawed by the threat, even though an ordinary person would not have been. In such cases the judge should explain that the element will be met if the accused was aware that his or her actions were likely to affect the victim in that way (see *R v Garwood* [1987] 1 WLR 319; *R v Lawrence* (1973) 57 Cr App R 64; *R v Tomlinson* [1895] 1 QB 706; *Benasic and Malavetas v R* (1987) 77 ALR 340; *R v Rasmussen* (1928) 28 SR (NSW) 349; *R v Clear* [1968] 1 QB 670; *R v Walton* (1863) 9 Cox CC 268).

The Demand was Unwarranted

33. The fourth element the prosecution must prove is that the demand was unwarranted (*Crimes Act 1958* s 87(1)).

34. A demand is unwarranted unless, at the relevant time, the accused believed that:

    i) He or she had reasonable grounds for making the demand; and

    ii) The use of menaces was a proper means of reinforcing the demand (*Crimes Act 1958* s 87(1)(a) and (b)).

35. The accused carries an evidentiary onus to establish that a demand was not unwarranted.

36. Whether a demand is unwarranted depends purely on the subjective state of mind of the accused at the time the demand was made. It is not sufficient for the prosecution to prove that the accused lacked objectively reasonable grounds for making the demand, or that the use of menaces was objectively improper (*R v Lambert* [1972] Crim LR 422; *R v Harvey* (1981) 72 Cr App R 139; *Murdoch v R* [2012] VSCA 7)).

37. However, the belief of a reasonable person may be relevant if it sheds light on what the accused actually believed (*R v Lambert* [1972] Crim LR 422; *R v Harvey* (1981) 72 Cr App R 139; *Murdoch v R* [2012] VSCA 7).

38. The word "proper" has a wide meaning. It means morally or socially acceptable (Criminal Law Revision Committee, Eighth Report: Theft and Related Offences (Cmnd 2977). See also *R v Harvey* (1981) 72 Cr App R 139).

39. If the accused knew or suspected that the threat (or the act threatened) was unlawful, he or she cannot have believed that his or her actions were "proper". This will be the case even if the accused believed his or her actions to be justified in the circumstances (*R v Harvey* (1981) 72 Cr App R 139).

40. However, even if the threatened action is clearly unlawful, the prosecution must prove that the accused did not believe that action was a lawful means of reinforcing the demand (*R v Harvey* (1981) 72 Cr App R 139).

41. Consequently, the judge must not tell the jury that this element is proven if they find that the accused threatened an unlawful act. The jury must focus on the accused's mental state, not the nature of the act threatened (*R v Harvey* (1981) 72 Cr App R 139).

42. The judge may, however, comment on the unlikelihood of the accused believing that a serious offence (e.g. murder or rape) is lawful (*R v Harvey* (1981) 72 Cr App R 139).

43. It is not necessary to give a detailed direction about this element where the only issue in the case is whether the demand was made (and the accused accepts that if the demand was made, it was unwarranted) (*R v Lawrence* (1973) 57 Cr App R 64; *R v Harvey* (1981) 72 Cr App R 139).

Intention

44. The fifth element the prosecution must prove is that the accused intended to make an unwarranted demand with menaces. This requires proof that the accused intended to make an express or implied threat, and that the recipient would act unwillingly in response to the threat (*Petch v The Queen* [2020] NSWCCA 133, [46]–[52]. See also *R v Dixon-Jenkins* (1985) 14 A Crim R 372).

Last updated: 21 July 2021

7.5.15.1 Charge: Blackmail

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Elements

I must now direct you about the crime of blackmail. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – The accused made a demand.

Two – The demand was made with an intention to [gain money or property/cause someone to lose money or property].

Three – The accused reinforced the demand with menaces.

Four – The demand was unwarranted.

Five – The accused intended to make an unwarranted demand with menaces.

I will now explain each of these elements in more detail.[1036]

The Accused Made a Demand

The first element that the prosecution must prove is that the accused made a demand.

The demand does not need to have been clearly spelt out or made explicit. A person can make a demand indirectly or implicitly. This element will be met if a reasonable person would have understood that a demand was being made in the circumstances.

[*Insert relevant evidence and arguments.*]

View to Gain or Intent to Cause Loss

The second element that the prosecution must prove is that the accused made the demand with the intention of [*insert relevant intention, e.g.* "gaining money for him/herself" *or* "causing NOV to lose property"].

[1036] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[*Describe relevant evidence and arguments.*]

The Demand was Accompanied by Menaces

The third element that the prosecution must prove is that the accused reinforced the demand with menaces.

This means that the accused must have made some threat to NOC. In this case, the prosecution say that NOA threatened to [*describe alleged threat*] unless [*describe alleged demand*].

[*If relevant, add the following shaded section.*]

To prove this element, the threat does not need to have been a threat of violent or criminal behaviour. This element will be met if the accused threatened any kind of negative or unpleasant action.

As was the case in relation to "demands", the threat does not need to have been clearly spelt out or made explicit. A person can make a threat indirectly or implicitly. It is for you to determine whether a threat was made, bearing in mind all of the evidence in the case.

[*If there is evidence that* NOV was not affected by the threat*, add the following shaded section.*]

You are not required to find that NOV actually felt threatened by NOA's [words/conduct]. A threat that does not achieve its purpose is still a threat.

However, you must be satisfied that NOA's [words/conduct] could have caused an ordinary person of normal stability and courage to comply with the demand against his/her will. If those [words/acts] would not have intimidated anybody into complying with the demand, they will not have been a "threat".

[*If NOV was affected by the threat due to being especially timid, add the following shaded section.*]

In this case, the prosecution argued that NOA threatened NOV by [*describe threat*]. The defence denied this, arguing that NOA's alleged [words/behaviour] did not constitute a "threat". In particular, they argued that an ordinary person would not have felt threatened by [those words/that behaviour], and the only reason NOV felt that way was because s/he is an especially timid or vulnerable person.

Ordinarily, [words/acts] that would not intimidate an ordinary person of normal stability and courage into complying with a demand will not be considered a "threat". However, there is a limited exception to this rule. If a person knows or suspects that the victim is likely to be threatened by his/her [words/conduct], because s/he knows that the victim is an especially timid or vulnerable person, then his/her actions will constitute a "threat". In such circumstances, it does not matter that an ordinary person would not have been intimidated by his/her [words/conduct].

[*Insert relevant evidence and arguments.*]

The Demand was Unwarranted

The fourth element that the prosecution must prove is that the demand was unwarranted.

To prove that the demand was unwarranted, the prosecution must prove that when s/he made the demand, NOA either:

- Did not believe that s/he had reasonable grounds for making the demand; or
- Did not believe that his/her use of threats was a proper way of reinforcing that demand.

The focus of this element is on the accused's beliefs at the time s/he made the demand. It is not enough to find that a reasonable person would not have believed that s/he had reasonable grounds for making the demand, or that a reasonable person would not have believed that the use of threats was proper. You must find that the accused did not have one or other of those beliefs.

This element will be satisfied if the prosecution proves that the accused did not believe that the use of threats was morally or socially acceptable. This is because it is not "proper" to reinforce a demand in a morally or socially unacceptable way.

[*Where the threatened action is unlawful, add the following shaded section*.]

Similarly, this element will also be met if the accused knew or suspected that the threatened action was unlawful. The law says that a person cannot believe that it is "proper" to behave in what s/he knows to be an unlawful manner, even if s/he believes his/her actions are somehow justified.

[*Insert relevant evidence and arguments.*]

The Accused Intended to make an unwarranted demand with menaces

The fifth element that the prosecution must prove is that the accused intended to make an unwarranted demand with menaces.

There are two parts to this element.

First, the prosecution must prove that the accused intended to threaten NOC.

Second, the prosecution must prove the accused intended that NOC would fear that the threat would be carried out if s/he didn't comply with the demand.

It does not matter whether or not NOC actually felt any alarm or fear. This element only requires proof that the accused intended that NOC would fear that the threat would be carried out.

[*Insert relevant evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of blackmail, the prosecution must prove to you, beyond reasonable doubt:

One – that NOA made a demand; and

Two – that NOA made the demand with an intention to [gain money or property/cause someone to lose money or property]; and

Three – that NOA reinforced the demand with menaces; and

Four – that NOA's demand was unwarranted; and

Five – that NOA intended to make an unwarranted demand with menaces.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of blackmail.

Last updated: 21 July 2021

7.5.15.2 Checklist: Blackmail

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused made a demand; and

2. The demand was made with an intention to [gain money or property/cause someone to lose money or property]; and

3. The accused reinforced the demand with menaces; and

4. The accused intended the complainant to fear that the threat would be carried out if s/he didn't comply with the demand; and

5. The demand was unwarranted.

Demand

1. Did the accused make a demand?

If yes, go to 2

If no, then the accused is not guilty of Blackmail

Intention to gain or cause loss

2. When s/he made the demand, did the accused intend to [gain money or property/cause someone to lose money or property]?

If yes, go to 3

If no, then the accused is not guilty of Blackmail

Menaces

3. Did the accused reinforce the demand with menaces?

Consider – Did the accused threaten to do something if the demand was not met?

If yes, go to 4

If no, then the accused is not guilty of Blackmail

Intention that complainant fear that threat be carried out

4. Did the accused intend that the complainant would fear that the threat would be carried out if the demand was not met?

If yes, go to 5

If no, then the accused is not guilty of Blackmail

Demand was unwarranted

5. Was the demand unwarranted?

5.1. Did the accused believe that s/he had reasonable grounds for making the demand?

If yes, go to 5.2

If no, then the accused is guilty of Blackmail (as long as you answered yes to questions 1, 2, 3 and 4)

5.2. Did the accused believe that the use of threats was a proper means of reinforcing the demand?

If yes, then the accused is not guilty of Blackmail

If no, then the accused is guilty of Blackmail (as long as you answered yes to questions 1, 2, 3 and 4)

Last updated: 4 December 2012

7.5.16 Criminal Damage

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Overview

1. Criminal damage is an offence under *Crimes Act 1958* s 197(1).
2. A number of related but discrete offences have also been created by s 197 and the surrounding provisions. These are addressed separately in the following topics:
    - 7.5.17 Criminal Damage Intending to Endanger Life (s 197(2));
    - 7.5.18 Criminal Damage with a View to Gain (s 197(3));
    - 7.5.19 Arson (s 197(6));
    - 7.5.20 Arson Causing Death (s 197A);
    - 7.5.21 Intentionally or Recklessly Causing a Bushfire (s 201A).

Elements

3. The offence of criminal damage has the following four elements:

    i) The accused destroyed or damaged property;

    ii) The property belonged to another;

    iii) The accused intended to destroy or damage property;

    iv) The accused did not have a lawful excuse for his or her actions.

Destroying or Damaging Property

4. The first element the prosecution must prove is that the accused destroyed or damaged property (*Crimes Act 1958* s 197(1)).

What is "property"?

5. For the purposes of this offence, property is defined as real or personal property of a tangible nature (*Crimes Act 1958* s 196(1)).
6. This is specifically stated to include the following objects:
    - Money;
    - Wild creatures which have been tamed or are ordinarily domesticated;
    - Other wild creatures or their carcasses that:
    - Have been reduced into possession that has not been lost or abandoned; or

- Are in the course of being reduced into possession (*Crimes Act 1958* s 196(1)).[1037]

7. This definition of property differs from the definition of property that is used in relation to the offence of theft. In particular:
    - It excludes intangible property (cf s 71(1)); and
    - It does not restrict the circumstances in which real property may be the subject of the offence (cf s 73(6)).

What does it mean to "destroy or damage" property?

8. The words "destroy" and "damage" are not defined in the *Crimes Act*.
9. Destroying property involves rendering it useless for the purpose for which it exists (A Smith, *Property Offences* (1994), 835).
10. Damage involves a permanent or temporary alteration to the physical integrity of the property (Grajewski v DPP [2019] HCA 8, [13]).
11. A temporary interference or obstruction in the operation of property, which does not interfere with its physical integrity, does not constitute damage (*Grajewski v DPP* [2019] HCA 8, [13], [21]).
12. Historically, some cases have held that damage occurs where there is a permanent or temporary reduction in the functionality, utility or value of the object (cases). In *Grajewski v DPP*, the High Court held that this did not give rise to an alternative meaning of damage. Instead, it held that those earlier cases all involved inference with the functionality, utility or value of the object by physical alteration to the integrity of the property, even if that alteration was temporary (*Grajewski v DPP* [2019] HCA 8, [29]).
13. The High Court has rejected a test of "temporary functional derangement" as a criterion for determining criminal damage of property (*Grajewski v DPP* [2019] HCA 8, [46]; c.f. *Samuel v Stubbs* (1972) 4 SASR 200; R v Heyne (unreported, Court of Criminal Appeal of New South Wales, 18 September 1998)).
14. While rendering property inoperative may be a consequence of damage, it does not itself constitute damage to property. For property to be "damaged", there must have been some kind of interference with the *integrity* of the property. Cases have therefore drawn a distinction between letting the air out of a tire and attaching a wheel clamp. In the former case, the physical integrity of the tyre is altered, whereas in the latter case, there is no damage unless the clamp physically alters the tyre, even if the vehicle remains inoperable while the clamp is in place (Grajewski v DPP [2019] HCA 8, [49], [53]. See also *Drake v DPP* [1994] Crim LR 855; *Lloyd v DPP* [1992] 1 All ER 982; *R v Mitchell* [2004] RTR 14).
15. Mere interference with the safe operation of property, without any alteration to the physical integrity of the property, is not damage. Therefore, acts such as tying a person to a bulldozer, or climbing onto a crane, are not acts of criminal damage. In each case, the bulldozer or crane remains functional, but is not operated because of the operator's desire not to injure the protester (*Grajewski v DPP* [2019] HCA 8, [49]).
16. Property may be "damaged" by virtue of being defaced, even if the operation of the item in question is not affected. Whether a defaced item has been "damaged" is a question of fact for the jury (*R v Zische* [1983] 1 Qd R 240; *Roe v Kingerlee* [1986] Crim LR 735; *Hardman v Chief Constable of Avon & Somerset* [1986] Crim LR 330).

[1037] For information on when a wild animal is in the course of being reduced into possession, see *Cresswell & Anor v DPP* [2006] EWHC 3379 (Admin).

17. Removing part of an object, such as by dismantling or sabotaging a machine, may also constitute "damage", even if there is no damage to the individual components. However, much will depend on whether the accused has been charged with damaging the machine itself, or the components (*R v Nesbitt* [2004] QCA 333; *R v Zische* [1983] 1 Qd R 240; *R v Fisher* (1865) LR 1 CCR 7; but compare *R v Nyawo* (1966) 2 SA 61).

18. While the *property* that is damaged must be tangible (see "What is property?" above), the *damage* does not need to be tangible. Erasure of electronic data may therefore constitute criminal damage (see *Cox v Riley* (1986) 83 Cr App R 54; *R v Whitely* (1991) 93 Cr App R 25).[1038] Such activity is also now covered by the specific offences in Subdivision 6 of Part I of the *Crimes Act 1958*.[1039]

19. It is possible to damage real property. For example:

    - A fixture or the land itself may be physically harmed, either temporarily or permanently; or
    - The land may be physically altered, such as by covering previously clear land with waste materials (*McIntosh v Shelley* (1908) 25 WN (NSW) 188*; R v Maund* (1866) 3 WW & A'B (L) 96; *R v Henderson & Battley*, Court of Appeal Criminal Division, 29/11/1984; *Grajewski v DPP* [2019] HCA 8, [33]–[35]).

20. When proving that an item was damaged, it is not necessary to show that there were costs associated with repairing the item. Costs of repairs are merely evidence that may show that the item was damaged (*R v Previsic* [2008] VSCA 112; *R v Zischke* [1983] 1 Qd R 240).

Destroying or damaging property by omission

21. While this element will usually be proven by establishing a positive act, it is possible for a person to destroy or damage property by omission (*R v Miller* [1983] 2 AC 161).

22. This may occur where the accused has *created* a dangerous situation, and has a duty to take action within his or her capabilities to address the dangers he or she has created. The first element of the offence will be met if the prosecution can prove that the accused knowingly failed to act in the way he or she was required to, and as a result property was damaged or destroyed (*R v Miller* [1983] 2 AC 161).

Indirect damage

23. It is not necessary to show that the accused directly damaged or destroyed the property in question. This element may be met where the accused sets off a chain of events which lead to the property being damaged or destroyed (*R v Hayes* [2008] QCA 371).

24. In such cases, it may be necessary to examine the issue of causation. In particular, the jury may need to determine whether the accused's acts were a "real and substantial cause" of the damage or destruction. See 7.1.2 Causation for further information.

Belonging to Another Person

25. The second element the prosecution must prove is that the damaged or destroyed property either:

[1038] Electronic data is tangible (and therefore "property") because it is grounded in a physical state, such as a specific pattern of magnetisation in a computer hard drive.

[1039] Subdivision 6 was added by the *Crimes (Property Damage and Computer Offences) Act 2003*, which implemented the recommendations of Chapter 4 of the Model Criminal Code Report. That report, while recommending the creation of specific offences for interfering with a computer, acknowledged that the offences may overlap with general criminal damage offences.

- Belonged to another person; or
- Belonged to the accused and another person (*Crimes Act 1958* s 197(1)).

When does property "belong" to another person?

26. Property "belongs" to a person where that person has:
    - Custody or control of it;
    - A proprietary right or interest in it (other than one arising from an equitable agreement to grant or transfer an interest); or
    - A charge on it (*Crimes Act 1958* s 196(2)).
27. This includes the interest of a mortgagee (*Holden v R* (1998) 103 A Crim R 70).
28. Property which is subject to a trust "belongs" to the trustees and the people who have a right to enforce the trust (*Crimes Act 1958* s 196(3)).
29. Property of a corporation "belongs" to the corporation, regardless of any vacancies within that corporation (*Crimes Act 1958* s 196(4)).
30. As abandoned property does not "belong" to anyone, this element is not met where the property in question has been abandoned (*R v McClymont; Ex parte Attorney-General* [1987] 2 Qd R 442; *R v Webb; Ex parte Attorney-General* [1990] 2 Qd R 275).

Who must the property belong to?

31. While the property must belong to "another person", that person does not need to be the sole owner. It is possible for the accused to commit an offence by damaging or destroying property that he or she co-owns with someone else (*Crimes Act 1958* s 197(1); *Howell v Dakin* [1965] Tas SR 142).
32. While this element requires the prosecution to prove that some other person owned the property, it is not necessary to prove the identity of that person (*Lodge v Lawton* [1978] VR 112. See also *R v McClymont; Ex parte Attorney-General* [1987] 2 Qd R 442).
33. Where the prosecution alleges that a specific person owns the damaged property and the evidence fails to establish that person's rights of ownership, the prosecution may need to seek leave to amend the particulars in the indictment (*R v McClymont; Ex parte Attorney-General* [1987] 2 Qd R 442).

Intending to Destroy or Damage Property

34. The third element the prosecution must prove is that the accused intended to damage or destroy the property (*Crimes Act 1958* s 197(1)).
35. Section 197(4) sets out the requirements for proving this element. A person *only* intends to destroy or damage property if:
    (a) One of his or her purposes is to destroy or damage property; or
    (b) He or she knows or believes that his or her conduct is more likely than not to result in destruction of or damage to property (see also R v Hayes [2008] QCA 371).
36. The test in s 197(4)(b) differs from the common law recklessness test:
    - The test in s 197(4)(b) requires the jury to find the required consequence to be "more likely than not" (i.e. a greater than 50 percent chance);
    - The recklessness test requires the jury to find the required consequence to be "probable" or "likely". This may be greater or less than a 50 per cent chance (see *Darkan & Ors v R* (2006) 227 CLR 373; *Boughey v R* (1986) 161 CLR 10).

37. The prosecution must prove that the accused had the required intention at the time he or she did the relevant act or made the relevant omission (*Royall v R* (1991) 172 CLR 378. See also *R v Miller* [1983] 2 AC 161).

38. The offender's age may be relevant when determining whether he or she knew or believed that his or her conduct was more likely than not to result in the property being damaged or destroyed (*R v T* [1997] 1 Qd R 623).

Without Lawful Excuse

39. The fourth element that the prosecution must prove is that the accused acted without lawful excuse (*Crimes Act 1958* s 197(1)).

Statutory Excuses

Belief in authority to destroy or damage

40. A person has a lawful excuse to a charge under s 197(1) if, at the time the relevant act was committed, he or she believed that:

    - The property belonged solely to him or herself (s 201(2)(a)(i));
    - He or she held a right or interest in the property which authorised him or her to engage in the conduct (s 201(2)(a)(ii)); or
    - The people he or she believed were entitled to consent to the destruction or damage had consented, or would have consented if they had known the circumstances of the destruction or damage (s 201(2)(a)(iii)).

41. Each of these excuses depend on the accused having held a particular belief at the relevant time. As long as that belief was honestly held, it does not matter whether it was:

    - Accurate (*R v Smith* [1974] QB 354; *R v Waine* [2006] 1 Qd R 458); or
    - Justified (*Crimes Act 1958* s 201(3)).

Belief that damage was necessary to protect property

42. A person has a lawful excuse to a charge under s 197(1) if he or she engaged in the conduct in order to protect property belonging to him or herself or another, or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of such conduct he or she believed that:

    - The property, right or interest was in immediate need of protection; and
    - The means adopted or proposed to be adopted to protect the property, right or interest were or would be reasonable in all the circumstances (s 201(2)(b)).

Scope of s 201(2)(b)

43. The wording of s 201(2)(b) draws a distinction between "property" and "rights or interests" in property:

    - In the case of "property", the excuse only applies to property that belongs to the accused or another person. It does not apply to property the accused *believes* belongs to him or herself or someone else.
    - In the case of "rights or interests" in property, the excuse applies both to rights or interests that actually vest in the accused or another person, or that the accused *believes* to vest in him or herself or someone else.

44. A "right or interest" in property is stated to include any right or privilege in or over land, whether created by grant, licence or otherwise (*Crimes Act 1958* s 201(4)).

45. Consequently, the excuse extends to protecting rights or interests such as easements or rights of way (see *Chamberlain v Lindon* [1998] EWHC Admin 329).

46. As the property must belong to the accused or another person, the excuse does not apply to actions taken to protect abandoned property (see *Cresswell & Anor v DPP* [2006] EWHC 3379 (Admin)).

47. As the excuse uses the definition of "property" contained in s 196(1) (see "What is 'property'?" above), it also does not apply to actions taken to protect things that falls outside the scope of that definition (e.g. intangible property and wild animals) (*Cresswell & Anor v DPP* [2006] EWHC 3379 (Admin)).

Requirements of s 201(2)(b)

48. The accused can only rely on the defence in s 201(2)(b) of the *Crimes Act 1958* if he or she:

    i) Acted in order to protect the relevant property, right or interest;

    ii) Believed that the property, right or interest was in immediate need of protection, and

    iii) Believed that the means of protection adopted were reasonable in the circumstances (*Crimes Act 1958* s 201(2)(b)).

49. The jury must objectively assess whether the accused acted to protect the relevant property, right or interest. A mere assertion by the accused that his or her actions were done for such a purpose is not conclusive (*R v Jones & Ors* [2004] EWCA Crim 1981; *R v Hunt* (1978) 66 Cr App R 105).

50. As long as the accused honestly believed the property was in immediate need of protection, and that the means used to protect the property were reasonable, it is immaterial whether those beliefs were justified (*Crimes Act 1958* s 201(3); *R v Jones & Ors* [2004] EWCA Crim 1981).

51. When assessing the reasonableness of the accused's conduct, the jury must take into account the circumstances which led to the need to protect the relevant property, right or interest. For example, when a person illegally leaves his or her car in a location where it may be immobilised using a wheel clamp, it will generally be unreasonable to protect his or her interest in the car by damaging or destroying the clamp, rather than paying the cost to have the clamp removed (*Drake v DPP* [1994] Crim LR 855; *Lloyd v DPP* [1992] 1 All ER 982; *R v Mitchell* [2004] RTR 14).

52. Interference with a right or interest may give rise to an ongoing and immediate need to protect the right or interest. The fact that the accused had taken other steps to try to protect the right or interest prior to damaging the property (e.g. he or she had entered into negotiations with the owner of the property) does not necessarily mean that the right or interest was not in immediate need of protection (*Chamberlain v Lindon* [1998] EWHC Admin 329).

53. Section 201(2)(b) does not allow a person to stop an owner of property from damaging or destroying that property, unless the damage or destruction is itself illegal, or someone else has an interest in the property in question (*Cresswell & Anor v DPP* [2006] EWHC 3379 (Admin)).

Common law defences and excuses

54. The lawful excuses spelt out in s 201 operate in addition to any other defences or excuses that arise by statute or under the common law (*Crimes Act 1958* s 201(2), (5)).

55. There are two matters that may be of particular relevance to this offence:

- Self-defence; and
- Consent.

Self-defence

56. In some cases, a person may believe, on reasonable grounds, that it is necessary to damage or destroy property belonging to another person, in order to defend him or herself or another person. In such cases, the person should not be convicted of criminal damage (see, e.g. *R v Wilkins* [1996] EWCA Crim 1126).

57. Although not clear, it seems that the same principles may also apply if property is damaged or destroyed in order to protect personal property, or to prevent crime (see, e.g. *R v McKay* [1957] VR 560). However, given the uncertainties in this area, where the relevant act is committed in defence of property, it is likely to be preferable for the accused to rely on *Crimes Act 1958* s 201(2)(b) (see, e.g. *Cresswell & Anor v DPP* [2006] EWHC 3379 (Admin); *DPP v Bayer* [2003] EWHC 2567 (Admin)).

58. For further information concerning self-defence, see 8.1 Statutory Self-Defence (From 1/11/14).

Consent

59. A person will have a lawful excuse to criminal damage if the owner(s) of the property consented to its damage or destruction. The owner of property has the right to damage or destroy his or her own property, or to authorise another person to do so (*R v Denton* (1982) 74 Cr App R 81).

60. This excuse will only apply where the accused had the consent of *all* co-owners. The authority of only one co-owner is not sufficient if there are other co-owners who have not consented (see *Howell v Dakin* [1965] Tas SR 142).

61. Even if the relevant act was carried out for an illegal purpose, such as to facilitate fraud against an insurance company, the accused will generally[1040] have a lawful excuse to a charge of criminal damage if the owner consented to the damage or destruction (*R v Denton* (1982) 74 Cr App R 81). However, he or she may be guilty of another offence, such as Criminal Damage with a View to Gain.

62. While the prosecution must prove that the owner did not consent to the damage or destruction, the circumstances of the damage or destruction alone may allow the jury to infer a lack of consent (*R v Stevenson* (1996) 90 A Crim R 259).

Last updated: 27 March 2019

7.5.16.1 Charge: Criminal Damage

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This charge should be used when the accused is charged with criminal damage under *Crimes Act 1958* s 197(1).

I must now direct you about the crime of criminal damage. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – That the accused damaged or destroyed property;

Two – That the property belonged to another;

Three – That the accused purposely damaged or destroyed the property, or knew or believed that damage or destruction was the likely result of his/her actions; and

Four – That the accused had no lawful excuse for damaging or destroying the property.

[1040] Where the owner of the property is a corporation, the consent of a director of the corporation may not be sufficient. A director may not be competent to consent to fraudulent damage or destruction of property owned by the company (*R v Appleyard* (1987) 81 Cr App R 319).

I will now explain each of these elements in more detail.[1041]

Damaging or Destroying Property

The first element that the prosecution must prove is that the accused damaged or destroyed property.

[*If there is a dispute about whether the relevant harm constitutes "damage", add the following shaded section.*]

In deciding whether [*identify relevant property*] has been damaged, you must decide if there has been some change to its physical integrity. This can be a permanent or temporary change.

In this case, it is alleged that NOA damaged or destroyed [*identify relevant property*] by [*identify relevant action*].[1042] [*Summarise relevant evidence and arguments.*]

This first element will be met if you are satisfied that NOA [*identify relevant act*], [*where relevant add*: and that what s/he did amounts to "damage"].

Property Belonging to Another

The second element that the prosecution must prove is that the property belonged to another person.[1043]

In this case the prosecution alleged that the [*describe property*] belonged to NOC. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

Intention to Damage or Destroy Property

There are two ways in which the prosecution can prove the third element of this offence.

First, they can prove that, when NOA [*identify act*], it was his/her purpose to damage or destroy the property, or one of his/her purposes.

Alternatively, they can prove that, when NOA [*identify act*], s/he knew or believed that his/her actions were more likely than not to result in the property being damaged or destroyed.

"Knowledge" and "belief" are both ordinary words. For this element to be proven on the basis of the accused's knowledge or belief, the prosecution must prove that the accused thought about the likely consequences of his/her actions. If s/he did not think about whether his/her actions would cause the property to be damaged or destroyed, then this element will not be met.

[1041] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[1042] If there is a factual dispute over whether the damaged object is "property", a direction on that issue will need to be given. See 7.5.16 Criminal Damage for information about the definition of "property". Some guidance on charging the jury on this issue can be obtained from 7.5.1.2 Charge: Theft (Extended). However, due to the slightly different definition of "property", judges should proceed with care.

[1043] If there are any issues about whether the property "belonged to another", adapt the direction on "belonging to another" from 7.5.1.2 Charge: Theft (Extended).

However, it is not enough to find that NOA simply thought about the possibility of damage or destruction. This element will not be met if the accused thought his/her actions might damage the property, but probably would not. It will only be satisfied if the prosecution can prove that NOA knew or believed that his/her actions were more likely than not to result in the property being damaged or destroyed, or that at least one of his purposes in [*identify act*] was to damage or destroy the property.

[*Summarise relevant evidence and arguments*.]

Without Lawful Excuse

The fourth element that the prosecution must prove is that the accused had no lawful excuse for damaging or destroying the property.

The law recognises that a person has a lawful excuse for damaging or destroying property if s/he [*describe relevant defence, e.g.* honestly believed that the owner of the property had consented to the damage].

[*Where a statutory excuse under s 201(2) has been raised, add the following shaded section.*]

The focus of this element is on what NOA actually believed at the time s/he [*identify act*]. It does not matter if that belief was neither accurate nor justified.

It is not for the accused to prove that [*describe relevant defence*]. Instead, it is for the prosecution to prove beyond reasonable doubt that the accused did not [*describe relevant defence*].

[*Summarise relevant evidence and arguments*.]

Summary

To summarise, before you can find NOA guilty criminal damage, the prosecution must prove to you, beyond reasonable doubt:

One – That the accused damaged or destroyed property;

Two – That the property belonged to another person;

Three – That the accused purposely damaged or destroyed the property, or knew or believed that damage or destruction was the likely result of his/her actions; and

Four – That the accused had no lawful excuse for damaging or destroying the property.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of criminal damage.

Last updated: 27 March 2019

7.5.16.2 Checklist: Criminal Damage

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused damaged or destroyed property; and

2. The property belonged to another person; and

3. The accused purposely damaged or destroyed the property, or knew or believed that damage or destruction was the likely result of his or her actions; and

4. The accused had no lawful excuse for damaging or destroying the property.

Damage or Destroy Property

1. Did the accused damage or destroy property?

If yes, then go to 2

If no, then the accused is not guilty of criminal damage

Belonging to Another

2. Did the property belong to another person?

If yes, then go to 3.1

If no, then the accused is not guilty of criminal damage

State of Mind of Accused

3.1 Did the accused act with the purpose of damaging or destroying the property?

If yes, then go to 4

If no, then go to 3.2

3.2 Did the accused know or believe that his or her actions were more likely than not to damage or destroy the property?

Consider – It is not enough to show that the accused realised that damage or destruction might occur, or was possible.

If yes, then go to 4

If no, then the accused is not guilty of criminal damage

Without Lawful Excuse

4. Did the accused act without lawful excuse?

If yes, then the accused is guilty of criminal damage (as long as you also answered yes to questions 1, 2 and 3.1 or 3.2)

If no, then the accused is not guilty of criminal damage

Last updated: 30 May 2014

7.5.17 Criminal Damage Intending to Endanger Life

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Overview

1. Criminal damage intending to endanger the life of another is an offence under *Crimes Act 1958* s 197(2).
2. A number of related but discrete offences have also been created by s 197 and the surrounding provisions. These are addressed separately in the following topics:
    - 7.5.16 Criminal damage (s 197(1));

- 7.5.18 Criminal damage with a view to gain (s 197(3));
- 7.5.19 Arson (s 197(6));
- 7.5.20 Arson causing death (s 197A);
- 7.5.21 Intentionally or recklessly causing a bushfire (s 201A).

Elements

3. The offence of criminal damage intending to endanger the life of another has the following four elements:

   i) The accused destroyed or damaged property;

   ii) The accused intended to destroy or damage property;

   iii) The accused intended by the damage or destruction to endanger the life of another;

   iv) The accused did not have a lawful excuse for his or her actions.

4. There is significant overlap between the elements of this offence and the elements of criminal damage (s 197(1)). However, there are three important differences:
   - The prosecution does *not* need to establish that the property in question belonged to another person;
   - The prosecution *does* need to establish that the accused intended to endanger the life of another person; and
   - The lawful excuses contained in *Crimes Act 1958* s 201 are *not* available. Consequently, the prosecution only needs to rebut any defences or excuses that arise at common law.
5. This topic only addresses the third element of the offence. For information concerning the other elements, see 7.5.16 Criminal Damage.

Intending to Endanger the Life of Another

6. The third element that the prosecution must prove is that the accused intended, by the damage or destruction, to endanger the life of another person (*Crimes Act 1958* s 197(2)).
7. Section 197(5) sets out the requirements for proving this element. A person *only* intends to endanger the life of another person if:

   (a) One of his or her purposes is to endanger the life of another by the damage or destruction; or

   (b) He or she knows or believes that the life of another is more likely than not to be endangered by the damage or destruction (Crimes Act 1958 s 197(5)).
8. The prosecution must prove that the accused intended the danger to arise from the *damage or destruction*, rather than from the *act that caused that damage or destruction* (*R v Steer* [1988] AC 111; *R v Wenton* [2010] EWCA Crim 2361; *R v Webster* [1995] 2 All ER 168).
9. Thus, if the relevant act is dropping a rock on a passing train:
   - This element will *not* be met if the accused intended that the rock would pass through the roof of the train and fatally injure a passenger;
   - This element *will* be met if the accused intended that the rock would damage the train in such a way that a passenger's life would be put in danger (see *R v Webster* [1995] 2 All ER 168).

10. Given the potentially fine distinctions that must be drawn in relation to this issue, it is essential that the trial judge carefully identify the way in which the prosecution alleges that the accused intended to endanger life. The directions must not conflate the danger created by the damage to the property with any danger created by the act causing the damage (*R v Steer* [1988] AC 111; *R v Wenton* [2010] EWCA Crim 2361; *R v Webster* [1995] 2 All ER 168).
11. Where a person knows or believes that destroying or damaging property is more likely than not to endanger the life of another, he or she must take steps to avoid creating the risk. It is not sufficient for him or her to take steps to mitigate the danger once it has been created (*R v Merrick* [1995] EWCA Crim 5; *Chief Constable of Avon v Shimmen* [1987] 84 Cr App R 7).
12. The jury must look at the degree and type of damage the accused *intended* to cause by his or her conduct. This element may be satisfied even if the accused caused less damage than expected, caused a different kind of damage, or the damage caused did not create an objective risk to another (*R v Dudley* [1989] Crim LR 57; *R v Webster* [1995] 2 All ER 168).

Alternative Offence

13. The offence of criminal damage (s 197(1)) is a statutory alternative to the offence of criminal damage intending to endanger the life of another (*Crimes Act 1958* s 427).

Last updated: 19 October 2011

7.5.17.1 Charge: Criminal Damage Intending to Endanger Life

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This charge should be used when the accused is charged with criminal damage intending to endanger life under Crimes Act 1958 s 197(3).

I must now direct you about the crime of criminal damage intending to endanger life. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – That the accused damaged or destroyed property;

Two – That the accused purposely damaged or destroyed the property, or knew or believed that damage or destruction was the likely result of his/her actions;

Three – That the accused purposely endangered the life of another person by causing the damage or destruction, or knew or believed that the life of another person was likely to be endangered by the damage or destruction; and

Four – That the accused had no lawful excuse for damaging or destroying the property.

I will now explain each of these elements in more detail.[1044]

Damaging or Destroying Property

The first element that the prosecution must prove is that the accused damaged or destroyed property.

[*If there is a dispute about whether the relevant harm constitutes "damage", add the following shaded section.*]

In deciding whether [*identify relevant property*] has been damaged, you must decide if there has been

[1044] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

some change to its physical integrity. This can be a permanent or temporary change.

In this case, it is alleged that NOA damaged or destroyed [*identify relevant property*] by [*identify relevant action*].[1045] [*Summarise relevant evidence and arguments*.]

This first element will be met if you are satisfied that NOA [*identify relevant act*], [*where relevant add*: and that what s/he did amounts to "damage"].

Intention to Damage or Destroy Property

There are two ways in which the prosecution can prove the second element of this offence.

First, they can prove that, when NOA [*identify act*], it was his/her purpose to damage or destroy the property, or one of his/her purposes.

Alternatively, they can prove that, when NOA [*identify act*], s/he knew or believed that his/her actions were more likely than not to result in the property being damaged or destroyed.

"Knowledge" and "belief" are both ordinary words. For this element to be proven on the basis of the accused's knowledge or belief, the prosecution must prove that the accused thought about the likely consequences of his/her actions. If s/he did not think about whether his/her actions would cause the property to be damaged or destroyed, then this element will not be met.

However, it is not enough to find that NOA simply thought about the possibility of damage or destruction. This element will not be met if the accused thought his/her actions might damage the property, but probably would not. It will only be satisfied if the prosecution can prove that NOA knew or believed that his/her actions were more likely than not to result in the property being damaged or destroyed, or that at least one of his purposes in [*identify act*] was to damage or destroy the property.

[*Summarise relevant evidence and arguments*.]

Intention to endanger

There are also two ways that the prosecution can prove the third element of this offence.

First, they can prove that it was NOA's purpose to endanger the life of another person by causing the damage or destruction, or one of his/her purposes.

Alternatively, they can prove that NOA knew or believed that the life of another person was more likely than not to be endangered by the damage or destruction.

For this element to be met, the accused must have meant to create such a risk by virtue of damaging or destroying the property, or must have known or believed that such a risk was likely to result from the damage or destruction. It is not enough that s/he knew or believed that someone's life would be endangered by his/her act itself, or that s/he meant to put someone's life in danger by that act.

[1045] If there is a factual dispute over whether the damaged object is "property", a direction on that issue will need to be given. See 7.5.16 Criminal Damage for information about the definition of "property". Some guidance on charging the jury on this issue can be obtained from 7.5.1.2 Charge: Theft (Extended). However, due to the slightly different definition of "property", judges should proceed with care.

This is a difficult distinction, which is probably easiest understood by the use of an example. Imagine that a person places a bomb on a train track, and stands by the side of the tracks waiting for a train before he detonates it. If he detonates it shortly before the train arrives, intending to damage the tracks and knowing or believing that this could derail the train killing the passengers, this element will be satisfied. In such a case he will have meant to put a person's life in danger by virtue of damaging property – in this case, the train tracks. If, however, he waits until the train is above the bomb before detonating, intending that the bomb itself will directly kill the passengers, this element will not be met. This is because his purpose in such a case is to kill the passengers directly, through the use of the bomb, rather than to put a their life in danger by damaging or destroying property. He would be guilty of another offence, probably murder, but not of criminal damage intending to endanger life.

This may seem like a fine distinction, but it is an important one, because this element requires the prosecution to prove that NOA purposely endangered the life of another person by causing the damage or destruction, or knew or believed that the life of another person was likely to be endangered by the damage or destruction.

[*Summarise relevant evidence and arguments*.]

Without Lawful Excuse

The fourth element that the prosecution must prove is that the accused had no lawful excuse for damaging or destroying the property.

The law recognises that a person has a lawful excuse for damaging or destroying property if s/he [*describe relevant defence, e.g.* honestly believed that the owner of the property had consented to the damage].

[*Where a statutory excuse under s 201(2) has been raised, add the following shaded section.*]

The focus of this element is on what NOA actually believed at the time s/he [*identify act*]. It does not matter if that belief was neither accurate nor justified.

It is not for the accused to prove that [*describe relevant defence*]. Instead, it is for the prosecution to prove beyond reasonable doubt that the accused did not [*describe relevant defence*].

[*Summarise relevant evidence and arguments*.]

Summary

To summarise, before you can find NOA guilty criminal damage intending to endanger life, the prosecution must prove to you, beyond reasonable doubt:

One – That the accused damaged or destroyed property;

Two – That the accused purposely damaged or destroyed the property, or knew or believed that damage or destruction was the likely result of his/her actions;

Three – That the accused purposely endangered the life of another person by causing the damage or destruction, or knew or believed that the life of another person was more likely than not to be endangered by the damage or destruction; and

Four – That the accused had no lawful excuse for damaging or destroying the property.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of criminal damage intending to endanger life.

Last updated: 27 March 2019

7.5.17.2 Checklist: Criminal Damage Intending to Endanger Life

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused damaged or destroyed property; and

2. The accused purposely damaged or destroyed the property, or knew or believed that damage or destruction was the likely result of his or her actions; and

3. The accused purposely endangered the life of another person through the damage or destruction of property, or knew or believed that the life of another was likely to be endangered by that damage or destruction; and

4. The accused had no lawful excuse for damaging or destroying the property.

Damage or Destroy Property

1. Did the accused damage or destroy property?

If yes, then go to 2.1

If no, then the accused is not guilty of criminal damage intending to endanger life

State of Mind of Accused

2.1 Did the accused act with the purpose of damaging or destroying the property?

If yes, then go to 3.1

If no, then go to 2.2

2.2 Did the accused know or believe that his or her actions were more likely than not to damage or destroy the property?

Consider – It is not enough to show that the accused realised that damage or destruction might occur, or was possible.

If yes, then go to 3.1

If no, then the accused is not guilty of criminal damage intending to endanger life

Intending to Endanger Life

3.1 Did the accused damage or destroy the property with the purpose of endangering the life of another person?

If yes, then go to 4

If no, then go to 3.2

3.2 Did the accused know or believe that damaging or destroying the property was more likely than not to endanger the life of another person?

If yes, then go to 4

If no, then the accused is not guilty of criminal damage intending to endanger life

Without Lawful Excuse

4. Did the accused act without lawful excuse?

If yes, then the accused is guilty of criminal damage intending to endanger life (as long as you also answered yes to questions 1, 2.1 or 2.2 and 3.1 or 3.2)

If no, then the accused is not guilty of criminal damage intending to endanger life

Last updated: 30 May 2014

7.5.18 Criminal Damage with a View to Gain

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Overview

1. Criminal damage with a view to gain is an offence under *Crimes Act 1958* s 197(3).
2. A number of related but discrete offences have also been created by s 197 and the surrounding provisions. These are addressed separately in the following topics:
    - 7.5.16 Criminal damage (s 197(1));
    - 7.5.17 Criminal damage intending to endanger life (s 197(2));
    - 7.5.19 Arson (s 197(6));
    - 7.5.20 Arson causing death (s 197A);
    - 7.5.21 Intentionally or recklessly causing a bushfire (s 201A).

Elements

3. The offence of criminal damage with a view to gain has the following three elements:
    i) The accused damaged or destroyed property;
    ii) The accused did so dishonestly;
    iii) The accused did so with a view to gain for himself or another (*Crimes Act 1958* s 197(3)).
4. This offence is primarily aimed at preventing people from damaging or destroying property in order to make false insurance claims (*DPP Reference (No 1 of 1988)* [1989] VR 857).
5. Consequently, unlike the offence of criminal damage under s 197(1), the prosecution does not need to prove that the property belonged to another. This offence may be committed in relation to property belonging to the accused him or herself, or abandoned property (see *DPP Reference (No 1 of 1988)* [1989] VR 857).
6. The lawful excuses contained in *Crimes Act 1958* s 201 are *not* available in relation to this offence (*Crimes Act 1958* s 201(1)).

Destroying or Damaging Property

7. The first element the prosecution must prove is that the accused destroyed or damaged property (*Crimes Act 1958* s 197(3)).
8. For information concerning this element, see 7.5.16 Criminal Damage.

Dishonesty

9. The second element the prosecution must prove is that the accused acted dishonestly (*Crimes Act 1958* s 197(3)).

10. While the law is unclear, it is likely that dishonesty in s 197(3) carries its ordinary meaning, rather than the special meaning that applies to offences such as theft or obtaining property by deception.

11. To determine whether the accused acted dishonestly, the jury must:

    - Determine whether the accused had the knowledge, belief or intent which is said to make his or her actions dishonest; and
    - Determine whether, based on that knowledge, belief or intent, the act was dishonest (*Peters v R* (1998) 192 CLR 493; *Macleod v R* (2003) 214 CLR 230).

12. The jury must determine whether the act was dishonest according to the standards of ordinary, decent people (*Peters v R* (1998) 192 CLR 493; *Macleod v R* (2003) 214 CLR 230).

13. It is only in borderline cases that the jury will need to determine whether the accused's acts should be characterised as "dishonest". In most cases, it will be sufficient for the judge to:

    - Explain which facts it is alleged make the accused's behaviour dishonest; and
    - Direct the jury that this element will be met if they find those facts to be proven (*Peters v R* (1998) 192 CLR 493; *Macleod v R* (2003) 214 CLR 230 (Callinan J)).

View to Gain

14. The third element the prosecution must prove is that the accused acted with a view to gain for him or herself or another (*Crimes Act 1958* s 197(3)).

15. The Act does not define the term "gain" for the purpose of this offence. This suggests that the word should be give a wide or general interpretation. It may not be limited to "financial advantage" or "profit". "Gain" does not need to be measured in "balance sheet" terms (*DPP Reference (No 1 of 1988)* [1989] VR 857).

16. The jury must determine whether a view to gain existed at the time the accused damaged or destroyed the property. While it is not necessary for the prosecution to prove that the accused later committed acts in order to gain some kind of benefit from the damage or destruction (e.g. by lodging an insurance claim), evidence of later acts may help to establish this element.

Alternative Offence

17. The offence of criminal damage (s 197(1)) is a statutory alternative to the offence of criminal damage with a view to gain (*Crimes Act 1958* s 427).

Last updated: 19 October 2011

7.5.18.1 Charge: Criminal Damage with a View to Gain

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This charge should be used when the accused is charged with criminal damage with a view to gain *under Crimes Act 1958* s 197(3).

I must now direct you about the crime of criminal damage with a view to gain. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – That the accused damaged or destroyed property;

Two – That the accused did so dishonestly; and

Three – That the accused did so with a view to gain.

I will now explain each of these elements in more detail.[1046]

Damaging or Destroying Property

The first element that the prosecution must prove is that the accused damaged or destroyed property.

[*If there is a dispute about whether the relevant harm constitutes "damage", add the following shaded section.*]

In deciding whether [*identify relevant property*] has been damaged, you must decide if there has been some change to its physical integrity. This can be a permanent or temporary change.

In this case, it is alleged that NOA damaged or destroyed [*identify relevant property*] by [*identify relevant action*].[1047] [*Summarise relevant evidence and arguments.*]

This first element will be met if you are satisfied that NOA [*identify relevant act*], [*where relevant add*: and that what s/he did amounts to "damage"].

Dishonesty

The second element that the prosecution must prove is that the accused damaged or destroyed the property dishonestly.

In this case the prosecution alleged that NOA acted dishonestly because [*describe the* knowledge, intent or belief *that is alleged to make the accused's conduct dishonest*].

[*If the parties agree that the accused will have acted dishonestly if s/he had the alleged state of mind, add the following shaded section.*]

If you find that NOA had this [knowledge/intention/belief] when s/he [*identify act*], then the second element will be met. This is because it is clear that [*describe alleged knowledge, intention or belief*] is dishonest.

[*If the defence contend that the alleged state of mind does not constitute dishonesty, add the following shaded section.*]

If you find that NOA had this [knowledge/intention/belief], you must then decide whether that made his/her conduct dishonest. This matter should be decided according to the standards of ordinary, decent people. If an ordinary, decent person would have considered NOA's actions to be dishonest, then this element will be met.

[*Summarise relevant evidence and arguments.*]

[1046] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[1047] If there is a factual dispute over whether the damaged object is "property", a direction on that issue will need to be given. See 7.5.16 Criminal Damage for information about the definition of "property". Some guidance on charging the jury on this issue can be obtained from 7.5.1.2 Charge: Theft (Extended). However, due to the slightly different definition of "property", judges should proceed with care.

View to Gain

The third element that the prosecution must prove is that the accused caused the damage or destruction with a view to gain something for himself/herself or another person.

In this case, the prosecution argued that NOA intended [NO3P] to gain [*describe intended gain*] by [damaging/destroying] the [*identify property*].

[*Summarise relevant evidence and arguments*.]

Summary

To summarise, before you can find NOA guilty criminal damage with a view to gain, the prosecution must prove to you, beyond reasonable doubt:

One – That the accused destroyed or damaged property;

Two – That the accused did so dishonestly; and

Three – That the accused did so with a view to gain for himself/herself or another person.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of criminal damage with a view to gain.

Last updated: 27 March 2019

7.5.18.2 Checklist: Criminal Damage with a View to Gain

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused damaged or destroyed property; and

2. The accused did so dishonestly; and

3. The accused did so with a view to gain.

Damage or Destroy Property

1. Did the accused damage or destroy property?

    If yes, then go to 2

    If no, then the accused is not guilty of criminal damage with a view to gain

Dishonesty

2. Did the accused damage or destroy the property dishonestly?

    If yes, then go to 3

    If no, then the accused is not guilty of criminal damage with a view to gain

View to Gain

3. Did the accused damage or destroy the property with a view to gain?

    If yes, then the accused is guilty of criminal damage with a view to gain (as long as you also

answered yes to questions 1 and 2)

If no, then the accused is not guilty of criminal damage with a view to gain

Last updated: 30 May 2014

7.5.19 Arson

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Overview

1. Arson is an offence under *Crimes Act 1958* s 197(7).
2. A number of related but discrete offences have also been created by s 197 and the surrounding provisions. These are addressed separately in the following topics:
    - 7.5.16 Criminal damage (s 197(1));
    - 7.5.17 Criminal damage intending to endanger life (s 197(2));
    - 7.5.18 Criminal damage with a view to gain (s 197(3));
    - 7.5.20 Arson causing death (s 197A);
    - 7.5.21 Intentionally or recklessly causing a bushfire (s 201A).
3. The common law crime of arson has been abolished (*Crimes (Criminal Damage) Act 1978* s 3).

Elements

4. A person is guilty of arson if he or she commits one of the offences in sections 197(1), (2) or (3), and the relevant offence is committed by destroying or damaging property by fire (*Crimes Act 1958* s 197(6)).
5. Consequently, the elements of arson consist of:
    - The elements of the relevant offence under ss 197(1), (2) or (3);
    - That the damage or destruction occurred by fire; and
    - That the accused intended to damage or destroy the property by fire.[1048]
6. See the following topics for information concerning the elements of ss 197(1), (2) and (3):
    - 7.5.16 Criminal damage (s 197(1));
    - 7.5.17 Criminal damage intending to endanger life (s 197(2));
    - 7.5.18 Criminal damage with a view to gain (s 197(3)).

Relevant Cases Must be Charged as Arson

7. Where one of the relevant criminal damage offences is committed by fire, it must be charged as arson (*Crimes Act 1958* s 197(6)).

[1048] It is unclear whether the accused must intend to damage or destroy the property *by fire*, or whether a general intention *to cause damage* is sufficient. As a matter of prudence, it is assumed that the more specific intention is required. This is the approach taken in G Williams, *Textbook of Criminal Law*, 2nd ed, 913 and *R v Cooper (G) and Cooper (Y)* [1991] Crim LR 524. But compare A Ashworth, "Transferred Malice and Punishment for Unforeseen Consequences" in P Glazebrook, *Reshaping the Criminal Law* (1978), 92.

8. Consequently, indictments charging one of the offences in ss 197(1)–(3) will be invalid if the property was damaged by fire (*R v Wood & Ors* [1998] EWCA Crim 2436; *R v Cooper (G) and Cooper (Y)* [1991] Crim LR 524).
9. However, these offences may be left as common law alternatives to a charge of arson.

Last updated: 19 October 2011

7.5.19.1 Charge: Arson

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This charge should be used when the accused is charged with arson *under Crimes Act 1958* s 197(6), and it is alleged that the accused committed the offence of criminal damage under s *197(1)* by fire.

If it is alleged that the accused committed criminal damage by fire intending to endanger life *(*ss 197(2) and (6)) or criminal damage by fire with a view to gain *(*ss 197(3) and (6)) the charge will need to be modified accordingly.

I must now direct you about the crime of arson. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt:

One – That the accused damaged or destroyed property by fire;

Two – That the property belonged to another;

Three – That the accused purposely damaged or destroyed the property by fire, or knew or believed that damage or destruction by fire was the likely result of his/her actions; and

Four – That the accused had no lawful excuse for damaging or destroying the property.

I will now explain each of these elements in more detail.[1049]

Damaging or Destroying Property by Fire

The first element that the prosecution must prove is that the accused damaged or destroyed property by fire.

[*If there is a dispute about whether the relevant harm constitutes "damage", add the following shaded section*.]

In deciding whether [*identify relevant property*] has been damaged, you must decide if there has been some change to its physical integrity. This can be a permanent or temporary change.

In this case, it is alleged that NOA damaged or destroyed [*identify relevant property*] by [*identify relevant action*].[1050] [*Summarise relevant evidence and arguments*.]

This first element will be met if you are satisfied that NOA [*identify relevant act*], [*where relevant add*: and that what s/he did amounts to "damage"].

[1049] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

[1050] If there is a factual dispute over whether the damaged object is "property", a direction on that issue will need to be given. See 7.5.16 Criminal Damage for information about the definition of "property". Some guidance on charging the jury on this issue can be obtained from 7.5.1.2 Charge: Theft (Extended). However, due to the slightly different definition of "property", judges should proceed with care.

Property Belonging to Another

The second element that the prosecution must prove is that the property belonged to another person.[1051]

In this case the prosecution alleged that the [*describe property*] belonged to NOC. [*Insert prosecution evidence and/or arguments.*] The defence denied this, arguing [*insert defence evidence and/or arguments*].

Intention to Damage or Destroy Property by Fire

There are two ways in which the prosecution can prove the third element of this offence.

First, they can prove that, when NOA [*identify act*], it was his/her purpose to damage or destroy the property by fire, or one of his/her purposes.

Alternatively, they can prove that, when NOA [*identify act*], s/he knew or believed that his/her actions were more likely than not to result in the property being damaged or destroyed by fire.

"Knowledge" and "belief" are both ordinary words. For this element to be proven on the basis of the accused's knowledge or belief, the prosecution must prove that the accused thought about the likely consequences of his/her actions. If s/he did not think about whether his/her actions would cause the property to be damaged or destroyed by fire, then this element will not be met.

However, it is not enough to find that NOA simply thought about the possibility of damage or destruction. This element will not be met if the accused thought his/her actions might damage the property, but probably would not. It will only be satisfied if the prosecution can prove that NOA knew or believed that his/her actions were more likely than not to result in the property being damaged or destroyed by fire, or that at least one of his purposes in [*identify act*] was to damage or destroy the property by fire.

[*Summarise relevant evidence and arguments.*]

Without Lawful Excuse

The fourth element that the prosecution must prove is that the accused had no lawful excuse for damaging or destroying the property.

The law recognises that a person has a lawful excuse for damaging or destroying property if s/he [*describe relevant defence, e.g.* honestly believed that the owner of the property had consented to the damage].

[*Where a statutory excuse under s 201(2) has been raised, add the following shaded section.*]

The focus of this element is on what NOA actually believed at the time s/he [*identify act*]. It does not matter if that belief was neither accurate nor justified.

It is not for the accused to prove that [*describe relevant defence*]. Instead, it is for the prosecution to prove beyond reasonable doubt that the accused did not [*describe relevant defence*].

[*Summarise relevant evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of arson, the prosecution must prove to you, beyond reasonable doubt:

[1051] If there are any issues about whether the property "belonged to another", adapt the direction on "belonging to another" from 7.5.1.2 Charge: Theft (Extended).

One – That the accused damaged or destroyed property by fire;

Two – That the property belonged to another person;

Three – That the accused purposely damaged or destroyed the property by fire, or knew or believed that damage or destruction by fire was the likely result of his/her actions; and

Four – That the accused had no lawful excuse for damaging or destroying the property.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of arson.

Last updated: 27 March 2019

7.5.19.2 Checklist: Arson

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused damaged or destroyed property by fire; and

2. The property belonged to another person; and

3. The accused purposely damaged or destroyed the property, or knew or believed that damage or destruction was the likely result of his or her actions; and

4. The accused had no lawful excuse for damaging or destroying the property.

Damage or Destroy Property

1. Did the accused damage or destroy property by fire?

If yes, then go to 2

If no, then the accused is not guilty of Arson

Belonging to Another

2. Did the property belong to another person?

If yes, then go to 3.1

If no, then the accused is not guilty of Arson

State of Mind of Accused

3.1 Did the accused act with the purpose of damaging or destroying the property by fire?

If yes, then go to 4

If no, then go to 3.2

3.2 Did the accused know or believe that his or her actions were more likely than not to damage or destroy the property by fire?

Consider – It is not enough to show that the accused realised that damage or destruction might occur, or was possible.

If yes, then go to 4

If no, then the accused is not guilty of Arson

Without Lawful Excuse

4. Did the accused act without lawful excuse?

If yes, then the accused is guilty of Arson (as long as you also answered yes to questions 1, 2 and 3.1 or 3.2)

If no, then the accused is not guilty of Arson

Last updated: 30 May 2014

7.5.20 Arson Causing Death

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Overview

1. Arson causing death is an offence under *Crimes Act 1958* s 197A.
2. A number of related but discrete offences have also been created by s 197 and the surrounding provisions. These are addressed separately in the following topics:
    - 7.5.16 Criminal damage (s 197(1));
    - 7.5.17 Criminal damage intending to endanger life (s 197(2));
    - 7.5.18 Criminal damage with a view to gain (s 197(3));
    - 7.5.19 Arson (s 197(7));
    - 7.5.21 Intentionally or recklessly causing a bushfire (s 201A).
3. The common law crime of arson has been abolished (*Crimes (Criminal Damage) Act 1978* s 3).

Elements

4. A person is guilty of arson if he or she commits the offence of arson as defined in s 197, and thereby causes the death of another person (*Crimes Act 1958* s 197A).
5. Consequently, the elements of arson causing death consist of:
    - The elements of the relevant offence under ss 197(1), (2) or (3);
    - That the damage or destruction occurred by fire;
    - That the accused intended to damage or destroy the property by fire;[1052] and
    - That the accused's acts caused a person's death.

[1052] It is unclear whether the accused must intend to damage or destroy the property *by fire*, or whether a general intention *to cause damage* is sufficient. As a matter of prudence, it is assumed that the more specific intention is required. This is the approach taken in G Williams, *Textbook of Criminal Law*, 2nd ed, 913 and *R v Cooper (G) and Cooper (Y)* [1991] Crim LR 524. But compare A Ashworth, "Transferred Malice and Punishment for Unforeseen Consequences" in P Glazebrook, *Reshaping the Criminal Law* (1978), 92.

6. The prosecution does *not* need to prove that the accused intended to cause the death, or was reckless as to that result. It is sufficient to prove that the accused had the mental state necessary for the offence of arson, and that death resulted.
7. See the following topics for information concerning the elements of ss 197(1), (2) and (3):
    - 7.5.16 Criminal damage (s 197(1));
    - 7.5.17 Criminal damage intending to endanger life (s 197(2));
    - 7.5.18 Criminal damage with a view to gain (s 197(3)).
8. See 7.5.19 Arson for information on causing damage or destruction by fire and an intention to cause damage or destruction by fire.
9. See 7.1.2 Causation for information concerning what it means for the accused's acts to have "caused" a person's death.

Last updated: 19 October 2011

7.5.20.1 Charge: Arson Causing Death

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This charge should be used when the accused is charged with arson causing death under *Crimes Act 1958* s 197A, and it is alleged that the accused caused the death by committing the offence of criminal damage under s 197(1) by fire.

If it is alleged that the accused caused death by committing criminal damage by fire intending to endanger life (ss 197(2), 197(6) and 197A) or criminal damage by fire with a view to gain (ss 197(3), 197(6) and 197A) the charge will need to be modified accordingly. Assistance can be obtained from the charges listed below.

I must now direct you about the crime of arson causing death. To prove this crime, the prosecution must prove the following five elements beyond reasonable doubt:

One – That the accused damaged or destroyed property by fire;

Two – That the property belonged to another;

Three – That the accused purposely damaged or destroyed the property by fire, or knew or believed that damage or destruction by fire was the likely result of his/her actions;

Four – That the accused's acts caused a person's death; and.

Five – That the accused had no lawful excuse for damaging or destroying the property.

I will now explain each of these elements in more detail.[1053]

Damaging or Destroying Property by Fire

The first element that the prosecution must prove is that the accused damaged or destroyed property by fire.

[*If there is a dispute about whether the relevant harm constitutes "damage", add the following shaded section.*]

[1053] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

In deciding whether [*identify relevant property*] has been damaged, you must decide if there has been some change to its physical integrity. This can be a permanent or temporary change.

In this case, it is alleged that NOA damaged or destroyed [*identify relevant property*] by [*identify relevant action*].[1054] [*Summarise relevant evidence and arguments*.]

This first element will be met if you are satisfied that NOA [*identify relevant act*], [*where relevant add*: and that what s/he did amounts to "damage"].

Property Belonging to Another

The second element that the prosecution must prove is that the property belonged to another person.[1055]

In this case the prosecution alleged that the [*describe property*] belonged to NOC. [*Insert prosecution evidence and/or arguments*.] The defence denied this, arguing [*insert defence evidence and/or arguments*].

Intention to Damage or Destroy Property by Fire

There are two ways in which the prosecution can prove the third element of this offence.

First, they can prove that, when NOA [*identify act*], it was his/her purpose to damage or destroy the property by fire, or one of his/her purposes.

Alternatively, they can prove that, when NOA [*identify act*], s/he knew or believed that his/her actions were more likely than not to result in the property being damaged or destroyed by fire.

"Knowledge" and "belief" are both ordinary words. For this element to be proven on the basis of the accused's knowledge or belief, the prosecution must prove that the accused thought about the likely consequences of his/her actions. If s/he did not think about whether his/her actions would cause the property to be damaged or destroyed by fire, then this element will not be met.

However, it is not enough to find that NOA simply thought about the possibility of damage or destruction. This element will not be met if the accused thought his/her actions might damage the property, but probably would not. It will only be satisfied if the prosecution can prove that NOA knew or believed that his/her actions were more likely than not to result in the property being damaged or destroyed by fire, or that at least one of his purposes in [*identify act*] was to damage or destroy the property by fire.

[*Summarise relevant evidence and arguments*.]

The Accused's Acts Caused a Person's Death

The fourth element that the prosecution must prove is that the accused's acts caused a person's death.

[1054] If there is a factual dispute over whether the damaged object is "property", a direction on that issue will need to be given. See 7.5.16 Criminal Damage for information about the definition of "property". Some guidance on charging the jury on this issue can be obtained from 7.5.1.2 Charge: Theft (Extended). However, due to the slightly different definition of "property", judges should proceed with care.

[1055] If there are any issues about whether the property "belonged to another", adapt the direction on "belonging to another" from 7.5.1.2 Charge: Theft (Extended).

In this case, the prosecution have alleged that by starting the fire, NOA caused NOV to die.[1056] [*Summarise relevant evidence and arguments*.]

Without Lawful Excuse

The fifth element that the prosecution must prove is that the accused had no lawful excuse for damaging or destroying the property.

The law recognises that a person has a lawful excuse for damaging or destroying property if s/he [*describe relevant defence, e.g.* honestly believed that the owner of the property had consented to the damage].

[*Where a statutory excuse under s 201(2) has been raised, add the following shaded section.*]

The focus of this element is on what NOA actually believed at the time s/he [*identify act*]. It does not matter if that belief was neither accurate nor justified.

It is not for the accused to prove that [*describe relevant defence*]. Instead, it is for the prosecution to prove beyond reasonable doubt that the accused did not [*describe relevant defence*].

[*Summarise relevant evidence and arguments*.]

Summary

To summarise, before you can find NOA guilty of arson, the prosecution must prove to you, beyond reasonable doubt:

One – That the accused damaged or destroyed property by fire;

Two – That the property belonged to another person;

Three – That the accused purposely damaged or destroyed the property by fire, or knew or believed that damage or destruction by fire was the likely result of his/her actions;

Four – That the accused's acts caused a person's death; and

Five – That the accused had no lawful excuse for damaging or destroying the property.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of arson causing death.

Last updated: 27 March 2019

7.5.20.2 Checklist: Arson Causing Death

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused damaged or destroyed property by fire; and

2. The property belonged to another person; and

3. The accused purposely damaged or destroyed the property, or knew or believed that damage or destruction was the likely result of his or her actions; and

4. The accused caused a person's death; and

[1056] If the jury require additional guidance on the meaning of causation, adapt an appropriate direction from 7.1.2.1 Charges: Causation.

5. The accused had no lawful excuse for damaging or destroying the property.

Damage or Destroy Property

1. Did the accused damage or destroy property by fire?

If yes, then go to 2

If no, then the accused is not guilty of Arson Causing Death

Belonging to Another

2. Did the property belong to another person?

If yes, then go to 3.1

If no, then the accused is not guilty of Arson Causing Death

State of Mind of Accused

3.1 Did the accused act with the purpose of damaging or destroying the property by fire?

If yes, then go to 4

If no, then go to 3.2

3.2 Did the accused know or believe that his or her actions were more likely than not to damage or destroy the property by fire?

Consider – It is not enough to show that the accused realised that damage or destruction might occur, or was possible.

If yes, then go to 4

If no, then the accused is not guilty of Arson Causing Death

Cause Death

4. Did the accused's conduct cause a person's death?

If yes, then go to 5

If no, then the accused is not guilty of Arson Causing Death

Without Lawful Excuse

5. Did the accused act without lawful excuse?

If yes, then the accused is guilty of Arson Causing Death (as long as you also answered yes to questions 1, 2, 3.1 or 3.2 and 4)

If no, then the accused is not guilty of Arson Causing Death

Last updated: 30 May 2014

7.5.21 Intentionally or Recklessly Causing a Bushfire

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Overview

1. Intentionally or recklessly causing a bushfire is an offence under *Crimes Act 1958* s 201A.
2. A number of related but discrete offences have also been created by s 197 and the surrounding provisions. These are addressed separately in the following topics:
    - 7.5.16 Criminal damage (s 197(1))
    - 7.5.17 Criminal damage intending to endanger life (s 197(2));
    - 7.5.18 Criminal damage with a view to gain (s 197(3));
    - 7.5.19 Arson (s 197(6));
    - 7.5.20 Arson causing death (s 197A).

Elements

3. The offence of intentionally or recklessly causing a bushfire has the following three elements:
    i) The accused caused a fire;
    ii) The accused caused the fire intentionally or recklessly;
    iii) The accused was reckless as to the spread of the fire to vegetation on property belonging to another.
4. The *Crimes Act 1958* defines causing a fire as including:
    - Lighting a fire;
    - Maintaining a fire;
    - Failing to contain a fire, except if the fire was lit by another person or the fire is beyond the control of the person who lit the fire (*Crimes Act 1958* s 201A(4)).
5. The special definition of intention that applies to offences in s 197 does not apply to this offence. The words 'intentionally or recklessly' should therefore be given their conventional meaning.

Recklessness as to the Spread of Fire

6. The Act does not contain any affirmative definition of recklessness. It is likely that the conventional legal meaning of that word applies. The prosecution must prove that the accused foresaw the probability that the fire would spread to vegetation on property belonging to another. See 7.1.3 Recklessness.
7. However, the Act contains a partial negative definition of recklessness that exempts a person who engages in fire prevention or fire suppression activity in accordance with provisions made under an Act or Code of practice and who honestly believes that his or her conduct was justified in the circumstances (*Crimes Act 1958* s 201A(2), (3)).
8. The spread of the fire, for the purpose of the third element, is defined as spread of the fire beyond the capacity of the person who caused the fire to extinguish it (*Crimes Act 1958* s 201A(4)).

Last updated: 19 October 2011

7.5.21.1 Charge: Intentionally or Recklessly Causing a Bushfire

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This charge should be used when the accused is charged with intentionally or recklessly causing a bushfire *under Crimes Act 1958* s 201A.

I must now direct you about the crime of intentionally or recklessly causing a bushfire. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – That the accused caused a fire;

Two – That the accused caused the fire intentionally or recklessly;

Three – That the accused was reckless as to the spread of the fire to vegetation on property belonging to another;

I will now explain each of these elements in more detail.[1057]

Causing a fire

The first element that the prosecution must prove is that the accused caused a fire.

The law states that a person causes a fire when s/he [*add the following where relevant:*

- Lights a fire;
- Maintains a fire;
- Fails to control a fire, other than a fire lit by another person;
- Fails to control a fire, other than a fire that is beyond the control of the person who lit it.]

[*Summarise relevant evidence and arguments*.]

Intentionally or recklessly causing a fire

The second element relates to the accused's state of mind. The prosecution must prove that s/he caused the fire intentionally or recklessly.

[*If recklessness is in issue, add the following shaded section.*]

To prove that NOA acted recklessly, the prosecution must prove that s/he was aware that his/her acts would probably cause a fire. It is not sufficient for NOA to have known that it was possible that s/he would cause a fire. S/he must have known that that consequence was probable.

In determining this element, you must be satisfied that NOA him/herself actually knew of the probability of causing a fire. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

[*Summarise relevant evidence and arguments*.]

[1057] If an element is not in issue it should not be explained in full. Instead, the element should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this element proven."

Recklessness as to spread of fire

The third element also relates to the accused's state of mind. The prosecution must prove that at the time of lighting the fire, the accused was reckless as to the spread of the fire to vegetation on property belonging to another.[1058]

To prove that NOA was reckless as to the spread of fire to vegetation on property belonging to another, the prosecution must prove that the fire would probably spread to vegetation on property belonging to another. It is not sufficient that NOA knew it was possible that it would do so.

In determining this element, you must be satisfied that NOA him/herself actually knew of the probability of the fire spreading to vegetation on property belonging to another. It is not enough that you, or a reasonable person, would have recognised that likelihood in the circumstances.

This element is only concerned about the spread of fire beyond the capacity of the accused to extinguish. Proof that the accused thought s/he could extinguish fire if it did spread to vegetation on property belonging to another is not sufficient to prove this element. The prosecution must prove that the accused foresaw the probability that the fire would spread to vegetation on property belonging to another and that s/he would be unable to extinguish it.

[*Summarise relevant evidence and arguments*.]

Summary

To summarise, before you can find NOA guilty of intentionally or recklessly causing a bushfire, the prosecution must prove to you, beyond reasonable doubt:

One – That the accused caused a fire;

Two – That the accused caused the fire intentionally or recklessly;

Three – That the accused was reckless as to the spread of the fire to vegetation on property belonging to another.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of intentionally or recklessly causing a bushfire.

Last updated: 2 July 2020

7.5.21.2 Checklist: Intentionally or Recklessly Causing a Bushfire

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused caused a fire; and

2. The accused caused the fire intentionally or recklessly; and

3. The accused was reckless as to the spread of the fire to vegetation on property belonging to another.

Cause a Fire

1. Did the accused cause a fire?

[1058] This charge does not address the negative definition of recklessness in *Crimes Act 1958* ss 201A(2) and (3). The judge will need to direct the jury on that definition if it is relevant in the case.

If yes, then go to 2.1

If no, then the accused is not guilty of intentionally or recklessly causing a bushfire

---

Intention or Recklessness

2.1 Did the accused cause the fire intentionally?

If yes, then go to 3

If no, then go to 2.2

2.2 Did the accused cause the fire recklessly?

Consider – The accused caused the fire recklessly if he or she was aware that his or her conduct would probably cause a fire

If yes, then go to 3

If no, then the accused is not guilty of intentionally or recklessly causing a bushfire

---

Reckless as to Spread of Fire

3. Was the accused reckless as to the spread of fire to vegetation on property belonging to another?

Consider – The accused will be reckless if he or she was aware that the fire would probably spread to vegetation on property belonging to another

Consider – This element will not be proved if the accused believed that he or she could extinguish the fire if it spread

If yes, then the accused is guilty of intentionally or recklessly causing a bushfire (as long as you also answered yes to questions 1 and 2.1 or 2.2)

If no, then the accused is not guilty of intentionally or recklessly causing a bushfire.

7.5.22 Victorian and Commonwealth money laundering offences

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Victorian offences – Dealing with proceeds of crime

1. The *Crimes Act 1958* s 194 creates four offences of cascading severity where a person deals with proceeds of crime.
2. The four offences contain the same physical elements, and different fault elements.
3. The elements are:
   i) That the accused dealt with the property
   ii) That the property is proceeds of crime
   iii) The accused had the relevant fault element.
4. The fault elements differ depending on which offence is charged. The different available fault elements are that the accused:

i) intends to conceal that it is proceeds of crime (*Crimes Act 1958* s 194(1))

ii) knows that it is proceeds of crime (*Crimes Act 1958* s 194(2))

iii) is reckless as to whether or not it is proceeds of crime (*Crimes Act 1958* s 194(3))

iv) is negligent as to whether or not it is proceeds of crime (*Crimes Act 1958* s 194(4)).

Dealing with property

5. The *Crimes Act 1958* s 193(1) provides that:

> "deal with" includes receive, possess, conceal or dispose of.

6. Section 193 was implemented to replace *Confiscation Act 1997* s 122. Under the old provision, the wording of the offence used the composite phrase "receive, possess, conceal, dispose of or bring into Victoria". While the *Crimes (Money Laundering) Act 2003* implemented the inclusively defined term "deal with", it is likely that it did not substantively change the meaning of the individual terms.

7. For the purpose the *Crimes Act 1958* s 193(1), possess likely requires physical possession and knowledge of possession by the accused (see *Rinaldi v Watts* [2003] VSC 2, [28]).

8. Property is defined to include "money and all other property real or personal including things in action and other intangible property" (*Crimes Act 1958* s 193(1)).

Proceeds of crime

9. The *Crimes Act 1958* s 193(1) provides that:

> "proceeds of crime" means property that is derived or realised, directly or indirectly, by any person from the commission of-
>
> (a) an offence referred to in Schedule 1 to the Confiscation Act 1997; or
>
> (b) an offence against a law of the Commonwealth that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence); or
>
> (c) an offence against a law of another State, a Territory or a country outside Australia that would have constituted an offence referred to in paragraph (a) if it had been committed in Victoria.

10. The offence which the property is derived or realised from is called the predicate offence.

11. Schedule 1 of the *Confiscation Act 1997* contains an extensive list of offences which permit forfeiture on court order. The full list is not extracted here, but it is worth noting that the first item is "an indictable offence against the law of Victoria".

12. There is no need to prove that the property held by the accused has been converted or transformed following the commission of an offence. Stolen goods can, therefore, be treated as "property that is derived ... directly ... from the commission of" the offence of theft (see *Rinaldi v Watts* [2003] VSC 2, [21]-[24]).

13. The *Crimes Act 1958* s 193(2) also states that for the purpose of the definition of proceeds of crime:

> …it is necessary to prove facts that constitute one or more offences referred to in paragraph (a), (b) or (c) of [the definition] but the particulars of an offence need not be proven.

14. Particulars which need not be proved may include who committed the predicate offence or when the predicate offence was committed (see Crimes (Money Laundering) Bill 2003 Explanatory Memorandum). Similarly, the second reading speech gives the example of a person who admits that a large amount of money is the property of an armed robbery, but does not say when the robbery was committed, who committed it, or who the victim was (Victoria, Parliamentary Debates, Legislative Assembly, 6 November 2003, 1609 (Rob Hulls, Attorney-General)).

15. Section 193 is the statutory successor to *Crimes (Confiscation of Profits) Act 1986* s 41Q. In relation to s 41Q, the Court of Appeal has held that it is not necessary to identify a particular serious offence. Such a requirement was held not to be supported by the text and would defeat the purpose of the provision, as it would require proof of the commission of a secondary criminal offence, to the knowledge of the accused, and that the property was derived from that offence (*Anile v The Queen* [2016] VSCA 226, [16]-[17]).

16. In the context of similar Commonwealth and New South Wales legislation, it has been held that a provision of this kind means the prosecution must identify a specific offence but need not identify the specific criminal acts involved in that offence, in the sense of either timing or the individuals involved. This requirement to identify the alleged offence is a necessary part of showing that the property is the proceeds of a crime (see *Chen v DPP* (2011) 83 NSWLR 224, [29]; *R v McKellar (No 3)* [2014] NSWSC 106, [7]-[16]).

17. It is suggested that for the purpose of the current provisions, the Commonwealth and New South Wales approach is to be preferred over the approach identified in *Anile v The Queen*. The Commonwealth and New South Wales approach gives proper effect to *Crimes Act 1958* s 193(2), which requires some identification of the predicate offence, but removes the requirement for particulars.

18. The existence of *Crimes Act 1958* s 193(2) also removes the point of distinction noted in Anile between Victorian law and the provisions of New Zealand and England, which allowed the Court to distinguish cases from those two jurisdictions (see *Anile v The Queen* [2016] VSCA 226, [25]).

19. Proof that the property is, in fact, proceeds of crime is part of what distinguishes the offences in *Crimes Act 1958* s 194 from the offence in Crimes Act 1958 s 195 of dealing with property suspected of being proceeds of crime (*DPP v Marell* [2005] VSC 430, [37]-[39]. See also *Harper v DPP* [2021] VSCA 173, [35]).

20. The offences in *Crimes Act 1958* s 194 differ from the equivalent offences in *Crimes Act 1958* s 195A, which involve dealing with property that later becomes an instrument of crime. A distinguishing feature of the s 194 offences is that, at the time of the relevant acts, the property already is proceeds of crime.

Intention, knowledge, recklessness and negligence

21. The most serious offence in *Crimes Act 1958* s 194 is in subsection (1) – dealing with proceeds of crime intending to conceal that it is proceeds of crime. While the offences in s 194 are often described as money laundering offences, only subsection (1) requires proof of an intention to launder, in the sense of disguising the illegal origins of the property (see Crimes (Money Laundering) Bill 2003 Explanatory Memorandum). The other offences involve dealing with property that is proceeds of crime.

22. The Act does not specify the kind of recklessness required to prove the offence in s 194(3). The explanatory memorandum for the Bill which introduced the provision stated that common law principles of recklessness apply. This was stated to be that the accused was aware of a substantial risk that the property is proceeds of crime and decided to deal with the property despite that risk (Crimes (Money Laundering) Bill 2003 Explanatory Memorandum).

23. It may now be doubted that this accurately states the meaning of recklessness as it applies to Victorian statutory offences, many of which require proof that the accused was aware that a particular harmful consequence would probably result, but decided to continue regardless (see *DPP Reference No 1 of 2019* [2021] HCA 26; *DPP Reference No 1 of 2019* [2020] VSCA 181; *R v Campbell* [1997] 2 VR 585). As stated in 7.5.12 Obtaining property by deception, it is likely that the substantial risk test understates the relevant mens rea, and so it is not used in this Charge Book.

Victorian offences – Instruments of crime

24. *Crimes Act 1958* s 195A contains three offences where a person deals with property that will become an instrument of crime.

25. As with the offences in *Crimes Act 1958* s 194, the offences have the same physical elements and different fault elements.

26. The elements are:

    i) That the accused dealt with the property

    ii) That the property subsequently becomes an instrument of crime

    iii) The accused had the relevant fault element.

27. The fault elements differ depending on which offence is charged. The different available fault elements are that the accused:

    i) Intends that the property will become an instrument of crime (*Crimes Act 1958* s 194A(1))

    ii) Is reckless as to whether or not the property will become an instrument of crime (*Crimes Act 1958* s 195A(2))

    iii) Is negligent as to whether or not the property will become an instrument of crime (*Crimes Act 1958* s 195A(3)).

28. The physical elements of property and dealing with property are the same as for the offences in *Crimes Act 1958* s 194, described above.

29. Instrument of crime is defined as

> property that is used in the commission of, or used to facilitate the commission of—
>
> (a) an offence referred to in Schedule 1 to the *Confiscation Act 1997*; or
>
> (b) an offence against a law of the Commonwealth that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence); or
>
> (c) an offence against a law of another State, a Territory or a country outside Australia that would have constituted an offence referred to in paragraph (a) if it had been committed in Victoria (*Crimes Act 1958* s 193).

30. As noted above, Schedule 1 of the *Confiscation Act 1997* contains an extensive list of offences which permit forfeiture on court order. The first item on the list is "an indictable offence against the law of Victoria".

31. In *Milne v The Queen*, the High Court provided the following guidance on the words "use" and "facilitate", for the purpose of the equivalent definition in the Criminal Code:

> An ordinary meaning of the verb "use" is "[t]o make use of (some immaterial thing) as a means or instrument; to employ for a certain end or purpose." That is the relevant

ordinary meaning for the definition of "become an instrument of crime" which involves the "use" of property to serve a purpose, namely the "commission of an offence" or "to facilitate the commission of an offence". The relevant ordinary meaning of "facilitate" in this case is "[t]o render easier the performance of (an action), the attainment of (a result); to afford facilities for, promote, help forward (an action or process)." (*Milne v The Queen* (2014) 252 CLR 149, [33]).

32. The distinguishing difference between the offences in *Crimes Act 1958* ss 194 and 195A are that the s 194 offences concern property where an indictable offence has already been committed, whereas the s 195A offences involve an indictable offence that is contemplated in the future (*Ansari v The Queen* (2007) 70 NSWLR 89, [15]; *Milne v The Queen* (2014) 252 CLR 149, [9]).

33. The dichotomy between past and future offences means that provisions like Crimes Act 1958 s 195A cannot apply where it is the dealing with the property itself that makes the property an instrument of crime. In other words, the offence does not apply to using property as an instrument of crime (see, e.g., *Chen v DPP* (2011) 83 NSWLR 224, where Basten and Garling JJ (Simpson J contra) held that the prosecution erroneously sought to use the accused's transfer of money as both a breach of the prohibition on structured transactions in *Foreign Transactions Reports Act 1988* s 31 and as a dealing with property intending it become an instrument of crime contrary to *Criminal Code* s 400.5).

34. There must be a temporal separation between the relevant dealing and the intended use of the property, along with an instrumental connection between the intended use of the property and the future commission or facilitation of the commission of an offence. An instrumental connection is not established merely by the dealing being a necessary condition for the subsequent offending, or by taking advantage of circumstances arising after the relevant dealing (*Milne v The Queen* (2014) 252 CLR 149, [37]; *Cheng v The Queen* (2017) 94 NSWLR 72, [44];).

35. However, this need for a temporal separation between the dealing and the future offending can be achieved where the prosecution particularises their case by reference to an earlier dealing, such as possession of money, intending to use the money in the future offending (see *Cheng v The Queen* (2017) 94 NSWLR 72, [30]-[35], which distinguished *Chen v DPP* on the basis that the relevant conduct in Chen was the remission of money overseas, whereas the conduct in Cheng was the possession of money. See also *Chen v The Queen* [2014] HCATrans 140).

Commonwealth offences

36. Division 400 of the *Criminal Code* contains 43 separate money laundering offences. The offences vary depending on:
    - The value of the property, with separate groups of offences for property valued at over:
        - $10,000,000
        - $1,000,000
        - $100,000
        - $50,000
        - $10,000, and
        - $1,000
    - The accused's state of mind, with separate offences for
        - Intention
        - Knowledge
        - Recklessness
        - Negligence

        - Dealing with property where it is reasonable to suspect the property is proceeds of crime
    - The accused's conduct, with separate offences for:
        - Dealing with property
        - Concealing or disguising the property
    - The number of occasions, with separate offences for:
        - Conduct on a single occasion
        - Conduct on 2 or more occasions

37. Due to the vast array of possibilities, it is not practical to consider every offence within Division 400 in this Charge Book. Instead, the remainder of this commentary will consider only the offences in *Criminal Code* s 400.9, dealing with property reasonably suspected of being the proceeds of crime.

38. The four offences in s 400.9 contain the following four elements:

    i) The accused deals with money or other property;

    ii) The accused intended to deal with the money or property;

    iii) It is reasonable to suspect that the money or property is the proceeds of indictable crime

    iv) At the time of the dealing, the value of the money or property is of the relevant amount.

Dealing with property

39. Section 400.2 of the *Criminal Code* is titled "Definition of deals with money or other property". The section covers two forms of dealing – personal dealing, and third party dealing.

40. Personal dealing is where a person:

    (a) receives, possesses, conceals or disposes of money or other property;

    (b) imports money or other property into Australia;

    (c) exports money or other property from Australia;

    (d) engages in a banking transaction relating to money or other property (*Criminal Code* s 400.2(1)).

41. A person is also deemed to have dealt with money or other property (third party dealing) if:

    (a) a person (the first person) engages in conduct; and

    (b) the first person's conduct causes another person to deal with money or other property (within the meaning of subsection (1)); and

    (c) the first person is reckless as to whether the first person's conduct causes the other person to deal with the money or property (*Criminal Code* s 400.2(2)).

42. A person causes another person to deal with money or other property if they substantially contribute to the other person dealing with the money or property within the meaning of personal dealing (*Criminal Code* s 400.2(4)).

43. For the purpose of third party dealing, it does not matter if the identity of the third party cannot be established (*Criminal Code* ss 400.2(3), (5)).

Intention

44. Dealing with money or other property is a physical element consisting of conduct.

45. The default fault element of intention therefore applies to that element (*Criminal Code* s 5.6(1)).

46. Intention with respect to conduct requires proof that the person meant to engage in the conduct (*Criminal Code* s 5.2(1)).

47. As noted above, the definition of dealing includes where a person receives money or other property. A person will not intentionally receive money (or the chose in action arising from the money) where money is deposited in the person's account without the person's knowledge (see *Commissioner of Australian Federal Police v Fitzroy All Pty Ltd* (2015) 299 FLR 439, [74]-[79]).

Reasonable to suspect that the property is the proceeds of indictable crime

48. The third element of the offence is that it is reasonable to suspect that the property is proceeds of indictable crime.

49. *Criminal Code* s 400.1 defines proceeds of indictable crime as:

> (a) any money or other property that is wholly or partly derived or realised, directly or indirectly, by any person from the commission of a particular offence against a law of the Commonwealth, a State, a Territory or a foreign country that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence); or
>
> (b) any money or other property that is wholly or partly derived or realised, directly or indirectly, by any person from the commission of an offence of a particular kind against a law of the Commonwealth, a State, a Territory or a foreign country that may be dealt with as an indictable offence (even if an offence of that kind may, in some circumstances, be dealt with as a summary offence).

50. A suspicion has been described as a state of conjecture or surmise when proof is lacking, and which is less than a belief (*George v Rockett* (1990) 170 CLR 104, 115, quoting *Hussien v Chong Fook Kam* (1970) AC 942, 948), or a positive feeling of apprehension amounting to a slight opinion but without sufficient evidence which is more than a mere idle wondering (*Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, [303]).

51. A suspicion need only be a reasonable hypothesis in the circumstances. It may be one of several hypotheses available on the evidence – the availability of other hypotheses does not necessarily prevent the jury from finding that it is reasonable to suspect that the property is the proceeds of crime (*R v Tween* [1965] VR 687, 693 (Sholl J); *DPP v Pastras* (2005) 11 VR 449, [31]).

52. As with the Victorian offence outlined offence, the offence which the property is derived or realised from is called the predicate offence.

53. Criminal Code s 400.9(2) lists circumstances in which "it is taken to be reasonable to suspect that money or other property is proceeds of indictable crime". These circumstances expand the operation of the substantive offence provision, as paragraphs (a), (aa), (b), (ba), (d) and (da) do not involve indictable offences from which the subject property is derived or realised, and so would not otherwise constitute proceeds of crime (*Lin v The Queen* [2015] NSWCCA 204, [23]-[24]; c.f. *Commissioner of Australian Federal Police v Fitzroy All Pty Ltd* (2015) 299 FLR 439, [54]-[62]).

54. The circumstance listed in *Criminal Code* s 400.9(2)(b) is that "the value of the money and property involved in the conduct is, in the opinion of the trier of fact, grossly out of proportion to the defendant's income and expenditure over a reasonable period within which the conduct occurs". In *Commissioner of Australian Federal Police v Nguyen*, Fagan J held that, for this purpose, income covered "receipts derived from personal exertion, from the conduct of a business, from investments and the like" but did not include "capital receipts (such as the proceeds of sale of assets) or other inflows of funds (such as gifts)" ([2016] NSWSC 883, [25], [28]).

55. Where the prosecution relies on *Criminal Code* s 400.9(2), it is not necessary to identify a predicate offence. Instead, the question for the purpose of the third element will be whether the prosecution has proved a dealing with the property which meets the relevant paragraph of subsection (2). The prosecution can therefore particularise the third element by reference to the relevant paragraphs of subsection (2) (*Lin v The Queen* [2015] NSWCCA 204, [26]. See also *Xue v The Queen* [2021] NSWCCA 270 at [183]-[186]; *Harper v DPP* [2021] VSCA 173).

56. It has been left open whether the prosecution must identify a particular predicate offence when it does not rely on *Criminal Code* s 400.9(2) or whether it is sufficient to establish the basis on which it is suspected that the relevant money is derived from an offence of the kind referred to in the definition of 'proceeds of crime' as distinct from some other lawful enterprise (*Harper v DPP* [2021] VSCA 173, [38]-[40]. See also *DPP v Ngo* (2012) 272 FLR 246, [40]). However, it has been held in relation to similar New South Wales provisions that the existence of a defence equivalent to s 400.9(5) is inconsistent with any obligation on the prosecution to particularise the type of offence (see *R v Ferguson* [2021] NSWDC 226, [26]).

57. It is not necessary to show that the property is, in fact, proceeds of crime (see, eg. *DPP v Marell* [2005] VSC 430, [24]-[25], [38]; *Arora v Cobern* (2015) 257 A Crim R 163, [66]).

58. The jury may consider all available and admissible evidence in deciding whether it is reasonable to suspect that the property is proceeds of crime, regardless of whether the evidence existed or was known at the time of the accused's dealing with the property, or came to light after that time (*Singh v The Queen* [2016] VSCA 163, [52]).

59. Evidence that the property was, in fact, proceeds of crime is relevant and admissible to prove that it is reasonable to suspect the property is proceeds of crime (*R v Buckett* (1985) 132 ALR 669, 685).

60. The test for this third element is objective and impersonal. The jury does not consider whether a reasonable person in the accused's position would have suspected that the property was proceeds of crime. Similarly, the prosecution does not need to show that an arresting police officer reasonably suspected the property was proceeds of crime (see *Singh v The Queen* [2016] VSCA 163, [52]-[53]; *DPP v Pastras* (2005) 11 VR 449, [23]; *Ex parte Patmoy; Re Jack* (1944) 44 SR (NSW) 351, 356; *R v Buckett* (1995) 132 ALR 669, 675).

61. Instead, the question is whether the jury holds a reasonable suspicion that the property is the proceeds of crime (*DPP v Pastras* (2005) 11 VR 449, [23]-[25]; *R v Zotti* (2002) 82 SASR 554, [6], [40], [127]; *DPP v Brown* (1994) 72 A Crim R 527, 538; *R v Buckett* (1995) 132 ALR 669, 675; *Anderson v Judges of the District Court of New South Wales* (1992) 27 NSWLR 701, 714).

62. One consequence of the fact that the element concerns the jury's own reasonable suspicion is that it is not apt to speak of the reasonableness of the suspicion being proved beyond reasonable doubt. Instead, the question is whether the facts which have been proved beyond reasonable doubt give rise to the reasonable suspicion. The reasonableness of a suspicion is a matter for opinion or judgment and not proof (*R v Zotti* (2002) 82 SASR 554, [6], [46]-[48], [133], [154] (c.f. [54]-[67]); *Tepper v Kelly* (1987) 45 SASR 340, 343; *Tepper v Kelly* (1988) 47 SASR 271, 273*; c.f. R v Buckett* (1985) 132 ALR 669, 687; *Ex parte Patmoy; Re Jack* (1944) 44 SR (NSW) 351, 356).

63. This also means that there does not need to be contemporaneity between the accused's dealing with the property and the existence of the state of affairs where it is reasonable to suspect that the property is the proceeds of crime (see *Singh v The Queen* [2016] VSCA 163, [51]; *DPP v Pastras* (2005) 11 VR 449; *R v Zotti* (2002) 82 SASR 554, [40], [127]-[128]).

Defendant's suspicion of the nature of the property

64. Absolute liability applies to the third element, and so there is no associated fault element (*Criminal Code* s 400.9(4)).

65. However, the section does not apply if the defendant proves that they had no reasonable grounds for suspecting that the money or property was "derived or realised, directly or indirectly, from some form of unlawful activity" (*Criminal Code* s 400.9(5)).

66. The accused bears a legal onus to establish this defence on the balance of probabilities (*Criminal Code* ss 13.4, 13.5).

67. The exact meaning of this provision does not appear to have been considered by an appellate court.

68. When commenting on the test for an exclusion order under the *Confiscation Act 1997* s 52(1)(a)(iii), which requires that the person acquire an interest in property "without knowing, and in circumstances such as not to arouse a reasonable suspicion", the Court of Appeal noted that the test was objective, but assessed by reference to the accused's circumstances. Therefore, the test is not met if a reasonable person in the accused's position would have formed a suspicion (see *DPP v Le* (2007) 15 VR 352, [23]-[25]).

69. It is suggested that this test reflects the appropriate balance struck between the language of *Criminal Code* s 400.9(5) ("no reasonable grounds for suspecting") with the structure of the offence provision, where the property itself must be reasonably suspected of being the proceeds of crime on an objective and impersonal basis.

Value of the property

70. The fourth element of the offences in s 400.9 is that, at the time of the dealing, the value of the property is of the relevant amount.

71. Section 400.9 contains four separate offences, with different value thresholds. These thresholds are:

    - The value of the property is $10,000,000 or more – s 400.9(1AA)
    - The value of the property is $1,000,000 or more – s 400.9(1AB)
    - The value of the property is $100,000 or more – s 400.9(1)
    - The value of the property is less than $100,000 – s 400.9(1A)

72. While absolute liability applies to this element and so there is no associated fault element (*Criminal Code* s 400.9(4)), a mistake of fact defence is available if the accused thought the value of the property was a lower amount (*Criminal Code* s 400.10).

73. The accused bears an evidentiary onus of raising the mistake of fact defence. Once the defence is raised, the prosecution bears the legal onus of disproving the relevant mistake of fact (*Criminal Code* s 400.10(1); *Singh v The Queen* [2016] VSCA 163, [69]).

74. The mistake of fact defence has three components:

(a) at or before the time of dealing with the money or property, the person considered what was the value of the money or property, and was under a mistaken but reasonable belief about that value; and

(aa) in a case where the dealing continued during a period—the person had that belief throughout that period; and

(b) had the value been what the person believed it to be, the person's conduct would have constituted another offence against this Division for which the maximum penalty, in penalty units, is less than the maximum penalty, in penalty units, for the offence charged.

75. Paragraph (aa) was introduced by clause 70 of Schedule 1 of the *Crimes Legislation Amendment (Economic Disruption) Act 2021.* According to the Explanatory Memorandum, this was designed to reverse the effect of *Singh v The Queen* [2016] VSCA 163, which had held that where the prosecution relied on receiving and continuing to possess property, then it was sufficient to engage the defence if the accused held the mistaken belief before receiving the goods, even if the accused later learnt the true value of the goods (see Explanatory Memorandum, Crimes Legislation Amendment (Economic Disruption) Bill 2020, [16] and compare *Singh v The Queen* [2016] VSCA 163, [102]-[104]).

76. It is likely that where the accused establishes the mistake of fact defence, the jury will then need to consider whether to convict the accused by reference to the lower amount. See Alternative Verdicts, below.

Alternative Verdicts

77. *Criminal Code* s 400.14 states:

If, on a trial for an offence against a provision of this Division (the offence charged), the trier of fact:

(a) is not satisfied that the defendant is guilty of the offence charged; but

(b) is otherwise satisfied that the defendant is guilty of another offence against this Division for which the maximum penalty, in penalty units, is less than the maximum penalty, in penalty units, for the offence charged;

the trier of fact may find the defendant not guilty of the offence charged but guilty of the other offence, so long as the person has been accorded procedural fairness in relation to that finding of guilt.

78. The effect of this provision is that all offences within Division 400 are statutory alternatives to one another, and the jury may return a verdict on any of these statutory alternatives provided:

- The maximum penalty for the alternative offence is less than the maximum penalty for the charged offence
- The accused has been accorded procedural fairness in relation to that statutory alternative.

Last updated: 17 April 2024

7.5.22.1 Charge: Dealing with proceeds of crime intending to conceal

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I must now direct you about the crime of knowingly dealing with proceeds of crime with intention to conceal. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt.

One – That the accused dealt with the property.

Two – That the property was proceeds of crime.

Three – That the accused knew the property was proceeds of crime.

Four – That the accused and intended to conceal that the property was proceeds of crime.

I will now explain each of these elements in more detail.

Dealing with property

The first element is that the accused dealt with property.

For this charge, the property in question is [*identify relevant property*].

In this case, the prosecution says that NOA dealt with the [*identify relevant property*] by [receiving / possessing / concealing / disposing of] it.

[*If possession is in issue, add the following shaded section*]

A person possesses property if they have control over the property and they intend to exercise control over the property to exclude anyone else [who did not jointly possess the property]. A person can have control over something even when they are not personally carrying it. For example, a person has possession of something if they have placed it where they have the power/right to take it when they wish.

[*Identify relevant evidence and arguments*]

Proceeds of crime

The second element is that the property is proceeds of crime.

The law defines proceeds of crime, for the purpose of this case, as property that is derived or realised, directly or indirectly, from the commission of an offence in Victoria.[1059]

The words "derived or realised" effectively mean "obtained". In other words, did the accused obtain the property, directly or indirectly, from the commission of an offence. To give you a couple of simple examples, if someone stole a painting, the painting would be proceeds of the crime of theft. If they then sold the painting, the money they received for the sale would also be proceeds of the original crime of theft. And if a person was paid to unlawfully attack someone, the money they received for the attack would be proceeds of crime.

The prosecution argues that the [*identify relevant property*] was the proceeds of [*identify relevant crime*].

The prosecution does not need to prove a specific crime, in terms of who committed it, when it was committed and where it was committed. But they do need to prove that property is from a specified offence.

[1059] This direction must be modified if the prosecution relies on paragraphs (b) or (c) of the definition of proceeds of crime.

To give you an example, suppose someone broke into several homes and took money to pay for a drug addiction. The prosecution would not need to prove which money came from which house. But they would need to prove beyond reasonable doubt that it came from breaking into homes, and not from any other type of offending, such as drug trafficking.[1060]

[*Identify relevant evidence and arguments*]

Knowledge that the property was proceeds of crime

The third element the prosecution must prove is that the accused knew that the property was proceeds of crime.

This element looks at NOA's state of mind.

The prosecution must prove that NOA knew the property was obtained from a criminal offence. There is an important difference between this and the second element. As I have just explained, the second element requires you to decide if the prosecution has proved that the property was, in fact, proceeds of crime. The third element requires the prosecution to prove that NOA knew it was proceeds of crime.

Intention to conceal

The fourth element the prosecution must prove is that the accused intended to conceal that the property was proceeds of crime.

This element looks at how and why NOA dealt with the property. The prosecution must prove that a dominant purpose of NOA [*identify act of dealing*] was to conceal that it came from [*identify relevant alleged offence*].

[*Identify evidence and arguments*].

Summary

To summarise, before you can find NOA guilty of knowingly dealing with proceeds of crime with intention to conceal, the prosecution must prove to you beyond reasonable doubt:

One – That NOA dealt with property;

Two – That the property is proceeds of crime

Three – That NOA knew the property was proceeds of crime and

Four – That NOA dealt with the property intending to conceal that it was proceeds of crime.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of knowingly dealing with proceeds of crime with intention to conceal.

Last updated: 17 April 2024

7.5.22.2 Charge: Knowingly Dealing with proceeds of crime

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I must now direct you about the crime of knowingly dealing with proceeds of crime. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – That the accused dealt with the property.

[1060] This example may need to be modified depending on the issues in the case.

Two – That the property was proceeds of crime.

Three – That the accused knew the property was proceeds of crime.

I will now explain each of these elements in more detail.

Dealing with property

The first element is that the accused dealt with property.

For this charge, the property in question is [*identify relevant property*].

In this case, the prosecution says that NOA dealt with the [*identify relevant property*] by [*receiving / possessing / concealing / disposing of]* it.

[*If possession is in issue, add the following shaded section*]

A person possesses property if they have control over the property and they intend to exercise control over the property to exclude anyone else [who did not jointly possess the property]. A person can have control over something even when they are not personally carrying it. For example, a person has possession of something if they have placed it where they have the power/right to take it when they wish.

[*Identify relevant evidence and arguments*]

Proceeds of crime

The second element is that the property was proceeds of crime.

The law defines proceeds of crime, for the purpose of this case, as property that is derived or realised, directly or indirectly, from the commission of an offence in Victoria.[1061]

The words "derived or realised" effectively mean "obtained". In other words, did the accused obtain the property, directly or indirectly, from the commission of an offence. To give you a couple of simple examples, if someone stole a painting, the painting would be proceeds of the crime of theft. If they then sold the painting, the money they received for the sale would also be proceeds of the original crime of theft. And if a person was paid to unlawfully attack someone, the money they received for the attack would be proceeds of crime.

The prosecution argues that the [*identify relevant property*] was the proceeds of [*identify relevant crime*].

The prosecution does not need to prove a specific crime, in terms of who committed it, when it was committed and where it was committed. But they do need to prove that property is from a specified offence.

To give you an example, suppose someone broke into several homes and took money to pay for a drug addiction. The prosecution would not need to prove which money came from which house. But they would need to prove beyond reasonable doubt that it came from breaking into homes, and not from any other type of offending, such as drug trafficking.[1062]

[*Identify relevant evidence and arguments*]

[1061] This direction must be modified if the prosecution relies on paragraphs (b) or (c) of the definition of proceeds of crime.

[1062] This example may need to be modified depending on the issues in the case.

Knowledge

The third element the prosecution must prove is that the accused knew that the property was proceeds of crime.

This element looks at NOA's state of mind. Did they know the property was proceeds of crime?

There is an important difference between this and the second element. As I have just explained, the second element requires you to decide if the prosecution has proved that the property was, in fact, proceeds of crime. The third element requires the prosecution to prove that NOA knew it was proceeds of crime.

[*Identify evidence and arguments*].

Summary

To summarise, before you can find NOA guilty of knowingly dealing with proceeds of crime, the prosecution must prove to you beyond reasonable doubt:

One – That NOA dealt with property.

Two – That the property was proceeds of crime.

Three – That NOA knew the property was proceeds of crime.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of knowingly dealing with proceeds of crime.

Last updated: 17 April 2024

7.5.22.3 Charge: Recklessly Dealing with proceeds of crime

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I must now direct you about the crime of recklessly dealing with proceeds of crime. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – That the accused dealt with the property.

Two – That the property was proceeds of crime.

Three – That the accused was reckless as to whether the property was proceeds of crime.

I will now explain each of these elements in more detail.

Dealing with property

The first element is that the accused dealt with property.

For this charge, the property in question is [*identify relevant property*].

In this case, the prosecution says that NOA dealt with the [*identify relevant property*] by [receiving / possessing / concealing / disposing of] it.

[*If possession is in issue, add the following shaded section*]

A person possesses property if they have control over the property and they intend to exercise control over the property to exclude anyone else [who did not jointly possess the property]. A person can have control over something even when they are not personally carrying it. For example, a person has possession of something if they have placed it where they have the power/right to take it when they wish.

[*Identify relevant evidence and arguments*]

Proceeds of crime

The second element is that the property was proceeds of crime.

The law defines proceeds of crime, for the purpose of this case, as property that is derived or realised, directly or indirectly, from the commission of an offence in Victoria.[1063]

The words "derived or realised" effectively mean "obtained". In other words, did the accused obtain the property, directly or indirectly, from the commission of an offence. To give you a couple of simple examples, if someone stole a painting, the painting would be proceeds of the crime of theft. If they then sold the painting, the money they received for the sale would also be proceeds of the original crime of theft. And if a person was paid to unlawfully attack someone, the money they received for the attack would be proceeds of crime.

The prosecution argues that the [*identify relevant property*] was the proceeds of [*identify relevant crime*].

The prosecution does not need to prove a specific crime, in terms of who committed it, when it was committed and where it was committed. But they do need to prove that property is from a specified offence.

To give you an example, suppose someone had broken into several homes and taken money to pay for a drug addiction. The prosecution does not need to prove which money came from which house. But they would need to prove beyond reasonable doubt that it came from breaking into homes, and not from any other type of offending, such as drug trafficking.[1064]

[*Identify relevant evidence and arguments*]

Recklessness

The third element the prosecution must prove is that the accused was reckless as to whether the property was proceeds of crime.

This element looks at NOA's state of mind. The prosecution must prove that they knew the property was probably proceeds of crime. It is not enough that NOA thought that the property was possibly proceeds of crime or might have been proceeds of crime. The prosecution must prove that NOA thought it was probable that the property was proceeds of crime. That is what it means to be reckless for this offence.

There is an important difference between this and the second element. As I have just explained, the second element requires you to decide if the prosecution has proved that the property was, in fact, proceeds of crime. The third element requires the prosecution to prove that NOA knew it was probably proceeds of crime.

[*Identify evidence and arguments*].

Summary

To summarise, before you can find NOA guilty of recklessly dealing with proceeds of crime, the prosecution must prove to you beyond reasonable doubt:

One – That NOA dealt with property.

Two – That the property was proceeds of crime.

[1063] This direction must be modified if the prosecution relies on paragraphs (b) or (c) of the definition of proceeds of crime.

[1064] This example may need to be modified depending on the issues in the case.

Three – That NOA knew the property was probably proceeds of crime.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of recklessly dealing with proceeds of crime.

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7.5.22.4 Charge: Negligently dealing with proceeds of crime

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I must now direct you about the crime of negligently dealing with proceeds of crime. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – That the accused dealt with the property.

Two – That the property was proceeds of crime.

Three – That the accused was negligent as to whether the property was proceeds of crime.

I will now explain each of these elements in more detail.

Dealing with property

The first element is that the accused dealt with property.

For this charge, the property in question is [*identify relevant property*].

In this case, the prosecution says that NOA dealt with the [*identify relevant property*] by [receiving / possessing / concealing / disposing of] it.

[*If possession is in issue, add the following shaded section*]

A person possesses property if they have control over the property and they intend to exercise control over the property to exclude anyone else [who did not jointly possess the property]. A person can have control over something even when they are not personally carrying it. For example, a person has possession of something if they have placed it where they have the power/right to take it when they wish.

[*Identify relevant evidence and arguments*]

Proceeds of crime

The second element is that the property was proceeds of crime.

The law defines proceeds of crime, for the purpose of this case, as property that is derived or realised, directly or indirectly, from the commission of an offence in Victoria.[1065]

The words "derived or realised" effectively mean "obtained". In other words, did the accused obtain the property, directly or indirectly, from the commission of an offence. To give you a couple of simple examples, if someone stole a painting, the painting would be proceeds of the crime of theft. If they then sold the painting, the money they received for the sale would also be proceeds of the original crime of theft. And if a person was paid to unlawfully attack someone, the money they received for the attack would be proceeds of crime.

The prosecution argues that the [*identify relevant property*] was the proceeds of [*identify relevant crime*].

[1065] This direction must be modified if the prosecution relies on paragraphs (b) or (c) of the definition of proceeds of crime.

The prosecution does not need to prove a specific crime, in terms of who committed it, when it was committed and where it was committed. But they do need to prove that property is from a specified offence.

To give you an example, suppose someone broke into several homes and took money to pay for a drug addiction. The prosecution would not need to prove which money came from which house. But they would need to prove beyond reasonable doubt that it came from breaking into homes, and not from any other type of offending, such as drug trafficking.[1066]

[*Identify relevant evidence and arguments*]

Negligence

The third element the prosecution must prove is that the accused was negligent as to whether the property was proceeds of crime.

This element looks at whether NOA took sufficient care to avoid dealing with property that was proceeds of crime.

The prosecution will prove that NOA was negligent for the purpose of this offence if they prove that NOA's actions to avoid dealing with property that was proceeds of crime fell far short of what a reasonable person would have done and involved a high risk of dealing with proceeds of crime.

This is an objective test. The prosecution does not need to show that NOA knew the property was proceeds of crime, or realised there was a risk that the property was proceeds of crime. What matters is what a reasonable person in NOA's position would have done. The prosecution must prove that a reasonable person in NOA's position would have realised there was a high risk that the property was proceeds of crime.

There is an important difference between this and the second element. As I have just explained, the second element requires you to decide if the prosecution has proved that the property was, in fact, proceeds of crime. The third element requires the prosecution to prove that a reasonable person in NOA's position would have realised there was a high risk that the property was proceeds of crime.

[*Identify evidence and arguments*].

Summary

To summarise, before you can find NOA guilty of negligently dealing with proceeds of crime, the prosecution must prove to you beyond reasonable doubt:

One – That NOA dealt with property.

Two – That the property was proceeds of crime.

Three – That a reasonable person in NOA's position would have realised there was a high risk that the property was proceeds of crime.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of negligently dealing with proceeds of crime.

Last updated: 17 April 2024

7.5.22.5 Charge: Intentionally dealing with an instrument of crime

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[1066] This example may need to be modified depending on the issues in the case.

I must now direct you about the crime of intentionally dealing with property that becomes an instrument of crime. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt.

One – That the accused dealt with the property.

Two – That the accused intended that the property become an instrument of crime.

Three – The property subsequently becomes an instrument of crime.

I will now explain each of these elements in more detail.

Dealing with property

The first element is that the accused dealt with property.

For this charge, the property in question is [*identify relevant property*].

In this case, the prosecution says that NOA dealt with the [*identify relevant property*] by [receiving / possessing / concealing / disposing of] it.

[*If possession is in issue, add the following shaded section*]

A person possesses property if they have control over the property and they intend to exercise control over the property to exclude anyone else [who did not jointly possess the property]. A person can have control over something even when they are not personally carrying it. For example, a person has possession of something if they have placed it where they have the power/right to take it when they wish.

[*Identify relevant evidence and arguments*]

Intention that property become an instrument of crime

The second element is that the accused intended that the property become an instrument of crime.

The law defines instrument of crime, for the purpose of this case, as property that is used in the commission of, or used to facilitate, an offence in Victoria.[1067]

To give you a simple example, the gun or knife used in an armed robbery is an instrument of crime.

[*If it is necessary to explain the need for temporal separation, add the following shaded section*]

There must be a separation in time between the accused dealing with the property and the later offence. For instance, if someone steals a painting, they do not take possession of the painting with the intention of it becoming an instrument of the crime of theft. But if they stole it, intending to insure it and destroy it, then it might be instrument of crime for the insurance fraud offence.

[1067] This direction must be modified if the prosecution relies on paragraphs (b) or (c) of the definition of proceeds of crime.

The accused must intend that the property be used in or used to facilitate the offence. You must look at the nature of the connection between the property and the later offence to decide if it was intended to be used. It is not enough that the person takes advantage of a situation that arises after they have dealt with the property.[1068]

[*Identify relevant evidence and arguments*]

Instrument of crime

The third element the prosecution must prove is that the property subsequently becomes an instrument of crime.

There is an important difference between this and the second element. As I have just explained, the second element requires you to decide if the accused intended that the property become an instrument of crime. This third element looks at whether that, in fact, happened. That is, has the prosecution proved that the property, in fact, was used in the commission of, or used to facilitate, an offence in Victoria.

[*Identify evidence and arguments*].

Summary

To summarise, before you can find NOA guilty of intentionally dealing with property that becomes an instrument of crime, the prosecution must prove to you beyond reasonable doubt:

One – That NOA dealt with the property.

Two – That NOA intended that the property become an instrument of crime.

Three – The property subsequently became an instrument of crime.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of intentionally dealing with property that becomes an instrument of crime.

Last updated: 17 April 2024

7.5.22.6 Charge: Dealing with property reasonably suspected of being proceeds of crime (Commonwealth)

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I must now direct you about the crime of dealing with property worth at least [*identify relevant amount*] which is reasonably suspected of being proceeds of crime. To prove this crime, the prosecution must prove the following 4 elements beyond reasonable doubt.

One – That the accused dealt with the property.

Two – The accused intended to deal with the property.

Three – It is reasonable to suspect the property is the proceeds of crime.

Four – The property was worth at least [*identify relevant amount*].

I will now explain each of these elements in more detail.

[1068] Add the following example, if appropriate: "Let me give you an example. Suppose I sold shares, intending not to declare any capital gain I made on the shares. In that situation, I have not used the shares to commit tax evasion. Instead, I have taken advantage of a situation that arose after I disposed of the shares".

Dealing with property

The first element is that the accused dealt with property.

For this charge, the property in question is [*identify relevant property*].

In this case, the prosecution says that NOA dealt with the [*identify relevant property*] by [receiving / possessing / concealing / disposing of / importing / exporting / engaging in a banking transaction in relation to] it.

[*If possession is in issue, add the following shaded section*]

A person possesses property if they have control over the property and they intend to exercise control over the property to exclude anyone else [who did not jointly possess the property]. A person can have control over something even when they are not personally carrying it. For example, a person has possession of something if they have placed it where they have the power/right to take it when they wish.

[*Identify relevant evidence and arguments*]

Intention

The second element is that the accused intended to deal with the property.

This means the prosecution must prove that the accused meant to [receive / possess / conceal / dispose of / import / export / engage in a banking transaction in relation to] it.

[*Identify relevant evidence and arguments*}.

Reasonably suspected of being proceeds of crime

The third element is that the property is reasonably suspected of being the proceeds of crime.

For this element, you the jury must decide whether you reasonably suspect that the property is proceeds of crime.

Property is proceeds of crime if it is wholly or partly, derived or realised, directly or indirectly, from the commission of a particular offence, or an offence of a particular kind, against a law of Australia, or an Australian State or Territory.[1069]

The words "derived or realised" effectively mean "obtained". In other words, did the accused obtain the property, directly or indirectly, from the commission of an offence. To give you a couple of simple examples, if someone stole a painting, the painting would be proceeds of the crime of theft. If they then sold the painting, the money they received for the sale would also be proceeds of the original crime of theft. And if a person was paid to unlawfully attack someone, the money they received for the attack would be proceeds of crime.

The prosecution does not need to prove that the property is proceeds of crime. Only that facts exist which lead you as a jury to reasonably suspect that it is.

I told you at the start of the trial that beyond reasonable doubt is the highest standard known to the law, and that it is not enough that the accused is probably or very likely to be guilty. Those directions require some adjustment in relation to this element, and only this element.

[1069] This direction must be modified if the prosecution relies on the commission of an offence in a foreign country.

Here, the fact you need to decide is whether you have a reasonable suspicion that the property is proceeds of crime. A suspicion is a state of conjecture where proof is lacking.

It is enough that you are satisfied that it is a reasonable possibility that the property is proceeds of crime. I told you at the start of the trial that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility. Equally, a reasonable possibility is not an imaginary or fanciful possibility, or something that is unrealistic.

When you are considering this element, you look at all the evidence that has been presented. You are not limited to the information that was available to NOA at the time he/she/they dealt with the property. For this element, you do not need to think about what NOA knew or should have known.

Instead, the question is this. On the basis of the evidence you accept, do you as reasonable jurors, suspect that the property is the proceeds of crime?

[*If the prosecution relies on Criminal Code s 400.9(2), add the following shaded section*]

There are certain circumstances which the law recognises as being ones where it is reasonable to suspect that property is the proceeds of crime.[1070] In this case, the relevant circumstance is:

[*If the prosecution relies on Criminal Code s 400.9(2)(a) or (aa), add the following darker shaded section*]

The money was used in structured transactions. Let me explain what I mean by structured transactions. In Australia, banks and other financial services must report transactions over $10,000 to an agency called AUSTRAC, the Australian Transaction Reports and Analysis Centre. It is a crime to be a party to 2 or more transactions under $10,000 where it is reasonable to conclude that the transactions were structured in that way for the sole or dominant purpose of attempting to ensure the transactions would not be reported to AUSTRAC. In deciding whether it is reasonable to conclude that the transactions were improperly structured, you must take into account how the transactions were conducted and any explanation by the person involved. You also must consider the value of money in each transaction, the total value of the transactions, the period of time over which the transactions took place, the interval between the transactions and the locations of the various transactions. The prosecution says that [*identify relevant money*] was used in structured transactions.

[*Identify relevant evidence and arguments*]

If you are satisfied that the money was used in structured transactions, then the prosecution has proved the third element.

[*If the prosecution relies on Criminal Code s 400.9(2)(b), add the following darker shaded section*]

The conduct involved using accounts held with authorised deposit-taking institutions in false names. In this case, you have heard evidence that [*identify relevant ADI*] is an authorised-deposit taking institution. Therefore, if you are satisfied that NOA dealt with money using accounts held at [*identify relevant ADI*] in a false name, then the prosecution has proved the third element.

[1070] As explained in *Lin v The Queen* [2015] NSWCCA 204 at [23]-[24], it may not be strictly correct to say that s 400.9(2) circumstances are ones where it is reasonable to suspect that the property is the proceeds of crime, as some of the s 400.9(2) circumstances do not involve the money being derived or realised from an indictable offence. However, as the *Criminal Code* makes clear, proof of a s 400.9(2) circumstance is sufficient to prove the third element. If the judge thinks it is necessary to make this point to the jury, then it is suggested that the directions should be written so that the third element does not refer to the prosecution proving that "it is reasonable to suspect the property is the proceeds of crime". Instead, the third element may be described as "the accused dealt with the property in prohibited circumstances" and the prohibited circumstances are either "it is reasonable to suspect the property is proceeds of crime" or the conduct met one of the s 400.9(2) circumstances.

[*Identify relevant evidence and arguments*]

[*If the prosecution relies on Criminal Code s 400.9(2)(ba) – breach of s 139, add the following darker shaded section*]

The accused allowed a customer to receive a designated service [in a false name / anonymously]. Australian law requires that people who provide [*identify relevant designated service*] must establish the identity of the customer and must record that name correctly. It is an offence to provide [*identify relevant designated service*] and [record a false customer name / provide the service on the basis of customer anonymity]. The prosecution says that NOA committed this offence. To prove the third element in this way, the prosecution must prove 3 matters.[1071]

First, that NOA provided [*identify relevant designated service*].

Second, that NOA provided [*identify relevant designated service*] [using a false customer name / on the basis of customer anonymity].

Third, that NOA intended to provide [*identify relevant designated service*] [using a false customer name / on the basis of customer anonymity].

[*Identify relevant evidence and arguments*].

If you are satisfied that the prosecution has proved these three matters, then the prosecution has proved this third element.

[*If the prosecution relies on Criminal Code s 400.9(2)(ba) – breach of s 140, add the following darker shaded section*]

The accused received a designated service [in a false name / anonymously]. Australian law requires that people who receive [*identify relevant designated service*] provide their name. It is an offence to receive [*identify relevant designated service*] [using a false customer name / on the basis of customer anonymity]. The prosecution says that NOA committed this offence. To prove the third element in this way, the prosecution must prove 3 matters.[1072]

First, that NOA received [*identify relevant designated service*].

Second, that NOA received [*identify relevant designated service*] [using a false customer name / on the basis of customer anonymity].

Third, that NOA intended to receive [*identify relevant designated service*] [using a false customer name / on the basis of customer anonymity].

[*Identify relevant evidence and arguments*].

[1071] These directions assume that the requirements of *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 139(1)(a) and (d) or 139(3)(a) and (d) are questions of law and are not in issue. The direction also assumes that the accused does not meet the evidentiary burden in s 139(2A) to establish that a false customer name is justified or excused by or under a law. The direction must be modified if any of these assumptions are not valid.

[1072] These directions assume that the requirements of *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 140(1)(c) or 140(3)(c) are questions of law and are not in issue. The direction must be modified if these assumptions are not valid.

If you are satisfied that the prosecution has proved these three matters, then the prosecution has proved this third element.

[*If the prosecution relies on Criminal Code s 400.9(2)(ba) – section 141, add the following darker shaded section*]

The accused receive a designated service without disclosing their other names. Australian law requires that when a person is commonly known by 2 or more names, the person must disclose all of those names when receiving [*identify relevant designated service*]. It is an offence to fail to provide all commonly known names when receiving [*identify relevant designated service*]. The prosecution says that NOA committed this offence. To prove the third element in this way, the prosecution must prove 6 matters.[1073]

First, that NOA received [*identify relevant designated service*].

Second, that NOA is commonly known by 2 or more different names.

Third, that NOA is aware that he is/she is/they are commonly known by 2 or more different names.[1074]

Third, NOA received [*identify relevant designated service*] using one of those names.

Four, NOA had not previously disclosed the other name or names to [*identify relevant designed service provider*].

Five, NOA knew of a substantial risk that that he/she/they had not previously disclosed the other name or names to [*identify relevant designed service provider*] and it was unjustifiable to take that risk in the circumstances.

[*Identify relevant evidence and arguments*].

If you are satisfied that the prosecution has proved these five matters, then the prosecution has proved this third element.

[*If the prosecution relies on Criminal Code s 400.9(2)(c), add the following darker shaded section*]

The conduct involves money or property, the value of which is, in your opinion, grossly out of proportion to NOA's income and expenditure over a reasonable period within which the conduct occurs.

[*Identify relevant evidence and arguments*]

If you are satisfied that the money or other property NOA dealt with is grossly out of proportion with

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[1073] These directions assume that the requirements of *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 141(1)(e) is a question of law and is not in issue. The direction also assumes that the accused does not meet the evidentiary burden in s 139(2A) to establish that a false customer name is justified or excused by or under a law. The direction must be modified if any of these assumptions are not valid.

[1074] This overstates the fault element for *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* s 141(1)(b), which only requires proof of recklessness (see *Criminal Code* ss 2.2 and 5.6(2)). If the prosecution relies on recklessness, substitute the following statement of the element: "Third, that NOA is aware of a substantial risk that he is/she is/they are commonly known by 2 or more names and in the circumstances it is unjustifiable to take that risk."

his/her/their lawful income and expenditure, then the prosecution has proved the third element.

[*If the prosecution relies on Criminal Code s 400.9(2)(d) or (da), add the following darker shaded section*]

The accused failed to comply with his/her/their obligations in relation to significant transactions. Let me explain that. Under Australian law, people who provide [*identify relevant designated service*] are required to report transactions worth $10,000 or more to an agency called AUSTRAC, the Australian Transaction Reports and Analysis Centre. Here, the prosecution says that NOA [*identify relevant designated service*] and did not properly report that transaction to AUSTRAC. In particular, the prosecution says that NOA [*identify how the accused failed their reporting obligations, either by failing to report or by giving false or misleading information*].

[*Identify relevant evidence and arguments*]

If you are satisfied that NOA was required to report [*identify relevant transaction*] and he/she/they failed to do so, then the prosecution has proved the third element.

[*If the prosecution relies on Criminal Code s 400.9(2)(e), add the following darker shaded section*]

NOA has stated the conduct was engaged in on behalf of or at the request of another person and he has/she has/they have not provided information enabling the other person to be identified and located. The law states that if you claim to deal with money or other property on behalf of someone else but cannot provide information to allow them to be identified and located, then it is reasonable to suspect the money or other property is the proceeds of crime. In this case, the prosecution say that NOA claimed [when giving evidence/during the interview with police] to be dealing with the property on behalf of NO3P. You have also heard evidence from [*identify relevant witness*] that they could not locate NO3P.

[*Identify relevant evidence and arguments*]

If you are satisfied that NOA did say that he was/she was/they were dealing with the property on behalf of NO3P, and he/she/they did not provide enough information to enable NO3P to be identified and located, then the prosecution has proved the third element.

Value of property

The fourth element is that the property was worth at least [*identify relevant value*].

[*If the property is not cash or an account balance, add the following shaded section*][1075]

As you have heard, the property is the [identify relevant property]. You heard evidence from [identify relevant witness] that this property is worth [identify relevant value]. If you accept that evidence, then you may find the property is worth at least [identify relevant value].

[*Identify relevant evidence and arguments*].

[*If the accused raises the mistake of fact defence, add the following shaded section*]

Mistake of fact concerning value of property

In this case, there is some evidence that the accused was not aware that the property was worth

[1075] If the property is cash or an account balance it is likely that the element will not be in dispute, unless the accused raises the mistake of fact defence in *Criminal Code* s 400.10.

[*identify relevant value*]. Instead, there is evidence that the accused thought he was/she was/they were dealing with property which was only worth [*identify lower value*]. In particular, you have heard evidence that [*identify relevant evidence*]. The law states if an accused mistakenly and reasonably thought the value of the property was worth less than the relevant amount, then they may be convicted of a less serious offence based what they thought they were dealing with.

This means that there are three possible verdicts you can return for this charge.[1076]

The first possible verdict is not guilty of charge [*number*] on the indictment. You must find the accused not guilty of this charge if the prosecution fails to prove any of the four elements I have just explained.

The second possible verdict is guilty of charge [*number*]. You may deliver this verdict if the prosecution proves the four elements I have just explained and proves the accused did not reasonably believe he was/she was/they were dealing with the lower amount.

The third possible verdict is not guilty of charge [*number*], but guilty of dealing with property worth at least [*identify lower amount*] which is reasonably suspected of being the proceeds of crime. This charge is not listed on the indictment, but it is a verdict available to you. You may deliver this verdict if the prosecution proves the four elements I have just explained, but cannot prove the accused did not reasonably believed he was/she was/they were dealing with the lower amount.

There are three ways for the prosecution to prove that the accused did not reasonably believe they were dealing with a lower amount.

One – The accused did not think about the value of the property at the time of, or before, dealing with it. In other words, the accused must have actually thought about and believed the property was worth a particular amount. If the prosecution can prove that he/she/they did not, then you can find him/her/them guilty of the charged offence, provided the prosecution have proved all the elements.

Two – The accused's belief about the value of the property was not reasonable. A belief is reasonable if a reasonable person in the accused's position, knowing what the accused knew, could have formed the same belief. If the prosecution can prove that a reasonable person would not have thought the property was only worth [*identify lower amount*], then you can find the accused guilty of the charged offence, provided the prosecution have proved all the elements.

Three – The accused did not continue to believe the property was only worth [*identify relevant amount*] during the period he/she/they dealt with it. If the accused learned new information about the value of the property, and continued to deal with it, then the alternative verdict is not available.

[*Identify relevant evidence and arguments*].

[*If the accused has raised the defence in Criminal Code s 400.9(5), add the following shaded section*]

Defence – No reasonable grounds to suspect

If the prosecution proves the four elements, there is a further issue you must decide. This final issue is called the defence of no reasonable grounds to suspect. It is different from the four elements, because it is a matter that the accused must prove. It is an exception to the usual rule that the prosecution

[1076] These directions are designed for the case where the lesser amount is an uncharged alternative. If the prosecution has specified the alternative as a charge on the indictment, then the directions must be modified to make clear that the charges are alternatives, and the appropriate verdict will depend on whether the elements are proved, and whether the defence of reasonable mistake is disproved.

must prove all matters in the case.

You must find the accused not guilty if the accused proves that there were no reasonable grounds for him/her/them to suspect that the property was proceeds of crime.[1077] This defence is very similar to what the prosecution had to prove for the third element, so I will explain the differences.

In the third element, you the jury decided whether it was reasonable to suspect the property was the proceeds of crime. For this defence, you decide whether the accused has proved that they did not, and a reasonable person in their position would not, have suspected that the property was the proceeds of crime.

For this defence, you only consider what the accused knew at the time he/she/they dealt with the property. You do not take into account anything that occurred later, or which the accused did not know about. For example, if the accused proves that he/she/they did not know that [*identify relevant fact*], then you ignore that fact when deciding if a reasonable person in the accused's position would have suspected that the property was the proceeds of crime.

For the purpose of this defence, the accused operates under a different standard of proof to the prosecution. The prosecution must prove the elements of the case beyond reasonable doubt. For this defence, the accused is only required to prove the issue on the balance of probabilities. That is, they only need to show that it is more likely than not that there were no reasonable grounds to suspect that the property was the proceeds of crime.

Summary

To summarise, before you can find NOA guilty of dealing with property worth at least [*identify relevant amount*] which is reasonably suspected of being proceeds of crime, the prosecution must prove to you beyond reasonable doubt:

One – That NOA dealt with the property.

Two – That NOA intended to deal with the property.

Three – It is reasonable to suspect the property is the proceeds of crime.

Four – The property was worth at least [*identify relevant amount*].

[*If the mistake of fact defence is raised, add the following shaded section*]

Further, the prosecution must prove that NOA did not reasonably believe that the property was worth at least [*identify relevant amount*]. Otherwise, you may only consider the alternative offence of dealing with property worth at least [*identify lower amount*] which is reasonably suspected of being proceeds of crime.

[*If the defence in Criminal Code s 400.9(5) is raised, add the following shaded section*]

Even if the prosecution has proved these four elements beyond reasonable doubt, you must find the accused not guilty if the accused proves, on the balance of probabilities, that he/she/they had no reasonable grounds to suspect that the property was the proceeds of crime.

[*If the defence in Criminal Code s 400.9(5) is not raised, add the following shaded section*]

[1077] In most cases, it will be sufficient to explain the defence by reference to the phrase 'proceeds of crime'. It is likely to be an exceptional case where the judge would need to draw the jury's attention to the language of s 400.9(5) ('derived or realised, directly or indirectly, from some form of unlawful activity') rather than the more familiar phrase 'proceeds of crime'.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of dealing with property worth at least [identify relevant/lower amount] which is reasonably suspected of being proceeds of crime.

Last updated: 17 April 2024

7.6 Drug Offences

7.6.1 Trafficking in a Drug of Dependence

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Commencement Information

1. The *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (the "Drugs Act") establishes four trafficking offences, each of which commenced operation on 1 January 2002:

    i) Section 71 – trafficking in a large commercial quantity of a drug of dependence;

    ii) Section 71AA – trafficking in a commercial quantity of a drug of dependence;

    iii) Section 71AB – trafficking in a drug of dependence to a child;

    iv) Section 71AC – trafficking in a drug of dependence.

2. Prior to 1 January 2002 there was only one trafficking provision (s 71), which contained the elements of the offence and specified different penalties depending upon the quantity trafficked. This created uncertainty about whether there was just one offence with aggravating circumstances, or a number of distinct offences (see *R v Satalich* (2001) 3 VR 231). One of the purposes behind the enactment of the current provisions was to make it clear that there are a number of distinct trafficking offences (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299).
3. If a trafficking offence is alleged to have been committed between dates, one date before and one date on or after 1 January 2002, then the offence is to be treated as having been committed before the commencement of the current provisions (*Drugs Act* s 137).

Overview of Elements

4. For each of the trafficking offences, the prosecution must prove the following elements beyond reasonable doubt:

    i) That the accused intentionally "trafficked" or "attempted to traffick" in a particular substance; and

    ii) That it was a "drug of dependence" that the accused intentionally trafficked or attempted to traffick.

5. In relation to ss 71 and 71AA, the prosecution must also prove that the accused intentionally trafficked or attempted to traffick in a quantity of drugs that was not less than a large commercial or commercial quantity respectively.
6. In relation to s 71AB, the prosecution must prove that the accused intentionally trafficked or attempted to traffick to a child.
7. Each of the trafficking provisions exclude from their scope people who are authorised or licensed to traffick in a drug of dependence.

Definitions of "Trafficking"

8. "Trafficking" is defined in s 70(1) of the *Drugs Act*. However, as this definition is inclusive, it is also possible to rely on the common law definition of trafficking (*R v Giretti* (1986) 24 A Crim R 112). Both of these definitions are addressed in turn below.

9. Each of the trafficking offences requires the prosecution to prove that the relevant act of trafficking was intentional (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300).

Section 70(1) Definition of "Trafficking"

10. Section 70(1) of the *Drugs Act* defines trafficking to include:

    - Preparing a drug of dependence for trafficking;
    - Manufacturing a drug of dependence; or
    - Selling, exchanging, agreeing to sell, offering for sale or having in possession for sale, a drug of dependence.

11. Although the terms "manufacture" and "sell" are defined in s 4 of the *Drugs Act*, these definitions do not apply to the trafficking offences (s 70(2)).

Preparing a Drug of Dependence for Trafficking

12. In relation to trafficking by "preparing a drug of dependence for trafficking", the prosecution must prove that the accused:

    - Prepared a drug of dependence;
    - Intended to prepare that drug; and
    - Prepared the drug for the purpose of trafficking (*R v Giretti* (1986) 24 A Crim R 112).

13. This requires the prosecution to prove that when the accused prepared the drug, they intended either that the drug would be dealt with in one of the ways specified in s 70(1), or that it would be trafficked in the manner defined by the common law (see "Common Law Definition of 'Trafficking'" below).

Agreeing and Offering to Sell a Drug of Dependence

14. In relation to trafficking by making an "agreement" or "offer" to sell a drug of dependence under s 70(1), the prosecution must prove that the accused:

    - Made a genuine agreement or offer to sell a drug of dependence to another person;
    - Intended to make that agreement or offer; and
    - Intended the agreement or offer to be regarded as genuine by the person to whom it was made (*R v Peirce* [1996] 2 VR 215; *Gauci v Driscoll* [1985] VR 428; *R v Addison* (1993) 70 A Crim R 213 (NSW CCA)).

15. It is not necessary for the prosecution to prove that the accused actually possessed the relevant drug, intended to complete the sale, or could ever have supplied the drug to the purchaser (*Gauci v Driscoll* [1985] VR 428; *R v Addison* (1993) 70 A Crim R 213 (NSW CCA); *R v Peirce* [1996] 2 VR 215).

16. It does not matter if the accused intended to provide a different substance from that which they offered, or to provide nothing at all, as long as they intended the agreement or offer to be regarded as genuine by the person to whom it was made (*R v Addison* (1993) 70 A Crim R 213 (NSW CCA)).

Possessing a Drug of Dependence for Sale

17. In relation to trafficking by "having in possession for sale a drug of dependence" under s 70(1), the prosecution must prove that:

    - The accused possessed a drug of dependence;
    - The accused intended to sell that drug (see, e.g. *R v Francis-Wright* (2005) 11 VR 354).

18. The prosecution must prove possession for sale by establishing possession at common law. Section 5 of the Act, which deems a person to be in possession of a drug of dependence in specified circumstances, does not apply to trafficking offences (*Momcilovic v R* (2011) 245 CLR 1).

19. At common law, a person has in their possession whatever is, to their knowledge, physically in their custody or under their physical control (*DPP v Brooks* [1974] AC 862; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Maio* [1989] VR 281; *R v Mateiasevici* [1999] 3 VR 185).

20. According to this definition, common law possession of a drug of dependence has three elements:

    i) The accused had physical custody or control of the drug;

    ii) The accused intended to have custody of or exercise control over the drug; and

    iii) The accused knew that the substance over which they had custody or control was a drug of dependence, or were aware that it was likely that it was a drug of dependence (*R v Maio* [1989] VR 281. See also *He Kaw Teh v R* (1985) 157 CLR 523; *Momcilovic v R* (2011) 245 CLR 1).

21. A person may have possession of an item even though they are not carrying the item or do not have it on them, as long as they have physical custody of or control over the item (*R v Maio* [1989] VR 281; *R v Mateiasevici* [1999] 3 VR 185).

22. It is not necessary for the prosecution to prove "exclusive possession", that is, the right of the accused to exclude everyone else (other than those with whom s/he was acting in concert) from interference with the drug. The accused will possess a drug if the three elements outlined above are satisfied – even if there is a reasonable possibility that someone else also possessed that drug (*R v Tran* (2007) 16 VR 673. See also *R v Dibb* (1991) 52 A Crim R 64 (NSW CCA); *R v Cumming* (1995) 86 A Crim R 156 (WA CCA) but c.f. *Moors v Burke* (1919) 26 CLR 265; *Williams v Douglas* (1949) 78 CLR 521)).

23. It is not always necessary to define the concept of possession at common law – the jury need only be told so much of the law as is necessary for them to know having regard to the issues in the trial (*R v Clarke and Johnstone* [1986] VR 643; *R v Mateiasevici* [1999] 3 VR 185; *R v Bandiera and Licastro* [1999] 3 VR 103; *R v Tran* [2007] VSCA 19).

24. A distinction is drawn between possessing a drug for the accused's own use and possessing a drug for sale to others. While the former may provide the basis for a charge of possession of a drug of dependence (*Drugs Act* s 73), it cannot sustain a charge of trafficking (*R v Kardogeros* [1991] 1 VR 269).

25. The prosecution only needs to prove that the accused had a general intention to sell the drug in the future. It is not necessary to prove that a particular sale was in contemplation at the material time, or that the accused had a specific buyer in mind (*Reardon v Baker* [1987] VR 887).

26. A drug may be in possession for sale even if the accused intends to mix it with another substance prior to sale (*McNair v Terroni* [1915] 1 KB 526; cited with approval by McGarvie J in *R v Kardogeros* [1991] 1 VR 269).

27. It may be possible for the jury to infer from the lack of usability of a portion of drugs possessed that the unusable portion was not possessed *for sale*. This may affect the quantity of drugs trafficked (see "Determining Quantity" below) (*R v Coviello* (1995) 81 A Crim R 293 (Vic CCA)).

28. A person who cultivates a drug may be guilty of trafficking (as well as the cultivation offences specified in ss 72, 72A and 72B) if it can be shown that the drug was possessed for sale (*R v Bandiera and Licastro* [1999] 3 VR 103; *R v Kardogeros* [1991] 1 VR 269; *R v Stavropoulos and Zamouzaris* (1990) 50 A Crim R 315; *R v Clarke and Johnstone* [1986] VR 643. For further information on the interaction of these offences, see "Trafficking, Cultivation and Possession" below).

Common Law Definition of "Trafficking"

29. At common law, the term "trafficking" has been held to at least connote:
    - An activity performed in a commercial setting (i.e. a setting in which it can fairly be inferred that someone involved is making a profit);
    - Participation by the alleged trafficker in the progress of goods from source to consumer; and
    - Contact between the alleged trafficker and at least one other person (*R v Holman* [1982] VR 471; *Giretti v R* (1986) 24 A Crim R 112).
30. Mere possession of drugs will not be sufficient to constitute trafficking at common law. A person will not have been involved in common law trafficking if they were not involved in the onward movement of the drugs to the ultimate consumer (*R v Holman* [1982] VR 471; *R v Kloufetos* (1985) 14 A Crim R 426 (Vic CCA)).
31. So a person who possessed drugs will not have trafficked at common law even if it can be inferred that they possessed the drugs for a commercial purpose and intended to traffick in the future (cf. under the statutory definition of trafficking: see above). They must have at least committed an overt act directed towards transferring ownership or possession of the drugs (*R v Holman* [1982] VR 471; *R v Kloufetos* (1985) 14 A Crim R 426 (Vic CCA)).
32. While it is necessary for there to be contact between the alleged trafficker and at least one other person, it may be sufficient if it can be inferred that a person exists who plays the role of the other person in the movement of the drugs, even if the identity of that person is unknown (*R v Holman* [1982] VR 471).
33. Trafficking at common law may involve delivering or selling drugs to another person, or possibly purchasing or receiving drugs from another person (*R v Holman* [1982] VR 471).
34. Bartering, sending or forwarding drugs may also be trafficking at common law (*Giretti v R* (1986) 24 A Crim R 112).
35. A voluntary trader acting as a link between parties to a transaction may still be involved in trafficking at common law, even if they are acting without reward (*Falconer v Pedersen* [1974] VR 185).
36. A person need not ever have possessed an item, or held title to it, to have been involved in trafficking at common law (*R v Holman* [1982] VR 471).

Carrying on a Trafficking Business (Giretti Trafficking)

37. "Trafficking" can be established by proving that the accused committed an identifiable single act or transaction, such as selling drugs on a specific occasion. It can also be established by proving that the accused carried on a drug dealing business over a specified period of time (*Giretti v R* (1986) 24 A Crim R 112; *R v Lao and Nguyen* (2002) 5 VR 129).
38. This latter type of trafficking (sometimes known as *Giretti* trafficking) requires the prosecution to prove that the accused was involved in a continuing trade or business of dealing in drugs, or had engaged on a regular and commercial basis in the transmission of drugs from source to consumer (*Giretti v R* (1986) 24 A Crim R 112; *R v Te* [1998] 3 VR 566; *R v Lao and Nguyen* (2002) 5 VR 129).

39. The expression "trade" or "business" does not connote the existence of a formal structure or organisation. It is used in a broad sense to encompass a relatively continuous activity, performed over a designated period of time, involving commercial dealings in the prohibited substance (*R v Lao and Nguyen* (2002) 5 VR 129).

40. A charge of trafficking on a *Giretti* basis will usually allege that the accused conducted the business of trafficking between a start date and an end date. It is open to a jury to conclude that such a business was being carried on if it finds that the accused was conducting such a business for a significant part of the period specified (*Mustica v R* (2011) 31 VR 367).

41. There is no need for the prosecution to prove that there was an agreement to engage in the business of trafficking. The prosecution must merely prove that the accused was involved in the trafficking business over the relevant period (*R v Lao and Nguyen* (2002) 5 VR 129).

42. It does not matter if the alleged activities were many and varied, and occurred over a long period of time, as long as they were part of a "continuing" offence. That is, they must have taken place with the necessary degree of regularity and system to amount to a business or trade (*Giretti v R* (1986) 24 A Crim R 112).

43. It is immaterial whether the accused was a supplier or purchaser of the drug, so long as their involvement went beyond being merely a remote and disjunctive commercial seller or buyer. They must have engaged in the continuous commercial activity of trafficking (*R v Lao and Nguyen* (2002) 5 VR 129).

44. The principles set down in *Giretti* are not limited to businesses that involve a regular ongoing trade in one particular drug. They also apply to businesses in which the accused deals in a diversity of drugs in the usual and ordinary course of their trade. So if it can be shown, for example, that the accused had a business which involved selling both heroin and marijuana on a regular basis, the accused could be convicted of trafficking in both of these drugs (*R v Komljenovic* (2006) 163 A Crim R 298; [2006] VSCA 136).

45. This will be the case even if the accused mainly trafficked in one type of drug, with other drugs only trafficked occasionally. As long as it can be shown that all of the sales were part of the same drug dealing business, and were not isolated sales which were separate from that business, it does not matter that the frequency and volume of sales in some drugs greatly exceeded that of others (*R v Komljenovic* (2006) 163 A Crim R 298; [2006] VSCA 136).

46. The jury may decide that a particular sale of drugs was separate from the accused's usual drug dealing business, and so not part of an ongoing trade in drugs. However, as drugs are the stock in trade of drug dealers, any sale of drugs will *prima facie* be considered to be part of the accused's drug business (*R v Komljenovic* (2006) 163 A Crim R 298; [2006] VSCA 136).

47. It is possible that an accused who has been in the business of dealing in a number of different drugs might cease to deal in one of them, while continuing to deal in others. In such a case, the accused could no longer be said to be trafficking in the drug which they stopped selling. However, this will be a question of fact for the jury. They will need to determine whether an apparent gap in sales in the drug in question was due to the accused deciding to no longer deal in that drug, or whether it was due to sales being slow. If the latter, then the accused would remain liable for trafficking in that drug, despite the low volume of sales (*R v Komljenovic* (2006) 163 A Crim R 298; [2006] VSCA 136).

48. The fact that an accused carried on part of their drug trafficking business on their own account, and part in association with other dealers, does not prevent all of their drug trafficking transactions forming part of their drug dealing business. The accused may be liable for all of the transactions, regardless of whether they were solely or jointly responsible for a particular transaction (*R v Komljenovic* (2006) 163 A Crim R 298; [2006] VSCA 136).

49. Where two accused are joined in a *Giretti* count of trafficking, it is not necessary for the prosecution to establish that they had entered into an agreement or understanding with each other as to their respective involvements in the business, or were in a joint enterprise with each other. Nor does the prosecution have to prove that the parties ever met or communicated with each other, or were aware of the identity of the other party. It is sufficient if they can prove that the parties were both engaged in the alleged trafficking business (*R v Lao and Nguyen* (2002) 5 VR 129).

50. *Giretti* trafficking cannot ordinarily be established by simply proving that the accused engaged in a number of relevant transactions over a period of time. A series of isolated sales made over a period of time does not constitute the continuing activity of trafficking (*Giretti v R* (1986) 24 A Crim R 112; *R v Komljenovic* (1994) 76 A Crim R 521; *R v Hamzy* (1994) 74 A Crim R 341 (NSWCCA); *R v Lao and Nguyen* (2002) 5 VR 129).

51. So in the absence of an admission by the accused that they were carrying on a trade or business of dealing in drugs, the jury must be directed that in order to convict an accused of this type of trafficking, they must be able to infer from the evidence that the accused was engaged in such a business (*Giretti v R* (1986) 24 A Crim R 112; *R v Komljenovic* (1994) 76 A Crim R 521; *R v Hamzy* (1994) 74 A Crim R 341 (NSWCCA); *R v Lao and Nguyen* (2002) 5 VR 129).

52. Such an inference can be drawn from evidence of a sufficient number of transactions (e.g. sales and deliveries), together with such other evidence as will enable the jury to conclude that the accused was engaged in the disposition or transmission of drugs on a regular and commercial basis during the period of the alleged offence (*Giretti v R* (1986) 24 A Crim R 112).

53. It does not matter if the prosecution relies on just two specific instances of trafficking, if the evidence enables the jury to draw an inference that those two acts occurred in the context of a business of trafficking, and were not simply two distinct offences for which separate charges should have been laid (*Giretti v R* (1986) 24 A Crim R 112; *R v Lao and Nguyen* (2002) 5 VR 129; *R v Komljenovic* (2006) 163 A Crim R 298; [2006] VSCA 136).

54. It is also unimportant that a *Giretti* count of trafficking will generally consist of a series of activities or transactions which could each in themselves be described as acts of trafficking, so long as the jury is properly directed that these individual transactions are only relevant to the extent that they provide a basis for drawing an inference that the accused was engaged in the business of trafficking (unless the accused is also charged with trafficking by virtue of those individual transactions as an alternative – see below) (*Giretti v R* (1986) 24 A Crim R 112).

55. The jury does not need to unanimously agree that all of the instances of drug dealing alleged by the prosecution have been proved, or that any one particular transaction has been proved. The jury only needs to be unanimous in drawing the inference, from the conduct proved, that during the relevant period the accused was engaged in the continuing offence of trafficking (*Giretti v R* (1986) 24 A Crim R 112; *R v Te* [1998] 3 VR 566; *R v Lao and Nguyen* (2002) 5 VR 129; *Mustica v R* (2011) 31 VR 367).

56. The jury can draw the requisite inference in different ways, relying on different facts or circumstances – so long as they are all satisfied beyond reasonable doubt that the accused was guilty of the continuous offence of trafficking over the alleged period (*Giretti v R* (1986) 24 A Crim R 112; *R v Te* [1998] 3 VR 566; *R v Lao and Nguyen* (2002) 5 VR 129).

57. It is not necessary for the prosecution to prove that the accused was trafficking 24 hours a day for the whole of the specified period. They need only prove that the accused was carrying on the business of trafficking for some portion of the alleged period (*R v Komljenovic* (1994) 76 A Crim R 521; *Giretti v R* (1986) 24 A Crim R 112*; Mustica v R* (2011) 31 VR 367)

58. A presentment which contains one count of engaging in a business of trafficking over a period of time, and a number of alternative counts specifying particular acts alleged to have taken place during that period of time, will not be bad for duplicity. In such a case, the jury should be invited to determine whether they can infer from all of the evidence (including the specified acts) that the accused was carrying on a business of trafficking in drugs over the relevant period. If they can, they should only return a guilty verdict on the *Giretti* count. If they cannot draw such an inference, they should then look to see if the prosecution has proven any of the alternative specific counts (*R v Te* [1998] 3 VR 566. See also *R v Lao and Nguyen* (2002) 5 VR 129).[1078]

Attempted Trafficking

59. Each of the trafficking provisions make it an offence to traffick or "attempt to traffick" in the specified manner. A person can therefore be charged with attempted trafficking directly under ss 71, 71AA, 71AB or 71AC of the *Drugs Act*, rather than having to rely on s 321M of the *Crimes Act 1958*.

60. A person charged with attempted trafficking under one of these provisions will be subject to the same penalties as a person charged with trafficking. In contrast, a person who is charged with attempted trafficking under s 321M of the *Crimes Act 1958* will be subject to the lesser penalties set out in s 321P of that Act.

61. Section 321N of the *Crimes Act 1958* sets out the conduct that will constitute an attempt. This section applies to a person charged with attempted trafficking under the provisions of the *Drugs Act* by virtue of s 321R of the *Crimes Act 1958*.

62. For more information about attempts see Attempts.

Drug of Dependence

63. Each of the trafficking offences requires the accused to have trafficked in a "drug of dependence". This term is defined in s 4 of the *Drugs Act*, to include:

    - Any form of the drugs specified in Parts 1 and 3 of Schedule Eleven to the Act, whether natural or synthetic;
    - The salts, analogues, derivatives and isomers of the drugs specified in Parts 1 and 3 of Schedule Eleven to the Act;
    - The salt of the above mentioned analogues, derivatives and isomers;
    - Any substances that are included in the classes of drugs specified above; and
    - The fresh or dried parts of the plants specified in Part 2 of Schedule Eleven.

64. These substances fall within the definition of a "drug of dependence" even if they are contained in or mixed with another substance (except for the plants specified in Part 2 of Schedule Eleven).

65. Unusable portions of a drug (such as the stems, roots and stalks of the cannabis plant) are still considered to be drugs of dependence, so long as they fit within the definition specified by s 4 (*R v Coviello* (1995) 81 A Crim R 293 (Vic CCA)). The usability of a portion of drugs may, however, affect the question of whether that drug was possessed for sale (see "Possessing a drug of dependence for sale" above) as well as the quantity of drug possessed (see "Determining Quantity" below)).

[1078] While the accused may be *presented* on both a *Giretti* count of trafficking and an alternative specific count of trafficking that occurred entirely within the specified period, he or she should not be *convicted* of both counts (see, e.g. *R v Doherty* [2009] VSCA 93; *R v Bidmade* [2009] VSCA 90).

66. Section 120 of the *Drugs Act* provides that a certificate purporting to be signed by an analyst with respect to any analysis or examination he or she has made shall be sufficient evidence of the identity of the substance analysed, of the result of the analysis and of the matters relevant to the proceedings as stated in the certificate. Section 120 also provides that a certificate purporting to be signed by a botanist shall be sufficient evidence of the identity of the substance examined. There is no need to provide proof that the person who signed the certificate is an analyst or botanist, nor to provide proof of their signature.

67. The provisions in s 120 do not apply if the certificate was not served on the defence at least seven days before the hearing, or if the defence, at least three days before the hearing, gave notice in writing to the informant and the analyst or botanist that the analyst or botanist is required to attend as a witness (s 120(2)).

68. Whether one drug is a salt, analogue, derivative or isomer of a listed drug is a question of fact for the jury. In the case of a derivative, it will require expert evidence which examines matters such as whether one drug can be made from another and whether one drug is structurally related to another (see *Daley v Tasmania* (2012) 21 Tas R 247; *Clegg v Western Australia (No 2)* [2017] WASCA 30).

Intention to Traffick in a Drug of Dependence

69. In addition to proving that the accused trafficked in a drug of dependence, each of the trafficking offences requires the prosecution to prove that the accused *intended* to traffick in a drug of dependence (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; see also *He Kaw Teh v R* (1985) 157 CLR 523; *Momcilovic v R* (2011) 245 CLR 1).

70. The prosecution does not need to prove that the accused intended to traffick in *the particular drug* in question. They need only prove that the accused intended to traffick in *a* drug of dependence (*He Kaw Teh v R* (1985) 157 CLR 523).

71. Although this intention may be proved by an admission by the accused that they intended to traffick in a drug of dependence, in most cases it will be necessary to infer the requisite intention from the performance of the proscribed act and the circumstances in which it was performed (*Bahri Kural v R* (1987) 162 CLR 502; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Page* [2008] VSCA 54).

72. It will usually be possible to infer an intention to traffick in a drug of dependence if it can be established that the accused knew of the existence and nature of the substance at the time that it was trafficked (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *Bahri Kural v R* (1987) 162 CLR 502; *He Kaw Teh v R* (1985) 157 CLR 523).

73. However, the prosecution does not need to prove knowledge of the existence and nature of the substance. It is possible that the requisite intent could instead be inferred from a lesser state of mind, such as:

    - A belief that it was a drug of dependence that was being trafficked (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *Bahri Kural v R* (1987) 162 CLR 502); or
    - An awareness of the likelihood that it was a drug of dependence that was being trafficked (i.e. an awareness that there was a significant or real chance that their conduct involved trafficking in a prohibited drug) (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *Bahri Kural v R* (1987) 162 CLR 502; *Mustica v R* (2011) 31 VR 367)

74. In some cases, it may also be possible to infer an intention to traffic in a drug of dependence from the fact that:

    - The circumstances were such that the accused's suspicions that s/he was trafficking a drug of dependence would have been aroused; and
    - The accused deliberately failed to make inquiries about the substance being trafficked, for fear of learning the truth (See, e.g. *R v Garlick (No.2)* (2007) 15 VR 388; *He Kaw Teh v R* (1985) 157 CLR 523; *Bahri Kural v R* (1987) 162 CLR 502; *R v Crabbe* (1985) 156 CLR 464).

75. However, such cases of "wilful blindness" will be rare, and judges should be cautious before charging the jury about this possibility. There must be evidence that the accused realised there was a risk that s/he was trafficking a drug of dependence, and deliberately chose to close his or her eyes to that risk so that s/he could later deny knowledge and avoid liability. In the absence of such evidence, it will be a misdirection to direct the jury about wilful blindness (*R v Garlick (No.2)* (2007) 15 VR 388).

76. It may be possible for the jury to infer the requisite state of mind from proof that the accused had custody or control of an object found to contain drugs, or from proof of the act of trafficking. However, this will not always be the case (*He Kaw Teh v R* (1985) 157 CLR 523).

77. While the states of mind outlined above (other than wilful blindness) will usually support an inference of the requisite intention, this will not always be the case. A judge should therefore not instruct the jury that they may convict simply because, for example, the prosecution established that the accused was aware that there was a significant or real chance that their conduct involved trafficking in a prohibited drug (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *R v Reed* [2008] VSCA 20; *R v Page* [2008] VSCA 54).

78. The jury should instead be directed that proof that the accused was aware of the likelihood that it was a drug of dependence that was being trafficked is capable of sustaining an inference that the accused intended to traffick in a drug of dependence. At the same time, the judge should make clear to the jury that it is for them to determine whether that inference should be drawn, based on all of the facts and circumstances (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *R v Reed* [2008] VSCA 20; *R v Page* [2008] VSCA 54).

79. In charging the jury on this issue, judges should follow as nearly as possible the language used in *R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299. In particular, care must be taken to ensure that the phrase "is capable of sustaining the inference" is used whenever reference is made in this context to proof of belief "in a significant or real chance" (*R v Page* [2008] VSCA 54).

80. The jury must be instructed that an inference is not to be drawn unless they are satisfied that it is the only inference that is reasonably open in the circumstances of the case (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *R v Page* [2008] VSCA 54).

81. Where intention is to be proved by inference, the judge should direct the jury as to any evidence capable of sustaining that inference (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Page* [2008] VSCA 54).

82. A judge should not attempt to explain the meaning of the expression "significant or real chance", other than to tell the jury that the words have their ordinary meaning and that it is a question for them to decide (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299).

83. Even though the issue of intent may not be a live issue in a trial, and may not have been raised by the defence, as it is an element of the offence a judge is required to direct the jury about it, unless the defence has conceded that a direction is not required (*R v Bui* [2005] VSCA 300).

Quantities

Commercial and Large Commercial Quantities

84. There are two trafficking offences that specify the quantity of drugs that must be trafficked if an accused is to be found guilty:

    - Section 71 – trafficking in a "large commercial quantity"; and
    - Section 71AA – trafficking in a "commercial quantity".

85. "Large commercial quantity" is defined in s 70(1) of the *Drugs Act* to mean:

    - The quantity of drugs, or the number of plants, specified in column 1A of Parts 2 and 3 of Schedule Eleven to the Act; and

- If the drug is contained in or mixed with another substance, the quantity of mixture specified in column 1B of Part 3 of Schedule Eleven.

86. "Commercial quantity" is defined in s 70(1) of the *Drugs Act* to mean:

    - The quantity of drugs, or the number of plants, specified in column 2 of Parts 1, 2 and 3 of Schedule Eleven; and
    - If the drug is contained in or mixed with another substance, the quantity of mixture specified in column 2A of Part 3 of Schedule Eleven.

87. The trafficking offences specified in ss 71AB and 71AC do not require proof that the accused trafficked in any particular quantity.

88. The quantities of drugs included in Parts 1, 2 and 3 of Schedules Eleven were recently modified by the *Drugs, Poisons and Controlled Substances (Amendment) Act 2006*, with the new provisions commencing operation on 1 May 2007 unless proclaimed earlier.

Mixtures of Drugs

89. The definitions of "commercial" and "large commercial" quantities draw a distinction between pure quantities and mixed quantities of drugs, specifying different minimum weights for each in Part 3 of Schedule Eleven.

90. It has been held that the amounts specified in relation to mixed quantities of drugs only apply if the drugs in question were actually mixed with another substance, and the total quantity of that mixture was not less than the specified amount. If these conditions are not satisfied, then it is permissible to look at the pure quantity of a drug that is contained *within* a mixture (*R v Zhu* (2000) 2 VR 421).

91. This means, for example, that a 400g mixture containing 300g of pure heroin will still be a commercial quantity, despite the fact that the amount of mixture is less than 500g (the requisite amount of mixture specified in column 2A of Part 3 of Schedule 11). This is because the amount of pure heroin contained within that mixture is more than 250g (the requisite amount of a pure drug specified in column 2 of Part 3 of Schedule 11).

92. Care needs to be taken when drafting the presentment in cases where it is alleged that the accused trafficked in a mixture containing two or more drugs of dependence. In such cases, the prosecution has three options:

    i) They may ascertain the pure quantity of each drug of dependence contained within the mixture, and present the accused on individual counts of trafficking in the quantity of each drug ascertained (with each count relating to one of the drugs found); or

    ii) They may select just one of the drugs of dependence within the mixture, and if the quantity of the mixture is a commercial or a large commercial quantity in relation to the selected drug,[1079] present the accused on a single count of trafficking in a commercial or large commercial quantity of that drug; or

    iii) They may aggregate the quantity of each drug of dependence within the mixture (see "Aggregating Quantities" below), and if the aggregate quantity of those drugs is not less than an "aggregated commercial quantity" or an "aggregated large commercial quantity" (as defined in s 70), present the accused on a single count of trafficking in an aggregated commercial or large commercial quantity (*R v Ahmed* (2007) 17 VR 454 (Nettle JA)).

[1079] As ascertained from Columns 2A and 1B of Part 3 of Schedule 11.

93. In such a case, the accused must *not* be charged with (or convicted of) separate trafficking offences for each of the drugs of dependence contained within the mixture, using the quantity of the mixture as the relevant measure (*R v Ahmed* (2007) 17 VR 454).[1080]

Determining Quantity

94. For most drugs of dependence, the relevant quantities are specified by weight. In determining the weight of a drug, it is appropriate to make the measurement in light of the conditions existing at the time that the offence is seen to have been committed (*R v Coviello* (1995) 81 A Crim R 293 (Vic CCA)).

95. In relation to cannabis, this means that if a crop was "green" at the relevant time, it is the weight of the drug in such a condition which is to be measured. The quantity is not what it would be when dried, even though the drug only becomes usable when in that condition (*R v Coviello* (1995) 81 A Crim R 293 (Vic CCA)).

96. The quantity of Cannabis L can be determined either by weight or by the number of plants (Part 2 of Schedule Eleven). The word "plant" has been held to be an ordinary English word. Expert evidence about its meaning is therefore inadmissible (*R v Francis-Wright* (2005) 11 VR 354).

97. Although the word "plant" is an ordinary English word, the jury should not be left at large to determine its meaning, because it is capable of a wide range of interpretations. Where relevant to the issues in the trial, the judge must tell the jury the meaning of the word in its statutory context (*R v Francis-Wright* (2005) 11 VR 354).

98. For offences committed after 1 May 2007, a "narcotic plant" is defined as including a cutting of a narcotic plant, whether or not the cutting has roots. This reverses the common law position that applied prior to 1 May 2007, which held that a cutting of cannabis becomes a plant when it develops a root, though it did not need to be viable. Once a cutting becomes a plant, it continues to be a plant, even if it dies (*Drugs, Poisons and Controlled Substances (Amendment) Act 2006* s 8; *R v Francis-Wright* (2005) 11 VR 354).

99. In relation to trafficking by "possession for sale" under s 70(1), the relevant quantity is the quantity of drugs possessed *for sale*, not simply the quantity of drugs possessed. If it can be shown that a portion of the drugs possessed by the accused was not for sale, that portion should not be included when determining the relevant quantity (*R v Coviello* (1995) 81 A Crim R 293 (Vic CCA); *R v Francis-Wright* (2005) 11 VR 354).

[1080] For example, if it is alleged that the accused had one 500g mixture, containing 230g of pure heroin, 220g of pure cocaine and 50g of pure methylamphetamine, the accused must not be charged with 3 counts of trafficking in a commercial quantity of drugs (one based on having a 500g mixture that contains heroin, another based on having a 500g mixture that contains cocaine, and a third based on having a 500g mixture that contains methylamphetamine). Instead, s/he should either be charged with:

Three counts of trafficking in a drug of dependence (one based on having 230g of heroin, the second based on having 220g of cocaine, and the third based on having 50g of methylamphetamine); or

One count of trafficking in a commercial quantity of either heroin, cocaine *or* methylamphetamine (based on having a 500g mixture that contains the selected drug); or

One count of trafficking in an aggregated commercial quantity of heroin, cocaine and methylamphetamine.

100. It may be possible for the jury to infer from the lack of usability of a portion of drugs that the unusable portion was not possessed for sale (see "Possessing a Drug of Dependence for Sale" above). If the jury finds this to be the case, then the unusable portion of drugs should not be included in a calculation of the quantity of drugs possessed for sale. This is a question of fact for determination by the jury based on all of the relevant evidence (*R v Coviello* (1995) 81 A Crim R 293 (Vic CCA). Although an unusable portion of drugs may not be possessed for sale, it will still be classified as a drug of dependence. See "Drug of Dependence" above)).

101. Section 120 of the *Drugs Act* provides that a certificate purporting to be signed by an analyst or botanist with respect to any analysis or examination they have made shall be sufficient evidence of the quantity of the substance analysed or examined. See the section "Drug of Dependence" above for a more detailed discussion of s 120.

Aggregating Quantities

102. Sections 71 and 71AA both state that the specified quantities can be comprised of "2 or more drugs of dependence". Similarly, the definitions of "commercial quantity" and "large commercial quantity" in s 70(1) both include "aggregated" quantities of 2 or more drugs. It is therefore possible to add together quantities of different drugs when determining whether the accused has trafficked in the specified amount.

103. The process for aggregating the quantities of 2 or more drugs of dependence is set out in the definitions of "aggregated commercial quantity" and "aggregated large commercial quantity" in s 70(1). These definitions were recently amended by the *Drugs, Poisons and Controlled Substances (Amendment) Act 2006*, with the new definitions commencing operation on 1 May 2007 unless proclaimed earlier.

104. In relation to a *Giretti* count of trafficking, in some cases it may be possible for the jury to aggregate a number of small quantities of drugs sold over a long period of time, to establish that a commercial or large commercial quantity was trafficked. This will only be permissible if each sale formed part of the same criminal enterprise (*Giretti v R* (1986) 24 A Crim R 112; *R v Hamzy* (1994) 74 A Crim R 341(NSWCCA); *R v Komljenovic* (1994) 76 A Crim R 521; *R v McCulloch* (2009) 21 VR 340; *Le v R* [2011] VSCA 42; *Mustica v R* (2011) 31 VR 367).

105. While in many such cases it is likely to be difficult to establish the precise quantities sold over time, the jury may examine the frequency of dealing and the nature of the business conducted, together with the proceeds of the trade, to assess the quantity sold over the relevant period (*R v Komljenovic* (1994) 76 A Crim R 521).

106. The prosecution only needs to establish that *not less than* the specified amount was trafficked over the relevant period of time. They do not need to establish the precise amount trafficked (*R v Komljenovic* (1994) 76 A Crim R 521).

107. The jury does not need to unanimously agree that specific transactions took place. The jury only needs to be unanimous in concluding, beyond reasonable doubt, that the accused had trafficked in not less than the specified quantity (*Le v R* [2011] VSCA 42; *Mustica v R* (2011) 31 VR 367).

108. If the jury is permitted to add together quantities of drugs sold over time, the jury should be directed in a way that helps them to avoid impermissible aggregation. For example, if it is alleged that the accused possessed drugs for sale *and* offered those same drugs for sale, the jury should be directed not to count the same drugs twice (*R v Hamzy* (1994) 74 A Crim R 341 (NSWCCA)).

Intention to Traffick in a Particular Quantity

109. Because the offences specified in ss 71 (trafficking in a large commercial quantity) and 71AA (trafficking in a commercial quantity) are defined by quantities, to convict a person of these offences they must be shown to have intended to traffick in not less than the specified quantity of the relevant drug (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *Mustica v R* (2011) 31 VR 367).

110. The accused must have had this intention at the time he or she committed the relevant act of trafficking (*Mustica v R* (2011) 31 VR 367; *R v McCulloch* (2009) 21 VR 340).

111. It is not sufficient for the prosecution to prove that the accused intended to traffick in a drug of dependence which in fact weighed the specified amount, or to traffick in an amount which "might approximate" the specified quantity. The intention must be to traffick *at least* the specified quantity (*R v Garlick (No.2)* (2007) 15 VR 388).[1081]

112. This does not mean that the accused must have known what the legal threshold was, or what the actual weight or number of the plants cultivated was. The question is whether the accused *intended* to cultivate a weight or number of plants that was at least the weight or number specified in Schedule Eleven of the *Drugs Act* (*R v Garlick (No.2)* (2007) 15 VR 388).

113. This intention can be proved in the same way as is explained in the section "Intention to Traffick in a Drug of Dependence" above. That is, it can be proved directly or by inferences. An inference can be drawn from a state of mind that is less than knowledge, such as proof that the accused was aware that there was a significant or real chance that the amount of drug trafficked was not less than the specified quantity (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *R v Page* [2008] VSCA 540; *Mustica v R* (2011) 31 VR 367).

114. Whether an inference of intention to traffick in not less than the specified quantity can be drawn is a question of fact for the jury to determine based on all of the facts and circumstances. Such an inference should not be drawn if any other inference is reasonably open (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *R v Page* [2008] VSCA 54).

115. In charging the jury on this issue, judges should follow as nearly as possible the language used in *R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299. In particular, care must be taken to ensure that the phrase "is capable of sustaining the inference" is used whenever reference is made in this context to proof of belief "in a significant or real chance" (*R v Page* [2008] VSCA 54).

Giretti Trafficking and Intention to Traffick in a Quantity

116. The need to prove that the accused intended to traffick in not less than the specified quantity *at the time he or she committed the relevant act of trafficking* can create difficulties where the accused is charged with carrying on a trafficking business (*Giretti* trafficking).

117. Proof that the accused carried on a business of trafficking can established by evidence of acts that took place after the accused formed the intention to traffick in an amount that would exceed the specified quantity. The prosecution cannot rely on conduct that pre-dates the formation of the relevant intention (*Mustica v R* (2011) 31 VR 367; *R v McCulloch* (2009) 21 VR 340; *Finn v R* [2011] VSCA 273).

118. This intention can be proved directly or by inferences. For example, an inference can be drawn from proof that, when the accused set up the trafficking business, he or she was aware that there was a significant or real chance that the amount trafficked over the specified period of time would exceed the designated amount (*Mustica v R* (2011) 31 VR 367).

[1081] While *R v Garlick (No.2)* (2007) 15 VR 388 involved a case of cultivation of a commercial quantity of a narcotic plant contrary to s 72A of the *Drugs Act*, it is likely that the same principles apply to trafficking in a drug of dependence.

119. In determining whether the accused had the requisite intention, the jury may take into account matters such as the frequency of dealings from the outset, the size of individual dealings, the number of dealings and the period of time over which the dealings took place (*Mustica v R* (2011) 31 VR 367).[1082]

120. Due to the difficulties in proving that the accused had this intention at the outset of the dealings, instead of charging an accused with *Giretti* trafficking, it may be desirable to charge the accused with a number of counts of trafficking *simpliciter*, selecting the instances which involve larger quantities (*Mustica v R* (2011) 31 VR 367).

Trafficking to a Child

121. Section 71AB requires the prosecution to prove that the accused trafficked to a child. "Child" is defined in s 70(1) to be person under the age of 18.

122. Although it has not been determined, it seems likely, following the principles set down in *He Kaw Teh v R* (1985) 157 CLR 523, that the accused must have intended to traffick to a child. This intention can be proved in the way explained in the section "Intention to Traffick in a Drug of Dependence" above. For example, the jury could infer this intention from proof that the accused was aware that there was a significant or real chance that the person to whom they trafficked was under the age of 18.

Possession of a "Traffickable Quantity" of Drugs

123. Section 73(2) of the *Drugs Act* states that where a person has in their possession not less than a "traffickable quantity" of a drug of dependence, the fact of possession provides *prima facie* evidence of trafficking.

124. "Traffickable quantity" is defined in s 70(1) of the *Drugs Act* to mean:

- The quantity of drugs, or the number of plants, specified in column 3 of Parts 1 and 2 of Schedule Eleven; and
- The quantity of drugs, including any other substances in which they are contained or with which they are mixed, specified in column 3 of Part 3 of Schedule Eleven.[1083]

125. For the purposes of s 73(2), "possession" of a traffickable quantity must be established by proving possession at common law. Section 5 of the Act, which deems the accused to be in possession of a drug in certain circumstances, does not does not apply to possession for the purpose of s 73(2) (see *Momcilovic v R* (2011) 245 CLR 1 (French CJ and Crennan and Kiefel JJ)).

126. Different drugs cannot be aggregated to determine whether the accused has a "traffickable quantity" of drugs under s 73(2), as neither s 73(2) nor the definition of "traffickable quantity" provide for such aggregation.

[1082] For example, the jury may find from evidence showing that the accused supplied drugs on a regular basis to a certain person that he or she had a 'contract' to do so. If the jury find that this contract existed at the time the trafficking business was established, they may be able to infer from that fact that, from the outset, the accused intended to traffick in at least the specified amount.

[1083] This definition was recently amended by the *Drugs, Poisons and Controlled Substances (Amendment) Act 2006*, with the new definition commencing operation on 1 May 2007 unless proclaimed earlier.

127. Section 73(2) is not to be read as providing that possession of a traffickable quantity of a drug of dependence is *prima facie* evidence of trafficking in all of the possible ways in which one may traffick (i.e., all of the ways specified in s 70(1)). It is only *prima facie* evidence of trafficking in a way which is consistent with the evidence. So if, for example, the evidence showed that the person did not manufacture the relevant drug, possession of a traffickable quantity would not be *prima facie* evidence of trafficking by manufacturing a drug of dependence (*R v Clarke and Johnstone* [1986] VR 643).

128. The fact that the accused is found to be in possession of a traffickable quantity of a drug of dependence is not conclusive proof that they were trafficking in that drug – it is merely *prima facie* evidence. This means that while the accused can be convicted based on proof of this fact alone, it is still for the jury to decide, on the whole of the evidence, whether they are satisfied beyond reasonable doubt that the accused trafficked in the way alleged (*R v Clarke and Johnstone* [1986] VR 643; *R v Raiacovici* (1993) 70 A Crim R 46; *R v Tran* [2007] VSCA 19; *Momcilovic v R* (2011) 245 CLR 1 (Bell J)).

129. The jury should therefore be directed that:

- If they are satisfied that the accused possessed a traffickable quantity of drugs, that would be sufficient in the absence of evidence to the contrary to convict the accused;
- While they can use uncontradicted evidence that the accused possessed a traffickable quantity of drugs to convict the accused, they are only entitled to do so if that evidence, either by itself or in conjunction with other evidence, satisfies them beyond reasonable doubt that the accused is guilty of trafficking; and
- They therefore need to look at all of the evidence, including the fact that the accused possessed a traffickable quantity of drugs, and consider whether they are satisfied beyond reasonable doubt that the accused trafficked in the way alleged (e.g. by having a drug of dependence in possession for sale) (see, e.g. *R v Stavropoulos and Zamouzaris* (1990) 50 A Crim R 315).

130. The extent to which it is necessary to elaborate upon the effect of s 73(2) will depend upon the issues in the case. It is not necessary to explain the way in which s 73(2) operates if there is no evidence suggesting that the drug in question was possessed other than for trafficking, and it is common ground that it was possessed for this reason (e.g. if the only issue in the case is whether it was the accused or another person who possessed the relevant drug) (*R v Clarke and Johnstone* [1986] VR 643; *R v Tran* [2007] VSCA 19).

131. Section 73(2) does not operate to reverse the onus of proof. If the accused denies that he or she was trafficking, it is for the prosecution to prove, beyond reasonable doubt, that the accused was trafficking (*R v Clarke and Johnstone* [1986] VR 643; *Medici v R* (1989) 40 A Crim R 413 (Vic CCA)).

Authorisation and Licensing

132. Each of the trafficking offences specifies that a person will be guilty if they traffick in the specified manner, "without being authorised by or licensed under this Act or the regulations to do so".

133. It has been held that the question of authorisation or licensing is a matter of "exception" or "qualification" for the purposes of s 104 of the *Drugs Act*. This section states that the burden of proving any "matter of exception qualification or defence" lies on the accused. It is therefore for the accused to prove, on the balance of probabilities, that they were appropriately authorised or licensed – rather than being for the prosecution to disprove beyond reasonable doubt (*R v Ibrahim* (1987) 27 A Crim R 460; *Horman v Bingham* [1972] VR 29).

134. Provisions concerning authorisation and licensing are contained in Divisions 2 and 4 of the Act respectively.

135. Sections 118 and 119 of the Act contain evidentiary provisions that may be of assistance in cases where there is a dispute about authorisation or licensing.

Trafficking, Cultivation and Possession

136. A plea in bar is not available unless the elements of two counts are identical or the elements of one are wholly included in another count (*Pearce v R* (1998) 194 CLR 610; *R v Sessions* [1998] 2 VR 304; *R v Lelah* [2002] VSCA 96; *R v Langdon* (2004) 11 VR 18).

137. A plea in bar is therefore not available in respect of the trafficking and cultivation offences (*R v Mason* [2006] VSCA 55; *R v Nguyen* [2006] VSCA 158), nor in relation to trafficking and possession of a drug of dependence (*R v Langdon* (2004) 11 VR 18; *R v Nor* (2005) 11 VR 390).

138. However, section 51 of the *Interpretation of Legislation 1984* (Vic) prevents a person from being punished more than once for the "same act or omission". So a person should not be punished twice for the commission of elements that overlap between the different offences (*R v Sessions* [1998] 2 VR 304; *R v Langdon* (2004) 11 VR 18; *R v Nunno* [2008] VSCA 31; *R v Filipovic* [2008] VSCA 14).

139. If the relevant acts of trafficking, cultivation and/or possession completely overlap, a conviction should only be recorded in relation to one of the offences (*R v Langdon* (2004) 11 VR 18; *R v Filipovic* [2008] VSCA 14; *Grixti v R* [2011] VSCA 220).[1084]

140. However, if the relevant acts are merely "linked" rather than completely overlapping, convictions may be recorded for all counts. The linking of the acts should be reflected in the sentences imposed, rather than in the convictions recorded (*R v Nunno* [2008] VSCA 31).

141. Whether it is appropriate to include trafficking, cultivation and possession in the presentment, or proceed to verdict and/or sentencing in relation to each of these offences, will depend on the circumstances of the case. The judge should consider whether there is such an overlap in the circumstances of each offence, and the evidence linking the accused to each of them, that it would be oppressive to take verdicts, proceed to conviction or impose a sentence for each (see, e.g. *R v Langdon* (2004) 11 VR 18; *R v Nor* (2005) 11 VR 390; *R v Nguyen* [2006] VSCA 158; *R v Nunno* [2008] VSCA 31; *Grixti v R* [2011] VSCA 220).

Last updated: 2 October 2017

7.6.1.1 Charge: Trafficking a Commercial/Large Commercial Quantity of a Drug of Dependence Giretti Trafficking

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This charge is designed for use where the prosecution alleges that the accused trafficked in a commercial or large commercial quantity of a drug of dependence by carrying on a business of trafficking (Giretti trafficking).

If the accused is charged with trafficking on a Giretti basis to a child, this charge must be modified.

I must now direct you about the crime of trafficking in not less than a [commercial/large commercial] quantity of a drug of dependence. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – That the accused carried on a business of trafficking.

Two – That the accused trafficked in not less than a [commercial/large commercial] quantity of a drug of dependence.

[1084] This may occur, for example, where the accused is charged with trafficking and cultivation, and the trafficking charge is based on the fact that the plants were in the accused's possession for sale (see, e.g. *R v Mason* [2006] VSCA 55; *R v Filipovic* [2008] VSCA 14).

Three – That the accused intended to traffick in not less than a [commercial/large commercial] quantity of a drug of dependence.

I will now explain these elements in more detail.

Trafficking

The first element relates to what the accused did. S/he must have carried on a business of trafficking.

This requires the prosecution to prove, beyond reasonable doubt, that the accused was involved in a continuing trade or business of dealing in drugs over a period of time, or was involved in getting drugs from source to consumer on a regular basis for money or other payment.

In this case it is alleged that the accused conducted this business between [*insert dates*]. The business is alleged to have involved [*insert acts of trafficking and name of drug*].

The prosecution does not have to prove that the accused set up a formal "business" structure, or had an agreement with anyone to traffick in drugs. The word "business" is used to mean that the accused had conducted an ongoing activity, over a period of time, involving commercial dealings in drugs.

The prosecution must prove more than isolated acts of trafficking during this period of time. Proof that the accused sold drugs on two or three isolated occasions is not enough to prove that the accused carried on a trafficking business. For this element to be met, you must be satisfied that the accused's activities took place with some regularity and system so that they amounted to a "business" or "trade".

In other words, the prosecution must prove that NOA carried on a trafficking business for a significant part of the period between [*insert dates*].

In this case, the prosecution submitted that you should draw this conclusion because [*insert evidence capable of sustaining the inference*]. The defence responded [*insert any evidence and/or arguments*].

It is for you to determine whether NOA was involved in a trade or business of dealing in drugs. It is only if you are satisfied, beyond reasonable doubt, that this was the case that this first element will be met.

To establish this element, you do not all need to agree about which particular acts of trafficking the prosecution has proved – as long as you all agree that the accused conducted a business of trafficking.

Quantity of a Drug of Dependence

The second element also looks at the accused's conduct. The prosecution must prove beyond reasonable doubt is that the accused trafficked in not less than a [commercial/large commercial] quantity of a drug of dependence.

The law says that [*insert relevant drug*] is a drug of dependence and a [commercial/large commercial] quantity of [*insert relevant drug*] is [*insert commercial/large commercial threshold*].

In other words, the prosecution must prove that NOA carried on a business of trafficking which trafficked in at least [*insert commercial/large commercial threshold*] of [*insert relevant drug*].

It is not necessary for the prosecution to establish the precise amount of drugs trafficked by the accused. They only need to establish that the amount trafficked was at least [*insert relevant weight or number of plants of relevant substance*].

[*If the prosecution relies on cuttings, add the following shaded section*.]

In this case there has been a dispute about the number of plants trafficked by the accused. According to the law, a plant includes a cutting of a plant, whether or not it has roots. Even if it dies before

becoming usable, it should still be counted as a "plant".[1085]

[*If the prosecution relies on a mixture quantity specified in column 2A of Part 3 of Schedule 11, add the following shaded section*.]

You have heard evidence that [*insert name of drug*] was mixed with another substance. This element will be proved if the weight of the mixed substance was at least [*insert commercial/large commercial threshold*]. The purity of the mixture and the weight of the pure quantity of [*insert name of drug*] is not relevant to whether this element is proved.

[*Summarise relevant evidence and arguments*.]

Intention to Traffick in a Commercial Quantity/Large Commercial Quantity

The third element that the prosecution must prove beyond reasonable doubt is that the accused intended to traffick in not less than a [commercial/large commercial] quantity of a drug of dependence. This element looks at the accused's state of mind.

As I have explained, the law states that [*insert commercial/large commercial threshold*] of [*insert relevant drug of dependence*] is a [commercial/large commercial] quantity of [*insert relevant drug of dependence*].

The law also states that for this element, the prosecution must prove that the accused had this intention before s/he trafficked in at least a [commercial/large commercial] quantity of a drug of dependence, and that this intention continued while NOA trafficked the [*insert drug of dependence*].

There are two ways the prosecution can prove this element.

First, a person intends to traffick in at least a [commercial/large commercial] quantity of [*insert relevant drug of dependence*] if they know or are aware that they are trafficking in at least a [commercial/large commercial] quantity of a drug of dependence.

Secondly, if you are satisfied that NOA was aware there was a significant or real chance that s/he would traffick in at least a [commercial/large commercial] quantity of [*name of drug*], then you can consider that awareness in combination with all other evidence to decide whether to draw the conclusion that NOA intended to traffick at least a [commercial/large commercial] quantity.

There is an important difference between these two paths. In the first, knowledge and awareness, that is enough by itself to prove the accused intended to traffick at least a [commercial/large commercial] quantity. The second path involves you drawing a conclusion about what NOA intended from all the evidence, including anything you find proved about NOA's awareness of a significant or real chance that s/he would traffick in at least a [commercial/large commercial] quantity. I remind you that you must not draw a conclusion unless you are satisfied that it is the only conclusion that is reasonably open in the circumstances. If another reasonable explanation is available, then the prosecution will not have proved this third element beyond reasonable doubt.

[*If 'wilful blindness' as to the relevant threshold arises as an issue, consider the shaded section.*]

"Wilful blindness" may be relevant if there is evidence that the accused realised there was a risk that s/he would traffick more than the relevant threshold, and deliberately chose to close his/her eyes to that risk so that s/he could later deny knowledge and avoid liability.

[1085] This section of the charge will need to be modified if the offence was alleged to have been committed prior to the commencement of s 8 of the *Drugs, Poisons and Controlled Substances (Amendment) Act 2006* on 1 May 2007. See 7.6.1 Trafficking in a Drug of Dependence for further information.

Cases of "wilful blindness" will be rare, and judges should be cautious before charging the jury about this possibility: *R v Garlick (No.2)* (2007) 15 VR 388.

There is also a third path, which is similar to the second path I just described. If the prosecution proves that NOA suspected s/he was going to traffick at least the [weight of drugs/number of plants] that constitutes a [commercial/large commercial] quantity, and chose not to make further inquiries for fear of learning the truth, then that would also provide a basis to draw a conclusion that s/he intended to traffick a [commercial/large commercial] quantity. That is, s/he was aware that there was a risk that s/he would traffick in at least a [commercial/large commercial] quantity, but deliberately closed [his/her] eyes to that risk to avoid possible liability. In such a situation, you may conclude that although NOA did not positively know that s/he was going to traffick in at least a [commercial/large commercial] [weight of drugs/number of plants], s/he still intended to traffick in such a [number/weight]. Again, I remind you that you must not draw a conclusion unless you are satisfied that it is the only conclusion that is reasonably open in the circumstances.

In this case, the prosecution submitted that the accused intended to traffick in at least a [commercial/large commercial] quantity of a drug of dependence because [*insert evidence capable of sustaining the inference*].

[*Summarise relevant prosecution and defence evidence and arguments*.]

[*Insert any other defence evidence or arguments*.]

So you must decide, based on all of the evidence, whether the prosecution has proved, beyond reasonable doubt, that NOA intended to traffick in at least a [commercial/large commercial] quantity of a drug of dependence over the period of trafficking.

Authorisation/Licence

[*If it is alleged that the accused was authorised or licensed to traffick in a drug of dependence, insert* 7.6.1.21 Additional Direction: Authorisation and Licensing *here*.]

Summary

To summarise, before you can find NOA guilty of trafficking in a drug of dependence, the prosecution must prove beyond reasonable doubt:

One – That s/he carried on a business of trafficking.

Two – That s/he carried on a business of trafficking in not less than a commercial/large commercial quantity of a drug of dependence.

Three – That s/he intended to traffick in not less than a commercial/large commercial quantity of a drug of dependence.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of trafficking in a drug of dependence in not less than a [commercial/large commercial] quantity.

Last updated: 14 August 2023

7.6.1.2 Charge: Trafficking in a Drug of Dependence

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I must now direct you about the crime of trafficking in a drug of dependence. To prove this crime, the prosecution must prove the following [2/3] elements[1086] beyond reasonable doubt:

One – the accused intentionally [committed an act/carried on a business] of trafficking.

Two – the accused intentionally trafficked in a drug of dependence.

[*If it is alleged that the accused trafficked in a commercial or large commercial quantity, or to a child, add the following shaded section.*]

Three – the accused intentionally trafficked [in not less than a commercial/large commercial quantity of that drug/to a child].

I will now explain these elements in more detail.

Trafficking

[*The nature of the first element will depend on the act*[*s*] *of trafficking alleged. The judge should* insert *one or more of the* additional directions *from the list below, as is relevant to the circumstances of the case*.]

- 7.6.1.3 Additional Direction: Selling, Exchanging or Manufacturing a Drug of Dependence*;*
- 7.6.1.6 Additional Direction: Offering or Agreeing to Sell a Drug of Dependence*;*
- 7.6.1.9 Additional Direction: Preparing a Drug of Dependence for Trafficking*;*
- 7.6.1.12 Additional Direction: Possessing a Drug of Dependence for Sale*;*
- 7.6.1.15 Additional Direction: Conducting a Business of Trafficking (Giretti trafficking)

Drug of Dependence

The second element that the prosecution must prove beyond reasonable doubt is that the accused intentionally trafficked in a drug of dependence. There are two parts to this element. The prosecution must prove that the substance allegedly trafficked by the accused was a drug of dependence. They must also prove that the accused intended to traffick in a drug of dependence.

The law says that [*insert name of drug*] is a drug of dependence. The first part of this element will therefore be satisfied if the prosecution has proved, beyond reasonable doubt, that NOA [*insert relevant act of trafficking – i.e.* sold/exchanged/manufactured/offered to sell/agreed to sell/prepared for trafficking/possessed for sale/conducted a business of trafficking involving] any quantity of [*insert name of drug*].

[*If the drug in question was mixed with another substance, add the following shaded section.*]

It does not matter whether the [*insert name of drug*] was mixed with another substance. The issue here

---

[1086] This charge can be used in cases involving:

Trafficking in a commercial or large commercial quantity of a drug of dependence (*Drugs, Poisons and Controlled Substances Act 1981* ss 71 and 71AA);

Trafficking in a drug of dependence to a child (s 71AB); or

Trafficking in a drug of dependence (s 71AC).

There will be two elements if the charge is used for offences under s 71AC, but three elements if used for offences under ss 71, 71AA and 71AB.

is whether the accused trafficked in [*insert name of drug*] at all – whether in its pure state or mixed with something else.

[*If it is alleged that the accused trafficked by offering or agreeing to sell a drug of dependence, add the following shaded section.*]

The accused does not need to have ever actually had the [*insert name of drug*] in their possession. S/he simply needs to have made an [offer/agreement] to sell that drug.

[*If it is alleged that a portion of the drug was unusable, add the following shaded section.*]

In this case you have heard [evidence/arguments] that [some of] the [*insert name of drug*] allegedly trafficked by NOA was unusable because [*insert evidence*]. This is not relevant to the issue of whether or not it was a drug of dependence that the accused trafficked in. Even if a substance is unusable, it is still classified as a drug of dependence as long it contains [*insert name of drug*].

In this case, the prosecution provided the following evidence that the substance the accused allegedly trafficked was [*insert name of drug and summary of relevant evidence*]. The defence responded [*insert any evidence and/or arguments*]. It is for you to determine, based on all the evidence, whether that substance was a drug of dependence, namely [*insert name of drug*].

Intention to traffick in a drug of dependence

For this second element to be satisfied, the prosecution must also prove – beyond reasonable doubt – that the accused intended to traffick in a drug of dependence. That is, the accused deliberately [*insert relevant act of trafficking*] a prohibited drug.

There are two ways the prosecution can prove this part of the element.

First, the prosecution will prove this element if you are satisfied that NOA knew or was aware that it was a prohibited drug, such as [*insert name of drug*], that s/he was [*insert relevant act of trafficking*].

Second, if you are satisfied that NOA was aware there was a significant or real chance that s/he was [*insert relevant act of trafficking*] a prohibited drug, such as [*insert name of drug*], then you can consider that awareness in combination with all other evidence to decide whether to draw the conclusion that NOA intended to traffick a drug of dependence.

There is an important difference between these two paths. In the first, knowledge and awareness, that is enough by itself to prove the accused intended to traffick a drug of dependence. The second path involves you drawing a conclusion about what NOA intended from all the evidence, including anything you find proved about NOA's awareness of a significant or real chance that s/he was [*insert relevant act of trafficking*] a prohibited drug. I remind you that you must not draw a conclusion unless you are satisfied that it is the only conclusion that is reasonably open in the circumstances. If another reasonable explanation is available, then the prosecution will not have proved this element beyond reasonable doubt.

[*If "wilful blindness" as to the nature of the substance arises as an issue, consider the shaded section.*]

"Wilful blindness" may be relevant if there is evidence that the accused realised there was a risk that s/he was trafficking in a drug of dependence, and deliberately chose to close his/her eyes to that risk so that s/he could later deny knowledge and avoid liability.

There is also a third path to prove this element, which is similar to the second path I just described. If you find that NOA suspected the nature of the substance s/he was [*insert relevant act of trafficking*], and deliberately failed to make further inquiries for fear of learning the truth, then that would also provide a basis to draw a conclusion that s/he intended to traffick a drug of dependence. That is, s/he was aware that there was a risk that s/he was trafficking in a drug of dependence, but deliberately closed his/her eyes to that risk to avoid possible liability. In such a situation, you may conclude that although NOA did not positively know that s/he was trafficking a drug of dependence, s/he still intended to do so. Again, I remind you that you must not draw a conclusion unless you are satisfied

that it is the only conclusion that is reasonably open in the circumstances.[1087]

In this case, the prosecution submitted that you should find that the accused intended to traffick in a drug of dependence from [*insert prosecution evidence and argument*].

[*If the accused denied this intention due to ignorance of the drug's existence, consider the following section.*]

[*This may be relevant if the* accused denied having an intention *to traffick in a drug of dependence because they* did not know of the existence *or nature of the drug, or were not aware of the likelihood that it was a drug of dependence.*]

The defence denied that NOA had an intention to traffick in a drug of dependence. They alleged that s/he did not know, or was not aware of the likelihood, that it was a drug s/he was [*insert relevant act of trafficking*]. [*Insert relevant evidence and arguments.*]

It is important to remember that it is the prosecution who must prove, beyond reasonable doubt, that the accused had the relevant intention. So if you are not satisfied that the accused knew or was aware of the likelihood that it was a drug s/he was trafficking, and there is no other basis from which you can infer that the accused intended to traffick in a drug of dependence, then this second element will not be met.

[*Insert any defence evidence or arguments.*]

So you must decide, based on all of the evidence, whether the substance trafficked by the accused was a drug of dependence, and that the accused intended to traffick in such a drug. It is only if you are satisfied of both of these matters, beyond reasonable doubt, that this second element will be met.

Possession of a traffickable quantity

[I*f it is alleged that the accused* possessed a traffickable quantity *of drugs, and it is* not common ground *that the drugs were possessed for the purpose of trafficking, insert* 7.6.1.16 Additional Direction: Possession of a Traffickable Quantity *here*.]

Commercial or Large Commercial Quantities

[*If it is alleged that the accused trafficked in a large commercial (s 71) or commercial quantity (s 71AA) of a drug of dependence, insert* 7.6.1.17 Additional Direction: Commercial or Large Commercial Quantities *here*.]

Trafficking to a Child

[*If it is alleged that the accused trafficked to a child (s 71AB), insert* 7.6.1.18 Additional Direction: Traficking to a Child *here*.]

Authorisation/Licence

[*If it is alleged that the accused was* authorised or licensed to traffick *in a drug of dependence, insert* 7.6.1.21 Additional Direction: Authorisation and Licensing *here*.]

[1087] Such cases of "wilful blindness" will be rare, and judges should be cautious before charging the jury about this possibility: *R v Garlick (No.2)* (2007) 15 VR 388; [2007] VSCA 23.

Summary

To summarise, before you can find NOA guilty of trafficking in a drug of dependence, the prosecution must prove to you beyond reasonable doubt:

One – that s/he intentionally committed an act of trafficking, being the [*insert relevant act of trafficking*] of a prohibited drug; and

Two – that s/he intentionally trafficked in a drug of dependence. That is, the substance s/he [*insert relevant act of trafficking*] was [*insert name of drug*], and that s/he intended to traffick in a prohibited drug.

[*If it is alleged that the accused trafficked to a child, or in a commercial or large commercial quantity, add the following shaded section.*]

- Three – that s/he intentionally trafficked [to a child/in not less than a commercial/large commercial quantity of that drug, being [*insert quantity and name of drug*]].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of trafficking in a drug of dependence [to a child/in a commercial quantity/in a large commercial quantity].

Last updated:14 August 2023

7.6.1.3 Additional Direction: Selling, Exchanging or Manufacturing a Drug of Dependence

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Insert the following section where indicated if it is alleged that the accused trafficked by selling, exchanging or manufacturing a drug of dependence.

The first element relates to what the accused did. S/he must have intentionally committed an act of trafficking.

The law defines "trafficking" to include a number of different activities, such as selling, exchanging, offering to sell, agreeing to sell or manufacturing certain drugs, known as "drugs of dependence".

The prosecution does not need to prove that the accused did all of these things. For this element to be satisfied, the prosecution only needs to prove that the accused intentionally committed at least one of the acts specified by law.

In this case, the relevant act of trafficking is [selling/exchanging/manufacturing] a drug of dependence. This requires the prosecution to prove two things beyond reasonable doubt:

First, that the accused [sold/exchanged/manufactured] a drug of dependence – in this case [*insert name of drug*]; and

Second, that the accused intended to [make that sale/make that exchange/manufacture that drug]. That is, they deliberately [made that sale/made that exchange/manufactured that drug].

In this case, the prosecution alleged that NOA [sold/exchanged/manufactured] a drug of dependence when [*insert relevant evidence*]. The defence responded [*insert any relevant evidence or arguments*].

It is for you to determine, based on all of the evidence, whether NOA [sold/exchanged/manufactured] the [*insert name of drug*], and intended to [make that sale/make that exchange/manufacture that drug]. It is only if you are satisfied of both of these matters, beyond reasonable doubt, that this first element will be met.

Last updated: 2 March 2007

7.6.1.4 Checklist: Trafficking by Sale, Exchange or Manufacture

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This checklist can be used where it is alleged that the accused trafficked by selling, exchanging or manufacturing a drug of dependence.

Two elements the prosecution must prove beyond reasonable doubt:

142. The accused intentionally committed an act of trafficking; and

143. The accused intentionally trafficked in a drug of dependence.

An Intentional Act of Trafficking

1.1 Did the accused [sell/exchange/manufacture] a drug?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Trafficking

1.2 Did the accused intend to [sell/exchange/manufacture] that drug?

If Yes, then go to 2.1

If No, then the Accused is not guilty of Trafficking

A Drug of Dependence

2.1 Was the drug [sold/exchanged/manufactured] a "drug of dependence"?

Consider – [*Insert name of drug*] *is a "drug of dependence"*

If Yes, then go to 2.2

If No, then the Accused is not guilty of Trafficking

2.2 Did the accused intend to [sell/exchange/manufacture] a drug of dependence?

If Yes, then the Accused is guilty of Trafficking (as long as you have also answered yes to questions 1.1, 1.2, and 2.1)

If No, then the Accused is not guilty of Trafficking

Last updated: 21 September 2011

7.6.1.5 Checklist: Trafficking by Sale, Exchange or Manufacture (Commercial or Large Commercial Quantity)

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This checklist can be used where it is alleged that the accused trafficked in a large commercial or commercial quantity of drugs by sale, exchange or manufacture.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally committed an act of trafficking;
2. The accused intentionally trafficked in a drug of dependence; and
3. The accused intentionally trafficked in not less than a [commercial/large commercial] quantity of that drug.

An Intentional Act of Trafficking

1.1 Did the accused [sell/exchange/manufacture] a drug?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Trafficking

1.2 Did the accused intend to [sell/exchange/manufacture] that drug?

If Yes, then go to 2.1

If No, then the Accused is not guilty of Trafficking

A Drug of Dependence

2.1 Was the drug [sold/exchanged/manufactured] a "drug of dependence"?

Consider – [*Insert name of drug*] *is a "drug of dependence"*

If Yes, then go to 2.2

If No, then the Accused is not guilty of Trafficking

2.2 Did the accused intend to [sell/exchange/manufacture] a drug of dependence?

If Yes, then go to 3.1

If No, then the Accused is not guilty of Trafficking

Quantity

3.1 Did the accused [sell/exchange/manufacture] not less than a [commercial/large commercial] quantity of a drug of dependence?

Consider – [*Insert relevant weight of drug or number of plants*] *is a* [*commercial/large commercial*] *quantity of* [*insert name of drug*].

If Yes, then go to 3.2

If No, then the Accused is not guilty of Trafficking in a [commercial/large commercial quantity]

3.2 Did the accused intend to [sell/exchange/manufacture] not less than a [commercial/large commercial] quantity of a drug of dependence?

If Yes, then the Accused is guilty of Trafficking in a [commercial/large commercial quantity] (as long as you have also answered yes to questions 1.1, 1.2, 2.1, 2.2 and 3.1)

If No, then the Accused is not guilty of Trafficking in a [commercial/large commercial quantity]

Last updated: 2 March 2007

7.6.1.6 Additional Direction: Offering or Agreeing to Sell a Drug of Dependence

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Insert the following section where indicated if it is alleged that the accused trafficked by offering or agreeing to sell a drug of dependence.

The first element relates to what the accused did. S/he must have intentionally committed an act of trafficking.

The law defines "trafficking" to include a number of different activities, such as selling, exchanging, offering to sell, agreeing to sell or manufacturing certain drugs, known as "drugs of dependence".

The prosecution does not need to prove that the accused did all of these things. For this element to be satisfied, the prosecution only needs to prove that the accused intentionally committed at least one of the acts specified by law.

In this case, the relevant act of trafficking is [offering/agreeing] to sell a drug of dependence. This requires the prosecution to prove three things beyond reasonable doubt:

First, that the accused made a genuine [offer/agreement] to sell a drug of dependence – in this case [*insert name of drug*].

Second, that the accused intended to make that [offer/agreement]. That is, they deliberately [offered/agreed] to sell that drug.

Third, that the accused intended that the [offer/agreement] would be regarded as genuine by the purchaser.

[*If relevant, add the following shaded section*.]

The prosecution does not need to prove that the accused actually possessed [*insert name of drug*], or was able to supply it to the purchaser. Nor do they need to prove that the accused ever intended to carry out the offer by providing [*insert name of drug*] to the purchaser. Even if the accused intended to supply a different drug, or to provide no drug at all, this first element will be satisfied as long as the prosecution have proved that s/he made a genuine [offer/agreement] to sell [*insert name of drug*], intending that the [offer/agreement] would be regarded as genuine.

In this case, the prosecution alleged that NOA [offered/agreed] to sell a drug of dependence when [*insert relevant evidence*]. The defence responded [*insert any relevant evidence or arguments*].

It is for you to determine, based on all of the evidence, whether NOA made a genuine [offer/agreement] to sell a drug of dependence, intended to make that [offer/agreement], and intended that [offer/agreement] to be regarded as genuine by the purchaser. It is only if you are satisfied of all three of these matters, beyond reasonable doubt, that this first element will be met.

Last updated: 2 March 2007

7.6.1.7 Checklist: Trafficking by Offering or Agreeing to Sell

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This checklist can be used where it is alleged that the accused trafficked by offering or agreeing to sell a drug of dependence.

Two elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally committed an act of trafficking; and
2. The accused intentionally trafficked in a drug of dependence.

An Intentional Act of Trafficking

1.1 Did the accused make a genuine [offer/agreement] to sell a drug?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Trafficking

1.2 Did the accused intend to make that [offer/agreement]?

If Yes, then go to 1.3

If No, then the Accused is not guilty of Trafficking

1.3 Did the accused intend that [offer/agreement] to be regarded as genuine by the purchaser?

If Yes, then go to 2.1

If No, then the Accused is not guilty of Trafficking

A Drug of Dependence

2.1 Was the drug the accused [offered/agreed] to sell a "drug of dependence"?

Consider – [*Insert name of drug*] *is a "drug of dependence"*

If Yes, then go to 2.2

If No, then the Accused is not guilty of Trafficking

2.2 Did the accused intend to [offer for sale/agree to sell] a drug of dependence?

If Yes, then the Accused is guilty of Trafficking (as long as you have also answered yes to questions 1.1, 1.2, 1.3 and 2.1)

If No, then the Accused is not guilty of Trafficking

Last updated: 2 March 2007

7.6.1.8 Checklist: Trafficking by Offering or Agreeing to Sell (Commercial or Large Commercial Quantity)

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This checklist can be used where it is alleged that the accused trafficked in a large commercial or commercial quantity *by* offering or agreeing to sell a drug of dependence.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally committed an act of trafficking;
2. The accused intentionally trafficked in a drug of dependence; and
3. The accused intentionally trafficked in not less than a [commercial/large commercial] quantity of that drug.

An Intentional Act of Trafficking

1.1 Did the accused make a genuine [offer/agreement] to sell a drug?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Trafficking

1.2 Did the accused intend to make that [offer/agreement]?

If Yes, then go to 1.3

If No, then the Accused is not guilty of Trafficking

1.3 Did the accused intend that [offer/agreement] to be regarded as genuine by the purchaser?

If Yes, then go to 2.1

If No, then the Accused is not guilty of Trafficking

2. A Drug of Dependence

2.1 Was the drug the accused [offered/agreed] to sell a "drug of dependence"?

Consider – [*Insert name of drug*] *is a "drug of dependence"*

If Yes, then go to 2.2

If No, then the Accused is not guilty of Trafficking

2.2 Did the accused intend to [offer for sale/agree to sell] a drug of dependence?

If Yes, then go to 3.1

If No, then the Accused is not guilty of Trafficking

3. Quantity

3.1 Did the accused [offer/agree] to sell not less than a [commercial/large commercial] quantity of a drug of dependence?

Consider – [*Insert relevant weight of drug or number of plants*] *is a* [*commercial/large commercial*] *quantity of* [*insert name of drug*].

If Yes, then go to 3.2

If No, then the Accused is not guilty of Trafficking in a [commercial/large commercial quantity]

3.2 Did the accused intend to [offer/agree] to sell not less than a [commercial/large commercial] quantity of a drug of dependence?

If Yes, then the Accused is guilty of Trafficking in a [commercial/large commercial quantity] (as long as you have also answered yes to questions 1.1, 1.2, 1.3, 2.1, 2.2 and 3.1).

If No, then the Accused is not guilty of Trafficking in a [commercial/large commercial quantity]

Last updated: 2 March 2007

7.6.1.9 Additional Direction: Preparing a Drug of Dependence for Trafficking

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Insert the following section where indicated if it is alleged that the accused trafficked *by* preparing a drug for trafficking.

The first element relates to what the accused did. S/he must have intentionally committed an act of trafficking.

The law defines "trafficking" to include a number of different activities, such as selling, exchanging, offering to sell, preparing for trafficking or manufacturing certain drugs, known as "drugs of dependence".

The prosecution does not need to prove that the accused did all of these things. For this element to be satisfied, the prosecution only needs to prove that the accused intentionally committed at least one of the acts specified by law.

In this case, the relevant act of trafficking is preparing a drug of dependence for trafficking. This requires the prosecution to prove three things beyond reasonable doubt:

First, that the accused prepared a drug of dependence – in this case [*insert name of drug*]. "Prepare" is an ordinary English word, and it is for you to determine whether the [*insert name of drug*] was prepared by the accused.

Second, that the accused intended to make those preparations. That is, they made those preparations deliberately.

Third, that the accused prepared the drug for the purpose of trafficking. That is, when they prepared the drug, they intended that it would be sold, exchanged or otherwise ultimately moved to a consumer within a setting in which someone involved is making a profit.

In this case, the prosecution alleged NOA prepared a drug of dependence for the purpose of trafficking when [*insert relevant evidence*]. The defence responded [*insert any relevant evidence or arguments*].

It is for you to determine, based on all of the evidence, whether NOA prepared the [*insert name of drug*], intended to make those preparations, and prepared it for the purpose of trafficking. It is only if you are satisfied of all three of these matters, beyond reasonable doubt, that this first element will be met.

Last updated: 2 March 2007

7.6.1.10 Checklist: Trafficking by Preparing a Drug for Trafficking

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This checklist can be used where it is alleged that the accused trafficked by preparing a drug of dependence for trafficking.

Two elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally committed an act of trafficking; and
2. The accused intentionally trafficked in a drug of dependence.

An Intentional Act of Trafficking

1.1 Did the accused prepare a drug?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Trafficking

1.2 Did the accused intend to prepare that drug?

If Yes, then go to 1.3

If No, then the Accused is not guilty of Trafficking

1.3 Did the accused prepare that drug for the purpose of trafficking?

Consider – Did the accused intend that the drug would ultimately be sold, exchanged or otherwise moved from source to consumer within a setting in which someone involved is making a profit?

If Yes, then go to 2.1

If No, then the Accused is not guilty of Trafficking

A Drug of Dependence

2.1 Was the drug the accused prepared a "drug of dependence"?

Consider – [*Insert name of drug*] *is a "drug of dependence"*

If Yes, then go to 2.2

If No, then the Accused is not guilty of Trafficking

2.2 Did the accused intend to prepare a drug of dependence?

If Yes, then the Accused is guilty of Trafficking (as long as you have also answered yes to questions 1.1, 1.2, 1.3 and 2.1)

If No, then the Accused is not guilty of Trafficking

Last updated: 2 March 2007

7.6.1.11 Checklist: Trafficking by Preparing a Drug for Trafficking (Commercial or Large Commercial Quantity)

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This checklist can be used where it is alleged that the accused trafficked in a large commercial or commercial quantity by preparing a drug of dependence for trafficking.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally committed an act of trafficking;
2. The accused intentionally trafficked in a drug of dependence; and
3. The accused intentionally trafficked in not less than a [commercial/large commercial] quantity of that drug.

An Intentional Act of Trafficking

1.1 Did the accused prepare a drug?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Trafficking

1.2 Did the accused intend to prepare that drug?

If Yes, then go to 1.3

If No, then the Accused is not guilty of Trafficking

1.3 Did the accused prepare that drug for the purpose of trafficking?

Consider – Did the accused intend that the drug would ultimately be sold, exchanged or otherwise moved from source to consumer within a setting in which someone involved is making a profit?

If Yes, then go to 2.1

If No, then the Accused is not guilty of Trafficking

A Drug of Dependence

2.1 Was the drug the accused prepared a "drug of dependence"?

Consider – [*Insert name of drug*] *is a "drug of dependence"*

If Yes, then go to 2.2

If No, then the Accused is not guilty of Trafficking

2.2 Did the accused intend to prepare a drug of dependence?

If Yes, then go to 3.1

If No, then the Accused is not guilty of Trafficking

Quantity

3.1 Did the accused prepare for trafficking not less than a [commercial/large commercial] quantity of a drug of dependence?

Consider – Insert relevant weight of drug or number of plants] *is a* [*commercial/large commercial*] *quantity of* [*insert name of drug*].

If Yes, then go to 3.2

If No, then the Accused is not guilty of Trafficking in a [commercial/large commercial quantity]

3.2 Did the accused intend to prepare for trafficking not less than a [commercial/large commercial] quantity of a drug of dependence?

If Yes, then the Accused is guilty of Trafficking in a [commercial/large commercial quantity] (as long as you have also answered yes to questions 1.1, 1.2, 1.3, 2.1, 2.2 and 3.1).

If No, then the Accused is not guilty of Trafficking in a [commercial/large commercial quantity]

Last updated: 2 March 2007

7.6.1.12 Additional Direction: Possessing a Drug of Dependence for Sale

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Insert the following section where indicated if it is alleged that the accused trafficked by *possessing a drug for sale.*

The first element relates to what the accused did. S/he must have intentionally committed an act of trafficking.

The law defines "trafficking" to include a number of different activities, such as selling, exchanging, offering to sell, agreeing to sell or possessing for sale certain drugs, known as "drugs of dependence".

The prosecution does not need to prove that the accused did all of these things. For this element to be satisfied, the prosecution only needs to prove that the accused intentionally committed at least one of the acts specified by law.

In this case, the relevant act of trafficking is possessing a drug of dependence for sale. This requires the prosecution to prove two things beyond reasonable doubt:

First, that NOA possessed a drug of dependence – in this case [*insert name of drug*]. I will explain the meaning of "possession" in a moment.

Second, that NOA intended to sell that drug. I will explain what this means after I have told you the meaning of "possession".

Possession

According to the law, a person is said to have in their possession whatever is, to their knowledge, physically in their custody or under their physical control. In relation to the drug in question in this case, the [*insert name of drug*], this requires the prosecution to prove:

- That the accused had physical custody or control of the drug; and
- That the accused intended to have custody or exercise control over that drug; and
- That the accused knew that the substance over which they had custody or control was a drug, or were at least aware of the likelihood that it was a drug. That is, they were aware that there was a significant or real chance that the substance they possessed was a drug.

[*If it is alleged that the accused was in possession of a drug that was not physically with them, add the following shaded section.*]

According to this definition of possession, a person does not need to have been carrying the drug or to have had it on them to have it in their possession. They will be in possession of whatever is, to their knowledge, in their custody or under their control, even if it is not with them.

[*In cases of joint possession, add the following shaded section.*]

It is possible for more than one person to possess an item – so long as they each meet all of the requirements I have just mentioned.

In this case, the prosecution alleged that NOA was in possession of [*insert name of drug and insert relevant evidence*]. The defence responded [*insert any relevant evidence or arguments*].

It is for you to determine, based on all of the evidence, whether NOA was in possession of the [*insert name of drug*]. If you decide, beyond reasonable doubt, that NOA had physical custody and control of that drug, intended to have such custody or control, and knew that the substance over which they had custody or control was a drug, or were at least aware of the likelihood that it was a drug, then s/he will have been in possession.

Intention to Sell

Even if you find that NOA was in possession of the [*insert name of drug*], this is not sufficient by itself for this first element to be satisfied. As I mentioned earlier, the prosecution must also prove that s/he intended to sell that drug. In other words, you must be satisfied that the accused possessed the [*insert name of drug*] for the purpose of selling it, rather than for another reason such as personal use.

It is not necessary for the prosecution to prove that NOA had a particular sale in mind, or knew who s/he was going to sell the drugs to. They only need to prove that the accused had a general intention to sell the drugs in the future.

In this case, the prosecution alleged that the accused had an intention to sell the [*insert name of drug and relevant evidence*]. The defence responded [*insert any evidence or arguments*].

It is for you to determine, based on all of the evidence, whether NOA both possessed the [*insert name of drug*], and intended to sell it. It is only if you are satisfied of both of these matters, beyond reasonable doubt, that this first element will be met.

Last updated: 21 September 2011

7.6.1.13 Checklist: Trafficking by Possession for Sale

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Two elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally committed an act of trafficking; and
2. The accused intentionally trafficked in a drug of dependence.

An Intentional Act of Trafficking

1.1 Did the accused possess a drug?

1.1a Did the accused have physical custody or control of a drug?

If Yes, then go to 1.1b

If No, then the Accused did not possess the drug and is not guilty of Trafficking

1.1b Did the accused intend to have custody or exercise control over that drug?

If Yes, then go to 1.1c

If No, then the Accused did not possess the drug and is not guilty of Trafficking

1.1c Did the accused know that the substance over which they had custody or control was a drug, or were they aware of that likelihood?

If Yes, then the accused possessed the drug. Go to 1.2

If No, then the Accused did not possess the drug and is not guilty of Trafficking

1.2 Did the accused intend to sell that drug?

If Yes, then go to 2.1

If No, then the Accused is not guilty of Trafficking

A Drug of Dependence

2.1 Was the drug possessed for sale a "drug of dependence"?

Consider – [*Insert name of drug*] *is a "drug of dependence"*

If Yes, then go to 2.2

If No, then the Accused is not guilty of Trafficking

2.2 Did the accused intend to possess for sale a drug of dependence?

If Yes, then the Accused is guilty of Trafficking (as long as you have also answered yes to questions 1.1a, 1.1b, 1.1c, 1.2, and 2.1)

If No, then the Accused is not guilty of Trafficking

Last updated: 2 March 2007

7.6.1.14 Checklist: Trafficking by Possession for Sale (Commercial or Large Commercial Quantity)

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This checklist can be used where it is alleged that the accused trafficked in a large commercial or commercial quantity of drugs by having those drugs in possession for sale, if the prosecution relies on the common law definition of possession.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally committed an act of trafficking;
2. The accused intentionally trafficked in a drug of dependence; and
3. The accused intentionally trafficked in not less than a [commercial/large commercial] quantity of that drug.

An Intentional Act of Trafficking

1.1 Did the accused possess a drug?

1.1a Did the accused have physical custody or control of a drug?

If Yes, then go to 1.1b

If No, then the Accused did not possess the drug and is not guilty of Trafficking

1.1b Did the accused intend to have custody or exercise control over that drug?

If Yes, then go to 1.1c

If No, then the Accused did not possess the drug and is not guilty of Trafficking

1.1c Did the accused know that the substance over which they had custody or control was a drug, or were they aware of that likelihood?

If Yes, then the accused possessed the drug. Go to 1.2

If No, then the Accused did not possess the drug and is not guilty of Trafficking

1.2 Did the accused intend to sell that drug?

If Yes, then go to 2.1

If No, then the Accused is not guilty of Trafficking

A Drug of Dependence

2.1 Was the drug possessed for sale a "drug of dependence"?

Consider – [*Insert name of drug*] *is a "drug of dependence"*

If Yes, then go to 2.2

If No, then the Accused is not guilty of Trafficking

2.2 Did the accused intend to possess for sale a drug of dependence?

If Yes, then go to 3.1

If No, then the Accused is not guilty of Trafficking

Quantity

3.1 Did the accused possess for sale not less than a [commercial/large commercial] quantity of a drug of dependence?

Consider – [Insert relevant weight of drug or number of plants] is a [*commercial/large commercial*] *quantity of* [*insert name of drug*].

If Yes, then go to 3.2

If No, then the Accused is not guilty of Trafficking in a [commercial/large commercial quantity]

3.2 Did the accused intend to possess for sale not less than a [commercial/large commercial] quantity of a drug of dependence?

If Yes, then the Accused is guilty of Trafficking in a [commercial/large commercial quantity] (as long as you have also answered yes to questions 1.1a, 1.1b, 1.1c, 1.2, 2.1, 2.2 and 3.1).

If No, then the Accused is not guilty of Trafficking in a [commercial/large commercial quantity]

Last updated: 21 September 2011

7.6.1.15 Additional Direction: Conducting a Business of Trafficking (Giretti Trafficking)

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Insert the following section where indicated if it is alleged that the accused conducted a business of trafficking (Giretti trafficking).

The first element relates to what the accused did. S/he must have carried on a business of trafficking.

This requires the prosecution to prove, beyond reasonable doubt, that the accused was involved in a continuing trade or business of dealing in drugs over a period of time, or had at least been involved in the transmission of drugs from source to consumer on a regular and commercial basis.

In this case it is alleged that the accused conducted this business between [*insert dates*]. The business is alleged to have involved [*insert acts of trafficking and name of drug*].

Although for this element to be met you must find that the accused conducted a trafficking "business", it is not necessary for the prosecution to prove that the accused had set up a formal "business" structure, or had entered into an agreement with anyone to traffick in drugs. The word "business" is used in a broad sense, to mean that the accused had conducted a relatively continuous activity, over a period of time, involving commercial dealings in drugs.

You also do not need to find that the accused was conducting this business for the whole of the specified period. It is sufficient for the prosecution to prove that NOA was carrying on such a business for some portion of the period [*insert dates*].

However, it is not enough for the prosecution to simply prove that the accused committed a number of isolated acts of trafficking during this period of time. For example, proof that the accused sold drugs on two or three occasions during that time would not, by itself, be sufficient for you to find that the accused carried on an ongoing trafficking business. For this element to be met, you must be satisfied that the accused's activities took place with the necessary degree of regularity and system to amount to a "business" or "trade".

In other words, you must be able to draw an inference from all of the evidence in this case that the accused carried on a trafficking business, rather than having merely committed a few unrelated acts of trafficking.[1088] You will remember what I told you about inferences.

That is not to say that the prosecution must prove that the accused committed more than two or three acts of trafficking for this element to be met. Proof of two or three acts may be sufficient, if you can infer from those acts, and all of the other evidence in the case, that the accused was carrying on a business of trafficking over the relevant period.

In this case, the prosecution submitted that this inference should be drawn because [*insert evidence capable of sustaining the inference*]. The defence responded [*insert any evidence and/or arguments*].

It is for you to determine whether to infer, from all of the facts and circumstances of the case, that NOA was involved in a continuing trade or business of dealing in drugs, or had at least been involved in the transmission of drugs from source to consumer on a regular and commercial basis. It is only if you are satisfied, beyond reasonable doubt, that this was the case that this first element will be met.

[1088] If the accused has admitted carrying on a business of trafficking, this section will need to be modified.

As what you are determining is whether the accused carried on a trafficking business, rather than having committed isolated acts of trafficking, this element will be satisfied even if you do not all agree about which particular acts of trafficking alleged by the prosecution have been proven – as long as you all agree that an inference can be drawn from all of the evidence that the accused conducted a business of trafficking.

However, it is important that you do not draw this inference unless you are satisfied that it is the only inference that is reasonably open in the circumstances. If any other reasonable explanation is available, then the prosecution will not have proved this element beyond reasonable doubt.

Last updated: 18 May 2016

7.6.1.16 Additional Direction: Possession of a Traffickable Quantity

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Insert the following section where indicated if it is alleged that the accused possessed a traffickable quantity of drugs, and it is not common ground that the drugs were possessed for the purpose of trafficking.

Note that if the accused has been charged with an offence contrary to ss 71, 71AA or 71AB, this section of the charge will need to modified to reflect the fact that the possession of a traffickable quantity provides sufficient evidence of the first two elements only.

As I have told you, it is for you to determine whether the prosecution has proved the two elements of this offence beyond reasonable doubt. That is, you must be satisfied that NOA intentionally committed an act of trafficking, and that what s/he trafficked in was a drug of dependence.

According to the law, in the absence of any evidence to the contrary, proof that the accused possessed no less than [*insert traffickable quantity and name of relevant drug*] is sufficient to enable you to find that these elements have been met. In other words, if you are satisfied that the accused possessed not less than [*insert traffickable quantity and name of relevant drug*], that will be sufficient, by itself, for you to convict the accused – unless there is any conflicting evidence.

That is not to say that you must convict the accused in such circumstances. Although you may use uncontradicted evidence that the accused possessed that quantity of drugs to convict them, you may only do so if that evidence – either by itself or together with other evidence – satisfies you that the accused is guilty of trafficking beyond reasonable doubt.

So you must look at all of the evidence, including the quantity of drugs possessed by NOA, and consider whether you are satisfied, beyond reasonable doubt, that s/he intentionally [*insert relevant act of trafficking*] a prohibited drug.

Last updated: 2 March 2007

7.6.1.17 Additional Direction: Commercial or Large Commercial Quantity

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Note – This charge is only for use in cases of trafficking on a single occasion. In cases of Giretti trafficking, use 7.6.1.1 Charge: Trafficking a Commercial/Large Commercial Quantity of a Drug of Dependence – Giretti trafficking.

Insert this section if it is alleged that the accused trafficked in a *large commercial* (s 71) or *commercial quantity* (s 71AA) of a drug of dependence.

The third element that the prosecution must prove beyond reasonable doubt is that the accused intentionally trafficked in not less than a [commercial/large commercial] quantity of a drug of dependence. There are also two parts to this element. The prosecution must prove that the accused trafficked in the relevant quantity of [*insert name of drug*]. They must also prove that the accused intended to traffick in not less than that quantity.

The law says that [*insert relevant weight or number of plants*] is a [commercial/large commercial quantity] of [*insert name of drug*]. The first part of this element will therefore be satisfied if the prosecution has proved, beyond reasonable doubt, that NOA [*insert relevant act of trafficking*] not less than [*insert relevant quantity and name of drug*].

It is not necessary for the prosecution to establish the precise amount of drugs trafficked by the accused for this part of the element to be met. They only need to establish that the amount trafficked was not less than the amount specified by the law.

[*If the prosecution relies on cuttings, add the following shaded section.*]

In this case there has been a dispute about the number of plants trafficked by the accused. According to the law, a plant includes a cutting of a plant, whether or not it has roots. Even if it dies before becoming usable, it should still be counted as a "plant".[1089]

[*If the quantity is measured by weight and the drugs had not been sold, add the following shaded section.*]

In calculating the weight, you should use the weight of the drug at the time the offence was committed, rather than the amount it would have weighed when it was ultimately sold.

[*If it is alleged that the trafficking was by offering or agreeing to sell a drug, add the following shaded section.*]

The relevant quantity in this case is the [weight of the drug/number of plants] the accused [offered/agreed] to sell. The amount of drugs actually possessed by the accused, if any, is not relevant to this calculation.

[*In cases of possession for sale, if a portion of the drugs possessed were unusable, add the following shaded section.*]

The relevant quantity of drugs is not the [weight of the drug/number of plants] possessed by the accused, but the [weight of the drug/number of plants] possessed for sale. You should not include in your calculations any drugs possessed by the accused that they never intended to sell. This includes any portion of the drugs that you find were unusable, if the accused did not plan to sell that portion.

Remember, it is for the prosecution to prove that the accused possessed not less than a [commercial/large commercial] quantity of drugs for sale. So if the prosecution cannot prove beyond reasonable doubt that NOA intended to sell an unusable portion of drugs, then that portion should not be included in your calculations.

In this case, the defence alleged that there was such a portion of unusable drugs. [*Insert relevant evidence and/or arguments.*]

In this case, the prosecution provided the following evidence that the accused allegedly trafficked in a [commercial/large commercial] quantity. [*Insert relevant evidence.*] The defence responded [*insert any evidence and/or arguments*]. It is for you to determine, based on all the evidence, what [weight of the drug/number of plants], if any, was trafficked.

[1089] This section of the charge will need to be modified if the offence was alleged to have been committed prior to the commencement of s 8 of the *Drugs, Poisons and Controlled Substances (Amendment) Act 2006* on 1 May 2007. See 7.6.1 Trafficking in a Drug of Dependence for further information.

Intention to traffick in a commercial/large commercial quantity

For this third element to be satisfied, the prosecution must also prove, beyond reasonable doubt, that when the accused [*describe relevant act of trafficking*], s/he intended to traffick in not less than a [commercial/large commercial] quantity. That is, s/he deliberately [*insert relevant act of trafficking*] not less than [*insert weight of the drug/number of plants and name of drug*].

The prosecution does not need to prove that the accused intended to traffick in that precise [weight of the drug/number of plants]. It is sufficient for the prosecution to prove that NOA intended to traffick in not less than [*insert relevant weight or number of plants*].

Applying my directions to you from the second element, you can find NOA intended to traffick in a commercial/large commercial quantity if you find s/he knew or was aware that s/he was going to traffick at least a commercial/large commercial quantity. You can also find this element proved if you draw a conclusion that s/he intended to traffick in a commercial/large commercial quantity by looking at all the evidence, including any evidence that NOA was aware of a significant or real chance that s/he was going to traffick at least a commercial/large commercial quantity.

You must apply the distinction I directed you about earlier between these two paths. The first proves the element directly. The second involves you drawing a conclusion from all the evidence. Remember that you must not draw a conclusion unless you are satisfied it is the only conclusion that is reasonably open in the circumstances.

[*If "wilful blindness" as to the relevant threshold arises as an issue, consider the following shaded section*.]

"Wilful blindness" may be relevant if there is evidence that the accused realised there was a risk that s/he was trafficking more than the relevant threshold, and deliberately chose to close his/her eyes to that risk so that s/he could later deny knowledge and avoid liability.

As with the second element, there is also a third path, which is similar to the second path that the accused was aware of a significant or real chance. If the prosecution proves that NOA suspected that the [weight of the drugs/number of plants] being trafficked was at least a commercial/large commercial quantity, and deliberately failed to make further inquiries for fear of learning the truth, then that would also provide a basis to draw a conclusion that s/he intended to traffick that quantity. That is, s/he was aware that there was a risk that s/he was [*insert relevant trafficking act and relevant weight or number of plants*], but deliberately closed [his/her] eyes to that risk to avoid possible liability. In such a situation, you may conclude that although NOA did not positively know that s/he was trafficking in a [commercial/large commercial] [weight of drugs/number of plants], s/he intended to traffick in such a [number/weight]. Again, you must not draw a conclusion unless you are satisfied that it is the only conclusion that is reasonably open in the circumstances. If another reasonable explanation is available, then the prosecution will not have proved this third element beyond reasonable doubt.[1090]

In this case, the prosecution submitted that you should find that the accused intended to traffick in not less than a [commercial/large commercial] quantity because [*insert evidence capable of sustaining the inference*].

[*If the accused denied this intention due to ignorance of the quantity trafficked, add the following section*.]

[*This may be relevant if the* accused denied having an intention *to traffick in a* [*commercial/large commercial*] *quantity because s/he* did not know*, or was not aware of the likelihood, that s/he was trafficking in such a quantity*.]

The defence denied that NOA had an intention to traffick in not less than a [commercial/large commercial] quantity, alleging that s/he did not know, or was not aware of the likelihood, that s/he

[1090] Such cases of "wilful blindness" will be rare, and judges should be cautious before charging the jury about this possibility: *R v Garlick (No.2)* (2007) 15 VR 388; [2007] VSCA 23.

was [*insert relevant act of trafficking*] that [weight/number of plants] of [*insert name of drug*]. [*Insert relevant evidence and arguments.*]

It is important to remember that it is the prosecution who must prove, beyond reasonable doubt, that the accused had the relevant intention. So if you are not satisfied that accused knew or was aware of the likelihood s/he was trafficking in not less than a [commercial/large commercial] [weight/number of plants], and there is no other basis from which you can infer that the accused intended to traffick in that quantity, then this third element will not be met.

[*Insert any other defence evidence or arguments*.]

So you must decide, based on all of the evidence, both whether the accused trafficked in not less than a [commercial/large commercial] quantity of a drug of dependence, and whether the accused intended to traffick in that quantity when s/he [*identify relevant act*]. It is only if you are satisfied of both of these matters, beyond reasonable doubt, that this third element will be met.

Last updated: 14 August 2023

7.6.1.18 Additional Direction: Trafficking to a Child

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Insert the following section where indicated if it is alleged that the accused trafficked to a child (s 71AB).

The third element that the prosecution must prove beyond reasonable doubt is that the accused intentionally trafficked to a child. There are also two parts to this element. The prosecution must prove that the accused trafficked to a child. They must also prove that the accused intended to traffick to a child.

The law says that a child is a person who is under 18 years old. The first part of this element will therefore be satisfied if the prosecution has proved, beyond reasonable doubt, that NOA [*insert relevant act of trafficking and name of drug*] to a person who was under 18 at that time.

In this case, the prosecution alleged that NOA trafficked to a child when [*insert summary of relevant evidence*]. The defence responded [*insert any evidence and/or arguments*].

Intention to traffick in a drug of dependence

For this third element to be satisfied, the prosecution must also prove, beyond reasonable doubt, that the accused intended to traffick to a child. That is, they deliberately [*insert relevant act of trafficking and name of drug*] to a child.

Applying my directions to you from the second element, you can find NOA intended to traffick to a child if you find s/he was aware that s/he was going to traffick to a child. You can also find this element proved if you draw a conclusion that he intended to traffick to a child by looking at all the evidence, including any evidence that NOA was aware of a significant or real chance that s/he was going to traffick to a child.

You must apply the distinction I directed you about earlier between these two paths. The first proves the element directly. The second involves you drawing a conclusion from all the evidence. Remember that you must not draw a conclusion unless you are satisfied it is the only conclusion that is reasonably open in the circumstances.

[*If the accused may have deliberately failed to inquire about the age of the person, consider the following section*.]

[*This may be relevant if an inference should be drawn from the fact that the accused* deliberately failed to make inquiries *about the age of the person they were trafficking to.*]

You could also draw an inference that the accused intended to traffick to a child if you find that they

deliberately failed to make inquiries about the age of the person to whom they were [*insert relevant act of trafficking*] the drug, in circumstances where they would have been suspicious about the age of that person. In such a situation, you may conclude that although the accused did not positively know that they were trafficking to a child, they nevertheless intended to traffick to one.

[*If "wilful blindness" as to the age of the person being trafficked to arises as an issue, consider the shaded section*.[1091]]

"Wilful blindness" may be relevant if there is evidence that the accused realised there was a risk that s/he was trafficking to a child, and deliberately chose to close his/her eyes to that risk so that s/he could later deny knowledge and avoid liability.

You could also draw an inference that NOA intended to traffick to a child if you find that, given the circumstances, [he/she] would have suspected that the person to whom [he/she] was [*insert relevant act of trafficking*] was under 18, and deliberately failed to make further inquiries for fear of learning the truth. That is, [he/she] was aware that there was a risk that [he/she] was trafficking to a child, but deliberately closed [his/her] eyes to that risk to avoid possible liability. In such a situation, you may conclude that although NOA did not positively know that [he/she] was trafficking to a child, [he/she] nevertheless intended to do so.

In this case, the prosecution submitted that you should infer that the accused intended to traffick to a child because [*insert evidence capable of sustaining the inference*].

[*If the accused denied having this intention because they did not know the child's age, add the following section.*]

The defence denied that NOA had an intention to traffick to a child, alleging that [he/she] did not know, or was not aware of the likelihood, that it was a child [he/she] was [*insert relevant act of trafficking*] the [*insert name of drug*] to. [*Insert relevant evidence and arguments.*]

It is important to remember that it is the prosecution who must prove, beyond reasonable doubt, that the accused had the relevant intention. So if you are not satisfied that accused knew or was aware of the likelihood that it was a child to whom they were trafficking, and there is no other basis from which you can infer that the accused intended to traffick to a child, then this third element will not be met.

[*Insert any other defence evidence or arguments*.]

So you must decide, based on all of the evidence, whether the accused trafficked to a child, and whether the accused intended to traffick to a child. It is only if you are satisfied of both of these matters, beyond reasonable doubt, that this third element will be met.

Last updated: 14 August 2023

7.6.1.19 Checklist: Trafficking to a Child (Sale or Exchange)

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally committed an act of trafficking;
2. The accused intentionally trafficked in a drug of dependence; and
3. The accused intentionally trafficked to a child.

An Intentional Act of Trafficking

[1091] Such cases of "wilful blindness" will be rare, and judges should be cautious before charging the jury about this possibility: *R v Garlick (No.2)* (2007) 15 VR 388; [2007] VSCA 23.

1.1 Did the accused [sell/exchange] a drug?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Trafficking

1.2 Did the accused intend to [sell/exchange] that drug?

If Yes, then go to 2.1

If No, then the Accused is not guilty of Trafficking

A Drug of Dependence

2.1 Was the drug [sold/exchanged] a "drug of dependence"?

Consider – [*Insert name of drug*] *is a "drug of dependence"*

If Yes, then go to 2.2

If No, then the Accused is not guilty of Trafficking

2.2 Did the accused intend to [sell/exchange] a drug of dependence?

If Yes, then go to 3.1

If No, then the Accused is not guilty of Trafficking

Child

3.1 Did the accused [sell/exchange] a drug of dependence [to/with] a child?

Consider – A child is a person who was under 18 years old at the time the offence was committed.

If Yes, then go to 3.2

If No, then the Accused is not guilty of Trafficking to a Child

3.2 Did the accused intend to [sell/exchange] a drug of dependence [to/with] a child?

If Yes, then the Accused is guilty of Trafficking to a Child (as long as you have also answered yes to questions 1.1, 1.2, 2.1, 2.2 and 3.1)

If No, then the Accused is not guilty of Trafficking to a Child

Last updated: 2 March 2007

7.6.1.20 Checklist: Trafficking to a Child (Offering or Agreeing to Sell)

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Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally committed an act of trafficking;
2. The accused intentionally trafficked in a drug of dependence; and

3. The accused intentionally trafficked to a child.

An Intentional Act of Trafficking

1.1 Did the accused make a genuine [offer/agreement] to sell a drug?

If Yes, then go to 1.2

If No, then the Accused is not guilty of Trafficking

1.2 Did the accused intend to make that [offer/agreement]?

If Yes, then go to 1.3

If No, then the Accused is not guilty of Trafficking

1.3 Did the accused intend that [offer/agreement] to be regarded as genuine by the purchaser?

If Yes, then go to 2.1

If No, then the Accused is not guilty of Trafficking

A Drug of Dependence

2.1 Was the drug the accused [offered/agreed] to sell a "drug of dependence"?

Consider – [Insert name of drug] is a "drug of dependence"

If Yes, then go to 2.2

If No, then the Accused is not guilty of Trafficking

2.2 Did the accused intend to [offer for sale/agree to sell] a drug of dependence?

If Yes, then go to 3.1

If No, then the Accused is not guilty of Trafficking

Child

3.1 Did the accused [offer/agree] to sell a drug of dependence to a child?

Consider – A child is a person who was under 18 years old at the time the offence was committed.

If Yes, then go to 3.2

If No, then the Accused is not guilty of Trafficking to a Child

3.2 Did the accused intend to [offer/agree] to sell a drug of dependence to a child?

If Yes, then the Accused is guilty of Trafficking to a Child (as long as you have also answered yes to questions 1.1, 1.2, 1.3, 2.1, 2.2 and 3.1)

If No, then the Accused is not guilty of Trafficking to a Child

Last updated: 2 March 2007

7.6.1.21 Additional Direction: Authorisation and Licensing

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Insert this section where indicated if it is alleged that the accused was *authorised or licensed to traffick* in a drug of dependence.

A person who is [authorised/licensed] to traffick in a drug of dependence will not be guilty of trafficking. In this case, the defence alleged that NOA was [authorised/licensed] to do so by virtue of [*insert relevant evidence*]. The prosecution disputed this, submitting that [*insert relevant evidence*].[1092]

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this is a matter which the defence must prove on the balance of probabilities. That is, you must be satisfied by the defence that it is more likely than not that NOA was [authorised/licensed] to traffick in a drug of dependence. If the defence cannot prove this to you, and the prosecution has also proven both elements of the offence, then you should find the accused guilty of trafficking.

Summary

[*Insert this section* after the summary *of the trafficking offence, if it is alleged that the accused was* authorised or licensed *to traffick in a drug of dependence*.]

However, even if you decide that these elements have been proven, NOA will not be guilty if the defence has proven, on the balance of probabilities, that s/he was [authorised/licensed] by law to traffick in a drug of dependence.

Last updated: 2 March 2007

7.6.2 Cultivation of Narcotic Plants

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Commencement Information

1. The *Drugs, Poisons and Controlled Substances* Act *1981* (the "Drugs Act") establishes three separate cultivation offences, each of which came in to force on 1 January 2002:

    i) Section 72 – Cultivation of a large commercial quantity of narcotic plants;

    ii) Section 72A – Cultivation of a commercial quantity of narcotic plants; and

    iii) Section 72B – Cultivation of narcotic plants.

Elements

2. For each of the cultivation offences, the prosecution must prove the following elements beyond reasonable doubt:

    i) That the accused intentionally cultivated or attempted to cultivate a particular substance;

[1092] Provisions concerning authorisation and licensing are contained in Divisions 2 and 4 of *the Drugs, Poisons and Controlled Substances Act 1981*. See also ss 118 and 119 of that Act for evidentiary provisions that may be of assistance in relation to such matters.

and

ii) That it was a narcotic plant that the accused cultivated or attempted to cultivate.

3. In relation to ss 72 and 72A the prosecution must also prove that the accused intentionally cultivated, or attempted to cultivate, not less than a large commercial or commercial quantity of narcotic plants respectively.

4. Each of the cultivation provisions exclude from their scope people who are authorised or licensed to cultivate a narcotic plant (see "Authorisation and Licensing" below).

"Cultivation"

5. Section 70(1) defines "cultivate" to include:

   (a) sowing a seed of a narcotic plant; or

   (b) planting, growing, tending, nurturing or harvesting a narcotic plant.

6. This definition has been amended by the *Drugs, Poisons and Controlled Substances (Amendment) Act 2006*, to include grafting, dividing or transplanting a narcotic plant. The new definition commences operation on 1 May 2007 unless proclaimed earlier.

7. The definition of "cultivate" is inclusive and should not be treated as exhaustive or read down (see, e.g. *Eager v Smith* (1988) 38 A Crim R 272 (NSW SC) in relation to a similar NSW provision).

8. In New South Wales, the acts of watering a plant or a seed, and keeping a seed in wet tissue paper with the intention of eventually harvesting a fully grown plant, have been held to be acts of "cultivation" (*Eager v Smith* (1988) 38 A Crim R 272 (NSW SC)).

9. In South Australia it has held that the definition of "cultivation" includes helping to harvest a crop. This is because the term "cultivation" is intended to incorporate the whole process of producing a drug from the soil. It therefore includes all activities associated with production from the soil, from preparing the soil to removing and stacking the harvested crop (*Giorgi and Romeo v R* (1982) 31 SASR 299).

10. In South Australia it has also been held that a land owner who provides land for cultivation has "cultivated" the plants grown on that land (*Pettingill v R* (1985) 21 A Crim R 130 (SA SC)).

11. Evidence that a person possessed cannabis seeds will not, by itself, be sufficient to prove cultivation. However, such evidence may be taken into account, with all of the other evidence, when determining whether the accused cultivated a narcotic plant (*Orchard* v *R* (1993) 70 A Crim R 289 (NSW CCA)).

12. Evidence that a person possessed cannabis is not evidence that they cultivated the plants which produced the cannabis (*Natale v R* (1988) 38 A Crim R 122 (Vic CCA)).

13. In Queensland it has been held that while an isolated act may constitute cultivation, normally the activity of cultivation is a continuing one. It is usually constituted by repeated or varying acts, performed with the purpose of fostering the growth of plants and achieving a final harvest from those plants (*R v Stratford and McDonald* (1984) 1 Qd R 361).

14. In cases involving ongoing activity, it is the whole of the continuing activity which constitutes the cultivation. In cases involving individual acts, the acts themselves constitute the cultivation (*R v Stratford and McDonald* (1984) 1 Qd R 361).

15. The relevant act of cultivation must have been performed intentionally. It may therefore be necessary to differentiate intentional acts of cultivation from unintentional acts, such as the accidental application of water to a plant, or any other acts which may have the unintended effect of encouraging the growth of a plant (*R v Stratford and McDonald* (1984) 1 Qd R 361).

Attempted Cultivation

16. Each of the cultivation provisions make it an offence to cultivate or "attempt to cultivate" in the specified manner. A person can therefore be charged with attempted cultivation directly under ss 72, 72A or 72B of the *Drugs Act*, rather than having to rely on s 321M of the *Crimes Act 1958*.

17. A person charged with attempted cultivation under one of these provisions will be subject to the same penalties as a person charged with cultivation. In contrast, a person who is charged with attempted cultivation under s 321M of the *Crimes Act 1958* will be subject to the lesser penalties set out in s 321P of that Act.

18. Section 321N of the *Crimes Act 1958* sets out the conduct that will constitute an attempt. This section applies to a person charged with attempted cultivation under the provisions of the *Drugs Act* by virtue of s 321R of the *Crimes Act 1958*.

19. For more information about attempts see Attempts.

"Narcotic Plant"

20. The plant cultivated by the accused must have been a "narcotic plant". Section 70(1) defines "narcotic plant" to mean "any plant the name of which is specified in column 1 of Part 2 of Schedule Eleven" of the *Drugs Act*. This includes cannabis, as well as two types of coca plant and two types of opium poppy.

21. The definition of "narcotic plant" has been amended by the *Drugs, Poisons and Controlled Substances (Amendment) Act 2006*, to include a cutting of such a plant, whether or not the cutting has roots. This Act also amends the plants included in Part 2 of Schedule Eleven. The new provisions commence operation on 1 May 2007 unless proclaimed earlier.

22. Section 120 of the *Drugs Act* provides that a certificate purporting to be signed by an analyst with respect to any analysis or examination he or she has made shall be sufficient evidence of the identity of the substance analysed, of the result of the analysis and of the matters relevant to the proceedings as stated in the certificate. Section 120 also provides that a certificate purporting to be signed by a botanist shall be sufficient evidence of the identity of the substance examined. There is no need to provide proof that the person who signed the certificate is an analyst or botanist, or to provide proof of their signature.

23. The provisions in s 120 do not apply if the certificate was not served on the defence at least seven days before the hearing, or if the defence, at least three days before the hearing, gave notice in writing to the informant and the analyst or botanist that the analyst or botanist is required to attend as a witness (s 120(2)).

No Need to Prove an Intention to Cultivate a Narcotic Plant

24. Although the related offences of trafficking (see 7.6.1 Trafficking in a Drug of Dependence) and possession (see 7.6.3 Possession of a Drug of Dependence) require the prosecution to prove that the accused *intended* to traffick in or possess a drug of dependence, there is no similar requirement in relation to the cultivation offences. The prosecution does not have to prove that the accused intended to cultivate a narcotic plant (*R v Pantorno* [1988] VR 195).

25. This is because of s 72C of the *Drugs Act*. This section states that it is a defence to a charge of cultivation if the accused can prove that they did not know or suspect, and could not reasonably have been expected to have known or suspected, that the narcotic plant was a narcotic plant (see "Knowledge of the Nature of the Plant" below). It has been held that this section places the onus on the accused to prove, on the balance of probabilities, that they did not have the requisite intention, rather than requiring the prosecution to prove that intention (*R v Pantorno* [1988] VR 195).

Quantities

Commercial and Large Commercial Quantities

26. There are two cultivation offences that specify the quantity of narcotic plants that must be cultivated if an accused is to be found guilty:
    - Section 72 – cultivation of a "large commercial quantity"; and
    - Section 72A – cultivation of a "commercial quantity".
27. "Large commercial quantity" is defined in s 70(1) of the *Drugs Act,* and includes the quantity of drugs, or the number of plants, specified in column 1A of Part 2 of Schedule Eleven to the Act.
28. "Commercial quantity" is defined in s 70(1) of the *Drugs Act* and includes the quantity of drugs, or the number of plants, specified in column 2 of Part 2 of Schedule Eleven.
29. The offence of cultivating narcotic plants under s 72B does not require proof that the accused cultivated any particular quantity of narcotic plants.
30. The quantities of drugs included in Part 2 of Schedule Eleven were recently modified by the *Drugs, Poisons and Controlled Substances (Amendment) Act 2006*, with the new provision commencing operation on 1 May 2007 unless proclaimed earlier.

Determining Quantity

31. The quantity of Cannabis L can be determined either by weight or by the number of plants. The quantity of the other narcotic plants specified in Part 2 of Schedule Eleven must be determined by weight.
32. If determining the quantity by weight, it is appropriate to make the measurement in light of the conditions existing at the time that the offence is seen to have been committed (*R v Coviello* (1995) 81 A Crim R 293 (Vic CCA)).
33. In relation to cannabis, this means that if a crop was "green" at the relevant time, it is the weight of the drug in such a condition which is to be measured. The quantity is not what it would be when dried, even though the drug only becomes usable when in that condition (*R v Coviello* (1995) 81 A Crim R 293 (Vic CCA)).
34. If determining the quantity by the number of plants, it may be necessary to define the meaning of the word "plant". It has been held that while the word is an ordinary English word, the jury should not be left at large to determine its meaning, because it is capable of a wide range of interpretations. Where relevant to the issues in the trial, the judge must tell the jury the meaning of the word in its statutory context (*R v Francis-Wright* (2005) 11 VR 354).
35. It has been held that a cutting of cannabis becomes a plant when it develops a root. It can then be regarded as an entity separate from the plant from which it has been cut, rather than being a part of that plant. The root need not be a root system, nor does it need to be viable. Once a cutting becomes a plant, it continues to be a plant, even if it dies (*R v Francis-Wright* (2005) 11 VR 354).
36. As the word "plant" is an ordinary English word, expert evidence about its meaning is inadmissible (*R v Francis-Wright* (2005) 11 VR 354).
37. The definition of "narcotic plant" has recently been amended by the *Drugs, Poisons and Controlled Substances (Amendment) Act 2006*, to include "a cutting of such a plant, whether or not the cutting has roots". It seems likely that this amendment, which commences operation on 1 May 2007 unless proclaimed earlier, will override the method for determining the number of plants set down in *R v Francis-Wright* (2005) 11 VR 354.

Intention to Cultivate a Particular Quantity of Plant

38. Because the offences specified in ss 72 (cultivating a large commercial quantity) and 72A (cultivating a commercial quantity) are defined by quantities, to convict a person of these offences they must be shown to have intended to cultivate not less than the specified quantity (*R v Bui* [2005] VSCA 300; *R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Garlick* [2006] VSCA 127); *R v Garlick (No.2)* (2007) 15 VR 388; *R v Filipovic* [2008] VSCA 14; *R v Page* [2008] VSCA 54; *Brooks v R* [2010] VSCA 322).

39. The prosecution does not need to prove that the accused intended to cultivate a commercial or large commercial quantity of *a narcotic plant*. They need only prove that the accused intended to cultivate a commercial or large commercial quantity of the plant in issue.

40. It is not sufficient for the prosecution to prove that the accused intended to cultivate plants, and those plants in fact weighed the specified amount, or that the accused intended to cultivate plants which "might approximate" the specified quantity. The intention must be to cultivate *at least* the specified quantity (*R v Garlick (No.2)* (2007) 15 VR 388; *R v McKittrick* [2008] VSCA 69).

41. This does not mean that the accused must have known what the legal threshold was, or what the actual weight or number of the plants cultivated was. The question is whether the accused *intended* to cultivate a weight or number of plants that was at least the weight or number specified in Schedule Eleven of the *Drugs Act* (*R v Garlick (No.2)* (2007) 15 VR 388; *Brooks v R* [2010] VSCA 322).

42. Although this intention may be proved by an admission of the accused, in most cases it will be necessary to infer the requisite intention from the performance of the proscribed act and the circumstances in which it was performed (*Bahri Kural v R* (1987) 162 CLR 502; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Bui* [2005] VSCA 300; *R v Garlick* [2006] VSCA 127; *R v Page* [2008] VSCA 54).

43. It will usually be possible to infer an intention to cultivate a commercial or large commercial quantity of plants if it can be established that the accused knew that that quantity of plants was being cultivated (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *Bahri Kural v R* (1987) 162 CLR 502; *He Kaw Teh v R* (1985) 157 CLR 523).

44. However, the prosecution does not need to prove knowledge of the exact quantity of plants cultivated. It is possible that the requisite intent could instead be inferred from a lesser state of mind, such as:

    - A belief that that quantity was being cultivated (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *Bahri Kural v R* (1987) 162 CLR 502); or
    - An awareness that there was a significant or real chance that that quantity was being cultivated (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *Bahri Kural v R* (1987) 162 CLR 502; *R v Filipovic* [2008] VSCA 14; *R v Page* [2008] VSCA 54; *Brooks v R* [2010] VSCA 322).

45. In some cases, it may also be possible to infer an intention to cultivate a specified quantity from the fact that:

    - The circumstances were such that the accused's suspicions that the specified quantity of plants was being cultivated would have been aroused; and
    - The accused deliberately failed to make inquiries about the quantity being cultivated, for fear of learning the truth (*R v Garlick (No.2)* (2007) 15 VR 388. See also *He Kaw Teh v R* (1985) 157 CLR 523; *Bahri Kural v R* (1987) 162 CLR 502; *R v Crabbe* (1985) 156 CLR 464).

46. However, such cases of "wilful blindness" will be rare, and judges should be cautious before charging the jury about this possibility. There must be evidence that the accused realised there was a risk that s/he was cultivating more than the relevant threshold, and deliberately chose to close his or her eyes to that risk so that s/he could later deny knowledge and avoid liability. In the absence of such evidence, it will be a misdirection to direct the jury about wilful blindness (*R v Garlick (No.2)* (2007) 15 VR 388).

47. It may be possible for the jury to infer the requisite state of mind from proof that the accused cultivated the required quantity of plants. However, this will not always be the case (*He Kaw Teh v R* (1985) 157 CLR 523).

48. While the states of mind outlined above (other than wilful blindness) will usually support an inference of the requisite intention, this will not always be the case. A judge should therefore not instruct the jury that they may convict simply because, for example, the prosecution established that the accused was aware that there was a significant or real chance that they had cultivated the requisite quantity (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *R v Garlick* [2006] VSCA 127; *R v Reed* [2008] VSCA 20; *R v Page* [2008] VSCA 54).

49. The jury should instead be directed that proof that the accused was aware of the likelihood that they were cultivating the requisite quantity of plants is capable of sustaining the inference that the accused intended to cultivate that quantity. At the same time, the judge should make clear to the jury that it is for them to determine whether that inference should be drawn, based on all of the facts and circumstances (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *R v Garlick* [2006] VSCA 127; *R v Reed* [2008] VSCA 20; *R v Page* [2008] VSCA 54).

50. In charging the jury on this issue, judges should follow as nearly as possible the language used in *R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299. In particular, care must be taken to ensure that the phrase "is capable of sustaining the inference" is used whenever reference is made in this context to proof of belief "in a significant or real chance" (*R v Page* [2008] VSCA 54).

51. The jury must be instructed that an inference is not to be drawn unless they are satisfied that it is the only inference that is reasonably open in the circumstances of the case (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *R v Page* [2008] VSCA 54).

52. Where intention is to be proved by inference, the judge should direct the jury as to any evidence capable of sustaining that inference (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Page* [2008] VSCA 54).

53. A judge should not attempt to explain the meaning of the expression "significant or real chance", other than to tell the jury that the words have their ordinary meaning and that it is a question for them to decide (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299).

54. Even though the issue of intent may not be a live issue in a trial, and may not have been raised by the defence, as it is an element of the offence a judge is required to direct the jury about it, unless the defence has conceded that a direction is not required (*R v Bui* [2005] VSCA 300).

Defences, Exceptions and Mitigating Circumstances

Authorisation and Licensing

55. Each of the cultivation offences specifies that a person will be guilty if they cultivate in the specified manner, "without being authorized by or licensed under this Act or the regulations to do so".

56. It has been held that the question of authorisation or licensing is a matter of "exception" or "qualification" for the purposes of s 104 of the *Drugs Act*. This section states that the burden of proving any "matter of exception qualification or defence" lies on the accused. It is therefore for the accused to prove, on the balance of probabilities, that they were appropriately authorised or licensed – rather than being for the prosecution to disprove beyond reasonable doubt (*R v Ibrahim* (1987) 27 A Crim R 460; *Horman v Bingham* [1972] VR 29).

57. Provisions concerning authorisation and licensing are contained in Divisions 2 and 4 of the Act respectively.

58. Sections 118 and 119 of the Act contain evidentiary provisions that may be of assistance in cases where there is a dispute about authorisation or licensing.

Knowledge of the Nature of the Plant

59. Under s 72C of the *Drugs Act*, it will be a defence to a charge of cultivation under sections 72, 72A or 72B if the accused "adduces evidence which satisfies the court on the balance of probabilities that, having regard to all the circumstances (including his or her conduct)... he or she did not know or suspect and could not reasonably have been expected to have known or suspected that the narcotic plant was a narcotic plant".

60. Due to this section, if the accused wishes to argue that they should be found not guilty of cultivation because they did not know or suspect that they were cultivating a narcotic plant, it will be for them to prove to the jury. They will need to prove to the jury, on the balance of probabilities, that:

    - They did not know or suspect that the plant they were cultivating was a narcotic plant; and
    - They could not reasonably have been expected to have known or suspected that it was a narcotic plant.

Mitigating Circumstances

61. Section 72B provides for a lesser penalty where the trial judge (or magistrate) is satisfied that the offence was not committed for any purpose related to trafficking.

62. Prior to 1 January 2002, the legislation stated that the act of cultivation provided *prima facie evidence* of trafficking. This is no longer the case (see, e.g. *R v Mason* [2006] VSCA 55).

Trafficking, Cultivation and Possession

63. If the relevant acts of trafficking, cultivation and/or possession completely overlap, a conviction should only be recorded in relation to one of the offences (*R v Langdon* (2004) 11 VR 18; *R v Mason* [2006] VSCA 55; *R v Nguyen* [2006] VSCA 158; *R v Nunno* [2008] VSCA 31; *R v Filipovic* [2008] VSCA 14)[1093] See 7.6.1 Trafficking in a Drug of Dependence for further information.

Last updated: 27 March 2019

7.6.2.1 Charge: Cultivation of Narcotic Plants

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I must now direct you about the crime of cultivating narcotic plants. To prove this crime, the prosecution must prove the following 2 elements beyond reasonable doubt:

One – the accused intentionally cultivated a plant.

Two – the plant cultivated by the accused was a narcotic plant.

I will now explain these elements in more detail.

Cultivation

The first element relates to what the accused did. S/he must have intentionally cultivated a plant.

[1093] This may occur, for example, where the accused is charged with trafficking and cultivation, and the trafficking charge is based on the fact that the plants were in the accused's possession for sale (see, e.g. *R v Mason* [2006] VSCA 55; *R v Filipovic* [2008] VSCA 14).

The law defines cultivation to include [*insert one or more of the following as relevant*: planting, growing, tending, nurturing, harvesting, sowing the seeds of] a plant.[1094]

In this case, the prosecution alleged that NOA cultivated a plant when [*insert relevant evidence*]. The defence responded [*insert any relevant evidence or arguments*].

It is for you to determine, based on all of the evidence, whether NOA cultivated the relevant plants, and did so intentionally. It is only if you are satisfied of this, beyond reasonable doubt, that the first element will be met.

Narcotic Plant

The second element that the prosecution must prove beyond reasonable doubt is that the plants cultivated by the accused were narcotic plants.

The law says that [*insert name of plant*] is a narcotic plant. This element will therefore be satisfied if the prosecution has proved, beyond reasonable doubt, that NOA cultivated [*insert name of plant*].

[*If it is alleged that a portion of the plant was unusable, add the following shaded section.*]

In this case you have heard [evidence/arguments] that [some of] the [*insert name of plant*] allegedly cultivated by NOA was unusable because [*insert evidence*]. This is not relevant to the issue of whether or not it was a narcotic plant that the accused cultivated. Even if a substance is unusable, it is still classified as a narcotic plant, as long it is [*insert name of plant*].

In this case, the prosecution provided the following evidence that the plant allegedly cultivated by the accused was [*insert name of plant and summary of relevant evidence*]. The defence responded [*insert any evidence and/or arguments*]. It is for you to determine, based on all the evidence, whether that plant was a narcotic plant, namely [*insert name of plant*].

Lack of Knowledge that the Plant was a Narcotic Plant (Section 72C Defence)

[*If the s 72C defence of lack of knowledge is raised, add the shaded section.*]

Even if you find that the prosecution has proven both of these elements, NOA will not necessarily be guilty of this offence. This is because there are certain circumstances in which the law allows a person to commit acts that would otherwise be illegal. That is, [he/she] may have a defence to the charge of cultivation.

The law states that it is a defence to the charge of cultivation if a person can prove that [he/she] did not know or suspect, and could not reasonably have been expected to have known or suspected, that the plant [he/she] was cultivating was a narcotic plant.

There are two parts to this defence. First, the accused must prove that [he/she] did not know or suspect that the plant [he/she] was cultivating was a narcotic plant.

Second, the accused must also prove that [he/she] could not reasonably have been expected to have known or suspected that the plant [he/she] was cultivating was a narcotic plant. That is, in all of the circumstances in which it is alleged the cultivation took place, it would have been unreasonable to expect NOA to have known or suspected that the plants [he/she] was cultivating were narcotic plants.

[1094] The definition of cultivation is inclusive. If the specific act of cultivation alleged is not included in the definition above, the charge will need to be adapted accordingly. See 7.6.2 Cultivation of Narcotic Plants for further guidance.

It is the defence who must prove these two matters to you. However, unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – the defence only needs to prove these matters on what is called the "balance of probabilities". That is, the defence needs to prove that it is more probable than not that NOA did not know or suspect, and could not reasonably have been expected to have known or suspected, that the plant he/she was cultivating was a narcotic plant.

If you are satisfied by the defence that both of these matters have been proven on the balance of probabilities, then this defence will be successful and you must find NOA not guilty of cultivation. This will be the case even if you find that both elements of the offence have been met.

However, if the defence cannot prove, on the balance of probabilities, both that NOA did not know or suspect that the plant [he/she] was cultivating was a narcotic plant, and that [he/she] could not reasonably have been expected to have known or suspected that the plant [he/she] was cultivating was a narcotic plant, then this defence will fail. If you are also satisfied that each of the elements of the offence have been proven by the prosecution, beyond reasonable doubt, you should find NOA guilty of cultivation.

[*Insert relevant evidence and/or arguments.*]

Authorisation/License

[*If the defence alleged that the accused was authorised to cultivate narcotic plants, add the following shaded section.*]

A person who is [authorised/licensed] to cultivate narcotic plants will not be guilty of the offence of cultivation. In this case, the defence alleged that NOA was [authorised/licensed] to do so by virtue of [*insert relevant evidence*]. The prosecution disputed this, submitting that [*insert relevant evidence*].[1095]

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this is a matter which the defence must prove on the balance of probabilities. That is, you must be satisfied that it is more likely than not that NOA was [authorised/licensed] to cultivate narcotic plants. If the defence cannot prove this to you, and the prosecution has also proven both of the elements of the offence, then you should find the accused guilty of cultivation.

Summary

To summarise, before you can find NOA guilty of cultivation of narcotic plants, the prosecution must prove to you beyond reasonable doubt:

One – that [he/she] intentionally cultivated a plant; and

Two – that the plant that [he/she] allegedly cultivated was a narcotic plant, in this case [*insert name of plant*].

If you find that either of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of cultivation of narcotic plants.

[*If the s 72C defence of lack of knowledge has been raised, add the following shaded section.*]

However, even if you decide that these elements have been proven, NOA will not be guilty if the defence has proven, on the balance of probabilities, that he/she did not know or suspect, and could

[1095] Provisions concerning authorization and licensing are contained in Divisions 2 and 4 of the *Drugs, Poisons and Controlled Substances Act 1981*. See also ss 118 and 119 of that Act for evidentiary provisions that may be of assistance in relation to such matters.

not reasonably have been expected to have known or suspected, that the plant he/she was cultivating was a narcotic plant.

[*If the defence alleged that the accused was authorised to cultivate narcotic plants, add the following shaded section.*]

However, even if you decide that these elements have been proven, NOA will not be guilty if the defence has proven, on the balance of probabilities, that he/she was [authorised/licensed] by law to cultivate narcotic plants.

Last updated: 3 December 2012

7.6.2.2 Checklist: Cultivation of Narcotic Plants (Simple)

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This checklist can be used if the accused is charged with cultivation of narcotic plants contrary to *s 72B*, and the accused *has not raised a defence under s 72C.*

Two elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally cultivated a plant; and
2. The plant cultivated by the accused was a narcotic plant.

An Intentional Act of Cultivation

1. Did the accused intentionally cultivate a plant?

Consider – "Cultivation" includes planting, growing, tending, nurturing, harvesting and sowing the seeds of a plant.

If Yes, then go to 2

If No, then the Accused is not guilty of Cultivation of Narcotic Plants

A Narcotic Plant

2. Was the plant cultivated a "narcotic plant"?

Consider – [*Insert name of plant*] *is a "narcotic plant"*

If Yes, then the Accused is guilty of Cultivation of Narcotic Plants (as long as you also answered yes to question 1).

If No, then the Accused is not guilty of Cultivation of Narcotic Plants

Last updated: 2 March 2007

7.6.2.3 Checklist: Cultivation of Narcotic Plants (Section 72C Defence)

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This checklist can be used if the accused is charged with cultivation of narcotic plants contrary to s 72B, and the accused has raised the s 72C defence that the accused did not know or suspect, and could not reasonably have been expected to have known or suspected, that the plant they were cultivating was a narcotic plant.

Two elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally cultivated a plant; and
2. The plant cultivated by the accused was a narcotic plant.

An Intentional Act of Cultivation

1. Did the accused intentionally cultivate a plant?

Consider – "Cultivation" includes planting, growing, tending, nurturing, harvesting and sowing the seeds of a plant.

If Yes, then go to 2

If No, then the Accused is not guilty of Cultivation of Narcotic Plants

A Narcotic Plant

2. Was the plant cultivated a "narcotic plant"?

Consider – [Insert name of plant] is a "narcotic plant"

If Yes, then go to 3

If No, then the Accused is not guilty of Cultivation of Narcotic Plants

Defence of Lack of Knowledge

Two matters the defence must prove on the balance of probabilities:

3. That the accused did not know or suspect that the plant they were cultivating was a narcotic plant; and

4. That the accused could not reasonably have been expected to have known or suspected that the plant they were cultivating was a narcotic plant.

Accused's Knowledge

3. Has the defence proven, on the balance of probabilities, that the accused did not know or suspect that the plant they were cultivating was a narcotic plant?

If Yes, then go to 4

If No, then the Accused is guilty of Cultivation of Narcotic Plants (as long as you answered yes to questions 1 and 2)

Reasonable Expectation

4. Has the defence proven, on the balance of probabilities, that the accused could not reasonably have been expected to have known or suspected that the plant they were cultivating was a narcotic plant?

If Yes, then the Accused is not guilty of Cultivation of Narcotic Plants (as long as you also answered yes to question 3)

If No, then the Accused is guilty of Cultivation of Narcotic Plants (as long as you answered yes to questions 1 and 2)

Last updated: 2 March 2007

7.6.2.4 Charge: Cultivation of a Commercial or Large Commercial Quantity of Narcotic Plants

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I must now direct you about the crime of cultivating a [commercial/large commercial] quantity of a narcotic plant. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – the accused intentionally cultivated a plant.

Two – the plant cultivated by the accused was a narcotic plant.

Three – the accused intentionally cultivated a [commercial/large commercial] quantity of the plant.

I will now explain these elements in more detail.

Cultivation

The first element relates to what the accused did. S/he must have intentionally cultivated a plant.

The law defines cultivation to include [*insert one or more of the following as relevant*: planting, growing, tending, nurturing, harvesting, sowing the seeds of] a plant.[1096]

In this case, the prosecution alleged that NOA cultivated a plant when [*insert relevant evidence*]. The defence responded [*insert any relevant evidence or arguments*].

It is for you to determine, based on all of the evidence, whether NOA cultivated the relevant plants, and did so intentionally. It is only if you are satisfied of this, beyond reasonable doubt, that the first element will be met.

Narcotic Plant

The second element that the prosecution must prove beyond reasonable doubt is that the plants cultivated by the accused were narcotic plants.

The law says that [*insert name of plant*] is a narcotic plant. This element will therefore be satisfied if the prosecution has proved, beyond reasonable doubt, that NOA cultivated [*insert name of plant*].

[*If it is alleged that a portion of the plant was unusable, add the following shaded section.*]

In this case you have heard [evidence/arguments] that [some of] the [*insert name of plant*] allegedly cultivated by NOA was unusable because [*insert evidence*]. This is not relevant to the issue of whether or not it was a narcotic plant that the accused cultivated. Even if a substance is unusable, it is still classified as a narcotic plant, as long it is [*insert name of plant*].

In this case, the prosecution provided the following evidence that the plant allegedly cultivated by the accused was [*insert name of plant and summary of relevant evidence*]. The defence responded [*insert any evidence and/or arguments*]. It is for you to determine, based on all the evidence, whether that plant was a narcotic plant, namely [*insert name of plant*].

[1096] The definition of cultivation is inclusive. If the specific act of cultivation alleged is not included in the definition above, the charge will need to be adapted accordingly. See 7.6.2 Cultivation of Narcotic Plants for further guidance.

Commercial or Large Commercial Quantity

The third element that the prosecution must prove beyond reasonable doubt is that the accused intentionally cultivated not less than a [commercial/large commercial] quantity of plants.

There are two parts to this element. The prosecution must prove that the accused cultivated not less than a [commercial/large commercial quantity] of [*insert name of plant*]. They must also prove that the accused intended to cultivate not less than a [commercial/large commercial] quantity of the plant in question.

The law says that [*insert relevant weight or number of plants*] is a [commercial/large commercial quantity] of [*insert name of plant*]. The first part of this element will therefore be satisfied if the prosecution has proved, beyond reasonable doubt, that NOA cultivated not less than [*insert relevant weight or number of plants and name of plant*].

It is not necessary for the prosecution to establish the precise [number/weight] of plants cultivated by the accused for this part of the element to be met. They only need to establish that the amount cultivated was not less than the amount specified by the law.

[*If the relevant quantity is measured by weight, add the following shaded section.*]

In calculating the weight, you should use the weight of the plants as you determine it to have been at the time the offence was committed, rather than what it would have been when dried or ready for consumption.

[*If there is a dispute about whether a cutting is a "plant", add the following shaded section.*]

In this case there has been a dispute about the number of plants cultivated by the accused, and in particular whether cuttings should be treated as a part of the plant they were cut from, or as a separate "plant". According to the law, a cutting becomes a separate plant when it develops a root. It does not need to be a root system, nor does it need to live. Even if it dies before becoming usable, it should still be counted as a "plant" if it developed a root.[1097]

Intention to cultivate a commercial/large commercial quantity

For this third element to be satisfied, the prosecution must also prove, beyond reasonable doubt, that the accused intended to cultivate not less than a [commercial/large commercial] quantity of plants. That is, s/he deliberately cultivated not less than [*insert relevant weight or number*] of plants.

The prosecution does not need to prove that the accused intended to cultivate that precise [number/weight] of plants. It is sufficient for the prosecution to prove that NOA intended to cultivate not less than [*insert relevant weight or number*] of plants.

[*If the accused denied knowing that the plants cultivated were narcotic plants, add the following shaded section.*]

It is also not necessary for the accused to have intended to cultivate that [number/weight] of [*insert name of drug*]. This part of the third element will be satisfied as long as the accused intended to cultivate a [commercial/large commercial] [number/weight] of the plants allegedly cultivated at [*insert location*] – whether s/he believed those plants were [*insert name of drug*] or something else.

[1097] This section of the charge will need to be modified when the *Drugs, Poisons and Controlled Substances (Amendment) Act 2006* commences operation (on 1 May 2007 unless proclaimed earlier), due to changes to the definition of "narcotic plant". See 7.6.2 Cultivation of Narcotic Plants for further information.

In determining whether or not the accused intended to cultivate not less than [*insert relevant number or weight*] of plants, you will need to decide if you can draw an inference from all of the evidence in the case that s/he had this intention.[1098] You will remember what I have told you about inferences.

You may be able to draw this inference if you find that the accused knew or believed that s/he was cultivating not less than that [number/weight] of plants.

However, you do not need to find that the accused actually knew s/he was cultivating not less than a [commercial/large commercial] [number/weight] of plants in order to draw this inference. Proof that the accused was aware that there was a significant and real chance that s/he was cultivating not less than a [commercial/large commercial] [number/weight] of plants is also capable of sustaining the inference that s/he intended to cultivate that quantity of plants.

This means that, if you find that the accused was aware of the likelihood that s/he was cultivating not less than a [commercial/large commercial] [number/weight], you may draw the inference that s/he had an intention to cultivate that quantity of plants. That is, you may infer that because the accused was aware that there was a significant and real chance that s/he was cultivating not less than a [commercial/large commercial] [number/weight], s/he must have intended to cultivate that [number/weight].

[*If "wilful blindness" as to the number/weight of plants arises as an issue, consider the following shaded section.*]

"Wilful blindness" may be relevant if there is evidence that the accused realised there was a risk that s/he was cultivating more than the relevant threshold, and deliberately chose to close his/her eyes to that risk so that s/he could later deny knowledge and avoid liability.

You could also draw an inference that NOA intended to cultivate a [commercial/large commercial] quantity of plants if you find that, given the circumstances, s/he would have suspected that that [number/weight] of plants was being cultivated, and deliberately failed to make further inquiries for fear of learning the truth. That is, s/he was aware that there was a risk that s/he was cultivating [*insert relevant number or weight*] plants, but deliberately closed [his/her] eyes to that risk to avoid possible liability. In such a situation, you may conclude that although NOA did not positively know that s/he was cultivating a [commercial/large commercial] [number/weight] of plants, s/he nevertheless intended to cultivate such a [number/weight].[1099]

It is for you to determine whether to infer, from all of the facts and circumstances of the case, that the accused had this intention. However, it is important that you do not draw such an inference unless you are satisfied that it is the only inference that is reasonably open in the circumstances. If any other reasonable explanation is available, then the prosecution will not have proved this third element beyond reasonable doubt.

In this case, the prosecution submitted that you should infer that the accused intended to cultivate not less than a [commercial/large commercial] [number/weight] of plants because [*insert evidence capable of sustaining the inference*].

[*If the accused denied intention to cultivate due to ignorance of the quantity being cultivated, consider the following shaded section.*]

The defence denied that NOA had an intention to cultivate not less than a [commercial/large commercial] [number/weight] of plants, alleging that s/he did not know, or was not aware of the likelihood, that s/he was cultivating that [number/weight] of plants. [*Insert relevant evidence and arguments.*]

[1098] If it is alleged that the accused admitted having such an intention, this part of the charge will need to be modified accordingly.

[1099] Such cases of "wilful blindness" will be rare, and judges should be cautious before charging the jury about this possibility: *R v Garlick (No.2)* (2007) 15 VR 388; [2007] VSCA 23.

It is important to remember that it is the prosecution who must prove, beyond reasonable doubt, that the accused had the relevant intention. So if you are not satisfied that accused knew or was aware of the likelihood s/he was cultivating not less than a [commercial/large commercial] [number/weight] of plants, and there is no other basis on which you can infer that the accused intended to cultivate that [number/weight], then this third element will not be met.

[*Insert any other defence evidence or arguments*.]

So you must decide, based on all of the evidence, whether the accused cultivated not less than a [commercial/large commercial] [number/weight] of narcotic plants, and whether the accused intended to cultivate that number/weight. It is only if you are satisfied of both of these matters, beyond reasonable doubt, that this third element will be met.

Lack of Knowledge that the Plant was a Narcotic Plant (Section 72C Defence)

[*If the s 72C defence of lack of knowledge is raised, add the following shaded section*.]

Even if you find that the prosecution has proven all of these elements, NOA will not necessarily be guilty of this offence. This is because there are certain circumstances in which the law allows a person to commit acts that would otherwise be illegal. That is, [he/she] may have a defence to the charge of cultivation.

The law states that it is a defence to the charge of cultivation if a person can prove that [he/she] did not know or suspect, and could not reasonably have been expected to have known or suspected, that the plant [he/she] was cultivating was a narcotic plant.

There are two parts to this defence. First, the accused must prove that [he/she] did not know or suspect that the plant [he/she] was cultivating was a narcotic plant.

Second, the accused must also prove that [he/she] could not reasonably have been expected to have known or suspected that the plant [he/she] was cultivating was a narcotic plant. That is, in all of the circumstances in which it is alleged the cultivation took place, it would have been unreasonable to expect NOA to have known or suspected that the plants [he/she] was cultivating were narcotic plants.

It is the defence who must prove these two matters to you. However, unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – the defence only needs to prove these matters on what is called the "balance of probabilities". That is, the defence needs to prove that it is more probable than not that NOA did not know or suspect, and could not reasonably have been expected to have known or suspected, that the plant he/she was cultivating was a narcotic plant.

If you are satisfied by the defence that both of these matters have been proven on the balance of probabilities, then this defence will be successful and you must find NOA not guilty of cultivation. This will be the case even if you find that all three elements of the offence have been met.

However, if the defence cannot prove, on the balance of probabilities, both that NOA did not know or suspect that the plant [he/she] was cultivating was a narcotic plant, and that [he/she] could not reasonably have been expected to have known or suspected that the plant he/she was cultivating was a narcotic plant, then this defence will fail. If you are also satisfied that each of the elements of the offence have been proven by the prosecution, beyond reasonable doubt, you should find NOA guilty of cultivation.

[*Insert relevant evidence and/or arguments*.]

Authorisation/Licence

[*If the defence alleged that the accused was authorised or licenced to cultivate narcotic plants, add the following shaded section.*]

A person who is [authorised/licensed] to cultivate narcotic plants will not be guilty of the offence of cultivation. In this case, the defence alleged that NOA was [authorised/licensed] to do so by virtue of [*insert relevant evidence*]. The prosecution disputed this, submitting that [*insert relevant evidence*].[1100]

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this is a matter which the defence must prove on the balance of probabilities. That is, you must be satisfied that it is more likely than not that NOA was [authorised/licensed] to cultivate narcotic plants. If the defence cannot prove this to you, and the prosecution has also proven all of the elements of the offence, then you should find the accused guilty of cultivation.

Summary

To summarise, before you can find NOA guilty of cultivation of a [commercial/large commercial] quantity of narcotic plants, the prosecution must prove to you beyond reasonable doubt:

One – that s/he intentionally cultivated a plant; and

Two – that the plant that s/he allegedly cultivated was a narcotic plant, in this case [*insert name of plant*].

Three – that s/he intentionally cultivated not less than a [commercial/large commercial] quantity of that plant, being [*insert relevant weight or number of plants*].

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of cultivating a [commercial/large commercial] quantity of narcotic plants.

[*If the s 72C defence of lack of knowledge has been raised, add the following shaded section.*]

However, even if you decide that these elements have been proven, NOA will not be guilty if the defence has proven, on the balance of probabilities, that s/he did not know or suspect, and could not reasonably have been expected to have known or suspected, that the plant s/he was cultivating was a narcotic plant.

[*If the defence alleged that the accused was authorised to cultivate narcotic plants, add the following shaded section.*]

However, even if you decide that these elements have been proven, NOA will not be guilty if the defence has proven, on the balance of probabilities, that s/he was [authorised/licensed] by law to cultivate a [commercial/large commercial] quantity of narcotic plants.

Last updated: 3 December 2012

7.6.2.5 Checklist: Cultivation of a Commercial or Large Commercial Quantity of Narcotic Plants (Simple)

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[1100] Provisions concerning authorization and licensing are contained in Divisions 2 and 4 of the *Drugs, Poisons and Controlled Substances Act 1981*. See also ss 118 and 119 of that Act for evidentiary provisions that may be of assistance in relation to such matters.

This checklist can be used if the accused is charged with cultivation of narcotic plants in a commercial or large commercial quantity, contrary to ss 72 or 72A, and the accused has not raised a defence under s 72C.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally cultivated a plant; and
2. The plant cultivated by the accused was a narcotic plant; and
3. The accused intentionally cultivated a [commercial/large commercial] quantity of plants.

An Intentional Act of Cultivation

1. Did the accused intentionally cultivate a plant?

Consider – "Cultivation" includes planting, growing, tending, nurturing, harvesting and sowing the seeds of a plant.

If Yes, then go to 2

If No, then the Accused is not guilty of Cultivation of a [Commercial/Large Commercial] Quantity of Narcotic Plants

A Narcotic Plant

2. Was the plant cultivated a "narcotic plant"?

Consider – [*Insert name of plant*] *is a "narcotic plant"*

If Yes, then go to 3.1

If No, then the Accused is not guilty of Cultivation of a [Commercial/Large Commercial] Quantity of Narcotic Plants

Quantity

3.1 Did the accused cultivate not less than a [commercial/large commercial] quantity of the plant?

Consider – [*Insert relevant weight or number of plants*] *is a* [*commercial/large commercial*] *quantity of* [*insert name of plant*].

If Yes, then go to 3.2

If No, then the Accused is not guilty of Cultivation of a [Commercial/Large Commercial] Quantity of Narcotic Plants

3.2 Did the accused intend to cultivate not less than a [commercial/large commercial] quantity of plants?

If Yes, then the Accused is guilty of Cultivation of a [Commercial/Large Commercial] Quantity of Narcotic Plants (as long as you have also answered yes to questions 1, 2 and 3.1).

If No, then the Accused is not guilty of Cultivation of a [Commercial/Large Commercial] Quantity of Narcotic Plants

Last updated: 30 August 2006

7.6.2.6 Checklist: Cultivation of a Commercial or Large Commercial Quantity of Narcotic Plants (Section 72C Defence)

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This checklist can be used if the accused is charged with cultivation of narcotic plants in a commercial or large commercial quantity, contrary to ss 72 or 72A, and the accused has raised a defence under s 72C.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused intentionally cultivated a plant; and
2. The plant cultivated by the accused was a narcotic plant; and
3. The accused intentionally cultivated a [commercial/large commercial] quantity of plants.

An Intentional Act of Cultivation

1. Did the accused intentionally cultivate a plant?

Consider – "Cultivation" includes planting, growing, tending, nurturing, harvesting and sowing the seeds of a plant.

If Yes, then go to 2

If No, then the Accused is not guilty of Cultivation of a [Commercial/Large Commercial] Quantity of Narcotic Plants

A Narcotic Plant

2. Was the plant cultivated a "narcotic plant"?

Consider – [*Insert name of plant*] *is a "narcotic plant"*

If Yes, then go to 3.1

If No, then the Accused is not guilty of Cultivation of a [Commercial/Large Commercial] Quantity of Narcotic Plants

Quantity

3.1 Did the accused cultivate not less than a [commercial/large commercial] quantity of the plant?

Consider – [*Insert relevant weight or number of plants*] *is a* [*commercial/large commercial*] *quantity of* [*insert name of plant*].

If Yes, then go to 3.2

If No, then the Accused is not guilty of Cultivation of a [Commercial/Large Commercial] Quantity of Narcotic Plants

3.2 Did the accused intend to cultivate not less than a [commercial/large commercial] quantity of plants?

If Yes, then go to 4

If No, then the Accused is not guilty of Cultivation of a [Commercial/Large Commercial] Quantity of Narcotic Plants

Defence of Lack of Knowledge

Two matters the defence must prove on the balance of probabilities:

4. That the accused did not know or suspect that the plant they were cultivating was a narcotic plant; and

5. That the accused could not reasonably have been expected to have known or suspected that the plant they were cultivating was a narcotic plant.

Accused's Knowledge

4. Has the defence proven, on the balance of probabilities, that the accused did not know or suspect that the plant they were cultivating was a narcotic plant?

If Yes, then go to 5

If No, then the Accused is guilty of Cultivation of Narcotic Plants (as long as you answered yes to questions 1, 2, 3.1 and 3.2)

Reasonable Expectation

5. Has the defence proven, on the balance of probabilities, that the accused could not reasonably have been expected to have known or suspected that the plant they were cultivating was a narcotic plant?

If Yes, then the Accused is not guilty of Cultivation of Narcotic Plants (as long as you also answered yes to question 4)

If No, then the Accused is guilty of Cultivation of Narcotic Plants (as long as you answered yes to questions 1, 2, 3.1 and 3.2)

Last updated: 2 March 2007

7.6.3 Possession of a Drug of Dependence

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Overview

1. Possession of a drug of dependence is an offence contrary to s 73 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (the "*Drugs Act*").
2. The offence has two elements that the prosecution must prove beyond reasonable doubt:
   i) That the substance in question was a "drug of dependence"; and
   ii) That the accused "possessed" that substance.
3. The second element can be met either by proving possession at common law, or by satisfying the requirements set out in s 5 of the *Drugs Act* (*R v Marabito* (1990) 50 A Crim R 412).
4. People who are authorized or licensed to possess a drug of dependence are excluded from the scope of the offence.

Drug of Dependence

5. The first element the prosecution must prove is that the substance in question was a "drug of dependence". This term is defined in s 4 of the *Drugs Act*, to include:

    - Any form of the drugs specified in Parts 1 and 3 of Schedule Eleven to the Act, whether natural or synthetic;
    - The derivatives and isomers of the drugs specified in Parts 1 and 3 of Schedule Eleven to the Act;
    - The salt of the abovementioned drugs, derivates and isomers;
    - Any substances that are included in the classes of drugs specified above; and
    - The fresh or dried parts of the plants specified in Part 2 of Schedule Eleven.

6. These substances fall within the definition of a "drug of dependence" even if they are contained in or mixed with another substance (except for the plants specified in Part 2 of Schedule Eleven).

7. Unusable portions of a drug (such as the stems, roots and stalks of the cannabis plant) are still considered to be drugs of dependence, so long as they fit within the definition specified by s 4 (*R v Coviello* (1995) 81 A Crim R 293 (Vic CCA)).

Proof of drug particulars by certificate

8. A certificate purporting to be signed by an analyst with respect to any analysis or examination he or she has made is sufficient evidence of the identity of the substance analysed, of the result of the analysis and of the matters relevant to the proceedings as stated in the certificate (*Drugs Act* s 120).

9. A certificate purporting to be signed by a botanist is sufficient evidence of the identity of the substance examined. There is no need to provide proof that the person who signed the certificate is an analyst or botanist, nor to provide proof of their signature (*Drugs Act* s 120).

10. The provisions in s 120 do not apply if the certificate was not served on the defence at least seven days before the hearing, or if the defence, at least three days before the hearing, gave notice in writing to the informant and the analyst or botanist that the analyst or botanist is required to attend as a witness (s 120(2)).

Possession

11. The second element the prosecution must prove is that the accused possessed the drug. There are three ways the prosecution can do this (each of which is discussed in turn below):

    i) By relying on the common law definition of possession, and proving that the accused intentionally had the drug in his or her custody, or under his or her control (*DPP v Brooks* [1974] AC 862; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Maio* [1989] VR 281; *R v Mateiasevici* [1999] 3 VR 185);

    ii) By relying on the deeming provision in *Drugs Act* s 5, and proving that the drug was on land or premises occupied by the accused; or

    iii) By relying on the deeming provision in *Drugs Act* s 5, and proving that the accused used, enjoyed or controlled the drug.

12. The prosecution can put common law possession and s 5 possession to the jury as alternatives (*Marabito v R* (1990) 50 A Crim R 412 (Vic CCA)).

13. If the prosecution relies on the deeming provision in *Drugs Act* s 5, the accused may seek to avoid conviction by proving that he or she did not possess the drug according to the common law definition of possession (see "Disputing Possession Under Section 5" below).

Common law possession

14. The first way in which the prosecution can prove that the accused "possessed" a drug of dependence is by relying on the common law definition of possession.

15. At common law the definition of "possession" contains a conduct element (exercising custody or control) and a mental element (intending to possess) (*He Kaw Teh v R* (1985) 157 CLR 523; *R v Maio* [1989] VR 281). These elements are discussed in turn below.

The conduct element: custody or control

16. The conduct element of common law possession requires the prosecution to prove that a drug of dependence was physically in the accused's custody, or was under his or her control (*DPP v Brooks* [1974] AC 862; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Maio* [1989] VR 281; *R v Mateiasevici* [1999] 3 VR 185).

17. A person does not need to be carrying the drug, or to have it physically with him or her, to have custody or control over it (*R v Maio* [1989] VR 281; *R v Mateiasevici* [1999] 3 VR 185).

18. It is a question of fact whether an item is within a person's custody or control. A person may have custody or control of an item:

    - By having it on him or her or within reach (i.e. "in manual custody"); or
    - By having it in a location where he or she maintains the power to "place his (or her) hands on it and so have manual custody when he (or she) wishes" (*Moors v Burke* (1919) 26 CLR 265).

The mental element: intention to possess

19. The mental element of common law possession requires the prosecution to prove that the accused intended to possess a drug of dependence (*Saad v R* (1987) 70 ALR 667*; Bahri Kural v R* (1987) 162 CLR 502; *He Kaw Teh v R* (1985) 157 CLR 523).

20. The prosecution does not need to prove that the accused intended to possess *the particular drug* in question. They only need to prove that the accused intended to possess *a* drug of dependence (*He Kaw Teh v R* (1985) 157 CLR 523).

21. Although the intention to possess may be proved by an admission by the accused that he or she intended to possess a drug of dependence, in most cases it will be necessary to infer the requisite intention (*Bahri Kural v R* (1987) 162 CLR 502; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Page* [2008] VSCA 54).

22. It will usually be possible to infer an intention to possess a drug of dependence from proof that the accused knew of the existence and nature of the substance at the time that it was possessed (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *Saad v R* (1987) 70 ALR 667*; Bahri Kural v R* (1987) 162 CLR 502; *He Kaw Teh v R* (1985) 157 CLR 523).

23. However, the prosecution does not need to prove that the accused *knew* of the existence and nature of the substance. It is possible for the requisite intent to be inferred from a lesser state of mind, such as:

    - A *belief* that it was a drug of dependence that was possessed (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *Saad v R* (1987) 70 ALR 667*; Bahri Kural v R* (1987) 162 CLR 502);
    - An *awareness of the likelihood* that it was a drug of dependence that was possessed (i.e. an awareness that there was a significant or real chance that he or she possessed a prohibited drug) (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *Saad v R* (1987) 70 ALR 667*; Bahri Kural v R* (1987) 162 CLR 502; *R v Page* [2008] VSCA 54).

24. In some cases, it may also be possible to infer an intention to possess a drug of dependence from the fact that:

- The circumstances were such that the accused's suspicions that he or she possessed a drug of dependence would have been aroused; and
- The accused deliberately failed to make inquiries about the substance possessed for fear of learning the truth (See, e.g. *R v Garlick (No.2)* (2007) 15 VR 388; *He Kaw Teh v R* (1985) 157 CLR 523; *Bahri Kural v R* (1987) 162 CLR 502; *R v Crabbe* (1985) 156 CLR 464).

25. However, such cases of "wilful blindness" will be rare, and judges should be cautious before charging the jury about this possibility. There must be evidence that the accused realised there was a risk that he or she possessed a drug of dependence, and deliberately chose to close his or her eyes to that risk so that he or she could later deny knowledge and avoid liability. In the absence of such evidence, it will be a misdirection to direct the jury about wilful blindness (*R v Garlick (No.2)* (2007) 15 VR 388).

26. It should be noted that the analysis in this commentary of the way in which to approach the mental element (i.e., by drawing an inference of intention from the accused's knowledge or awareness), which is drawn from cases such as *Saad*, *Nguyen* and *Bui*, differs from the approach formerly taken in cases such as *R v Maio* [1989] VR 281. That approach, which allowed the prosecution to establish the mental element without reference to inferences (e.g. by proving that the accused was aware of the significant likelihood that he or she had a drug of dependence in his or her custody or control, and intended to have custody or exercise control over the drug), no longer seems correct in light of these cases.

Directing the jury about the mental element

27. Even though the issue of intent may not be a live issue in a trial, and may not have been raised by the defence, as it is an element of the offence a judge is required to direct the jury about it, unless the defence has conceded that a direction is not required (*R v Bui* [2005] VSCA 300).

28. While it will usually be possible to infer the requisite intention from the states of mind outlined above (other than wilful blindness), this will not always be the case. A judge should therefore not instruct the jury that they may convict simply because, for example, the prosecution established that the accused was aware that there was a significant or real chance that he or she possessed a prohibited drug (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *R v Reed* [2008] VSCA 20; *R v Page* [2008] VSCA 54).

29. The jury should instead be directed that proof that the accused was aware of the likelihood that it was a drug of dependence that was possessed is capable of sustaining the inference that the accused intended to possess a drug of dependence. At the same time, the judge should make clear to the jury that it is for them to determine whether that inference should be drawn, based on all of the facts and circumstances (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *R v Reed* [2008] VSCA 20; *R v Page* [2008] VSCA 54).

30. In charging the jury on this issue, judges should follow as nearly as possible the language used in *R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299. In particular, care must be taken to ensure that the phrase "is capable of sustaining the inference" is used whenever reference is made in this context to proof of belief "in a significant or real chance" (*R v Page* [2008] VSCA 54).

31. The jury must be instructed that an inference is not to be drawn unless they are satisfied that it is the only inference that is reasonably open in the circumstances of the case (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Bui* [2005] VSCA 300; *R v Page* [2008] VSCA 54).

32. Where intention is to be proved by inference, the judge should direct the jury about the evidence that is capable of sustaining that inference (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299; *R v Page* [2008] VSCA 54).

33. A judge should not attempt to explain the meaning of the expression "significant or real chance", other than to tell the jury that the words have their ordinary meaning and that it is a question for them to decide (*R v Nguyen*; *DPP Reference (No 1 of 2004)* (Vic) (2005) 12 VR 299).

No need to prove exclusive possession

34. Despite authority to the contrary, it is not necessary for the prosecution to prove "exclusive possession" (i.e., the right of the accused to exclude everyone else, other than those with whom he or she was acting in concert, from interfering with the drug). The accused can "possess" a drug at common law even if there is a reasonable possibility that someone else also possessed that drug (*R v Tran* (2007) 16 VR 673. See also *R v Dibb* (1991) 52 A Crim R 64 (NSW CCA); *R v Cumming* (1995) 86 A Crim R 156 (WA CCA) but c.f. *Moors v Burke* (1919) 26 CLR 265; *Williams v Douglas* (1949) 78 CLR 521)).

Deemed possession: occupation of land or premises

35. The second way in which the prosecution can prove that the accused "possessed" a drug of dependence is by relying on the deeming provision in s 5 of the *Drugs Act*, and proving that a drug of dependence was on land or premises occupied by the accused (*R v Clarke and Johnston* [1986] VR 643).

36. It is not necessary for the prosecution to prove that the accused intended to possess the drug (cf. common law possession). Once the prosecution has proven that the accused was in occupation of the land or premises upon which the drug was found, the accused will be deemed to have been in possession of it (unless the court is satisfied to the contrary: see below) (*R v Momcilovic* (2010) 25 VR 436; *R v Clarke and Johnston* [1986] VR 643; *Marabito v R* (1990) 50 A Crim R 412 (Vic CCA); *R v Tran* [2007] VSCA 19).

When does a person "occupy" land or premises?

37. The meaning of "occupation" in relation to s 5 is not to be determined by reference to indicia of occupancy applicable in other contexts. Its meaning is to be determined by looking at the "mischief" against which the legislation is concerned – the possession of a drug of dependence (*R v Phung* [2003] VSCA 32).

38. In this context, occupation means more than merely being present at a location at the relevant time. An occupier must be in practical control of the land or premises (*R v Phung* [2003] VSCA 32; *R v Tran* [2007] VSCA 19).

39. The ability to control access to land or premises is crucial to determining whether a person is in occupation of that land or premises (*R v Phung* [2003] VSCA 32; *R v Tran* [2007] VSCA 19).

40. "Occupation" includes the right to possess premises. It is not necessary for an occupier to be always present at those premises. A person who is temporarily absent from premises they own or lease remains the occupier when absent on holidays, whilst working or living elsewhere, or whilst briefly separated from their spouse (*R v Dang* [2004] VSCA 38).

41. An owner who furnishes a house and keeps it ready for habitation whenever they want to go will be in occupation, even if they only reside there one day a year (*R v Clarke and Johnston* [1986] VR 643; *Shire of Poowong and Jeetho v Gillen* [1907] VLR 37).

42. However, merely attending premises at various times, or leaving property there with the owner's permission, is not "occupation" for the purposes of s 5 (see, e.g. *R v Pisano* [1997] 2 VR 342).

43. Section 5 can apply to joint possession. It is not necessary for the prosecution to prove that the accused was the sole occupier of the relevant land or premises (*R v Doan* (2001) 3 VR 349).

44. Whether the accused's connection with premises falls within the definition of occupation is a matter of fact for the jury to determine (*R v Phung* [2003] VSCA 32; *R v Dang* [2004] VSCA 38).

45. As the word "occupation" is capable of a number of meanings depending on the context in which it is used, it is unhelpful to direct the jury that the word is to be given its ordinary English meaning (*R v Phung* [2003] VSCA 32).

Deemed possession: use, enjoyment or control

46. The third way in which the prosecution can prove that the accused "possessed" a drug of dependence is by relying on the deeming provision in s 5 of the *Drugs Act*, and proving that the accused used, enjoyed or controlled a drug of dependence (*R v Clarke and Johnston* [1986] VR 643).

47. It is not necessary for the prosecution to prove that the accused intended to possess the drug (cf. common law possession). Once the prosecution has proven that the accused used, enjoyed or controlled a drug, he or she will be deemed to have been in possession of it (unless the court is satisfied to the contrary: see below) (*R v Momcilovic* (2010) 25 VR 436; *R v Clarke and Johnston* [1986] VR 643; *Marabito v R* (1990) 50 A Crim R 412 (Vic CCA); *R v Tran* [2007] VSCA 19).

When does a person "use, enjoy or control" a drug?

48. The word "use" is defined in s 70(1) of the *Drugs Act* to mean:

    - smoke a drug of dependence;
    - inhale the fumes caused by heating or burning a drug of dependence; or
    - introduce a drug of dependence into the body of a person.

49. In this context, the term "enjoy" does not have any separate meaning from the term "use" and should not be put forward as an independent basis for deeming possession.

50. A person has been held to "control" drugs for the purposes of s 5 where those drugs were concealed in their car (*R v Burr* 6/4/1989 Vic CCA).

51. It is not necessary for the purposes of s 5 for the prosecution to prove that the accused was "knowingly" in control of the drug. This means that the prosecution can prove that the accused "controlled" a drug without proving that the accused knew of the presence or nature of the drug (*R v Burr* 6/4/1989 Vic CCA).

52. Section 5 can apply to joint possession or direct control exercised jointly. It is not necessary for the prosecution to prove that the accused was the only person who used, enjoyed or controlled the drug (*R v Doan* (2001) 3 VR 349).

Disputing Possession Under Section 5

53. Once the prosecution has proved that a prohibited drug was used, enjoyed or controlled by the accused, or that the accused was in occupation of the land or premises upon which the drug was found, the accused will be deemed to be in possession of that drug unless he or she can "satisfy the court to the contrary" (*Drugs Act* s 5).

54. This requires the accused to prove that he or she did not possess the drug according to the common law definition of "possession" (*Marabito v R* (1990) 50 A Crim R 412 (Vic CCA); *R v Clarke and Johnston* [1986] VR 643; *R v Tran* [2007] VSCA 19).

55. The accused must prove this on the balance of probabilities. This is a legal burden rather than a mere evidentiary burden (*R v Momcilovic* (2010) 25 VR 436).

56. The accused can meet this burden by establishing, on the balance of probabilities, that despite the requirements of s 5 being satisfied:

    - The drug was not actually in his or her custody or control (i.e., by disproving the conduct element of possession) (see, e.g. *R v Mateiasevici* [1999] 3 VR 185); or
    - He or she did not intend to possess the drug (i.e., by disproving the mental element of possession) (see, e.g. *R v Clarke and Johnstone* [1986] VR 643; *R v Tran* [2007] VSCA 19).

57. Depending on the circumstances, the accused may be able to disprove the mental element by establishing, on the balance of probabilities, that he or she:

- Did not know, or was not aware of the likelihood, that the relevant substance was present (*R v Clarke and Johnstone* [1986] VR 643; *Marabito v R* (1990) 50 A Crim R 412 (Vic CCA; *R v Mateiasevici* [1999] 3 VR 185; *R v Tran* [2007] VSCA 19);
- Did not know, or was not aware of the likelihood, that the substance was a drug of dependence (*R v Clarke and Johnstone* [1986] VR 643; *R v Tran* [2007] VSCA 19); or
- Did not intend to exercise control over the drug or the place it was kept (*R v Tran* [2007] VSCA 19).

58. However, the precise nature of what the accused must prove will depend on all the circumstances of the case. For example, it will not be sufficient to establish that the accused did not know, or was not aware of the likelihood, that the substance was a drug of dependence, if it is possible to infer an intention to possess from the fact that the accused would have been suspicious about the nature of the substance possessed, but deliberately failed to make inquiries for fear of learning the truth (see, e.g. *R v Garlick (No.2)* (2007) 15 VR 388). In such cases, the accused will also need to prove that he or she did not deliberately choose to close his or her eyes to the risk that he or she possessed a drug of dependence.

59. The judge is only required to direct the jury about whichever issues (if any) arise on the evidence. For example, if the only issue which arises on the evidence is whether the accused knew of the drug's presence, there is no need to direct the jury about the accused's intention to exercise control over the drug (*R v Tran* [2007] VSCA 19; *R v Clarke and Johnstone* [1986] VR 643; *R v Mateiasevici* [1999] 3 VR 185; *R v Momcilovic* (2010) 25 VR 436).

60. The Court of Appeal has declared that s 5 of the *Drugs Act* cannot be interpreted consistently with the presumption of innocence under s 25(1) of the *Charter of Human Rights and Responsibilities Act 2006*. The declaration does not affect the validity or operation of s 5, or any trial which relies upon s 5.

Authorisation and Licensing

61. Section 73 specifies that a person will be guilty if they are in possession of a drug of dependence, "without being authorized by or licensed under this Act or the regulations to do so".

62. It has been held that the question of authorisation or licensing is a matter of "exception" or "qualification" for the purposes of s 104 of the *Drugs Act*. That section states that the burden of proving any "matter of exception qualification or defence" is on the accused.

63. It is therefore for the accused to prove, on the balance of probabilities, that he or she was appropriately authorised or licensed – rather than being for the prosecution to disprove beyond reasonable doubt (*R v Ibrahim* (1987) 27 A Crim R 460; *Horman v Bingham* [1972] VR 29).

64. Provisions concerning authorisation and licensing are contained in Divisions 2 and 4 of the Act respectively.

65. Sections 118 and 119 of the Act contain evidentiary provisions that may be of assistance in cases where there is a dispute about authorization or licensing.

Trafficking, Cultivation and Possession

66. If the accused is charged with trafficking or cultivation as well as possession, and the relevant acts of trafficking, cultivation and/or possession completely overlap, a conviction should only be recorded in relation to one of the offences (*R v Langdon* (2004) 11 VR 18; *R v Mason* [2006] VSCA 55; *R v Nguyen* [2006] VSCA 158; *R v Nunno* [2008] VSCA 31; *R v Filipovic* [2008] VSCA 14). See 7.6.1 Trafficking in a Drug of Dependence for further information.

Attempted Possession

67. Section 73 of the *Drugs Act* makes it an offence to have in possession or "attempt to have in possession" a drug of dependence. A person can therefore be charged with attempted possession directly under s 73, rather than having to rely on s 321M of the *Crimes Act 1958*.

68. A person charged with attempted possession under s 73 will be subject to the same penalties as a person charged with possession. In contrast, a person who is charged with attempted possession under s 321M of the *Crimes Act 1958* will be subject to the lesser penalties set out in s 321P of that Act.

69. Section 321N of the *Crimes Act 1958* sets out the conduct that will constitute an attempt. This section applies to a person charged with attempted possession under the provisions of the *Drugs Act* by virtue of s 321R of the *Crimes Act 1958*.

70. For more information about attempts see Attempt.

Mitigating Circumstances

71. Section 73 of the *Drugs Act* states that a person who possesses a drug of dependence will be subject to the penalty set out in s 73(1)(c), unless he or she can satisfy the court, on the balance of probabilities, of one of the following mitigating circumstances:

    - That he or she did not have more than a small quantity of cannabis or tetrahydrocannabinol (as defined in Schedule 11 to the Act), and did not have those drugs for any purpose related to trafficking (s 73(1)(a)); or
    - That he or she was not in possession of the relevant drugs for any purpose related to trafficking (s 73(1)(b)).

72. As these are mitigating circumstances, rather than elements of the offence, their existence is for the judge to determine when sentencing the accused, rather than for the jury to decide when determining the accused's guilt (*R v Pantorno* [1988] VR 195, overruling *R v Bridges* (1986) 20 A Crim R 271. See *R v Wyllie* [1989] VR 21 for guidance on sentencing in possession cases).

Last updated: 5 May 2010

7.6.3.1 Charge: Possession of a Drug of Dependence (Section 5 Possession Occupation)

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This charge can be used where it is alleged that the accused possessed a drug of dependence, the prosecution relied on the deeming provision in s 5 of the *Drugs, Poisons and Controlled Substances Act*, and alleged that the accused *occupied the land or premises* on which the drug was found.

I must now direct you about the crime of possessing a drug of dependence. To prove this crime, the prosecution must prove the following 2 elements beyond reasonable doubt:

One – that the substance in question was a drug of dependence; and

Two – that the accused possessed that substance.

I will now explain these matters in more detail.

Drug of Dependence

The first element that the prosecution must prove beyond reasonable doubt is that the substance in question was a drug of dependence.

The substance in question here was [*identify relevant material, e.g* "the substance in the three plastic bags tendered as Exhibit X and analysed in the certificate of analysis, Exhibit Y"].

In this case, [*describe the evidence and arguments (or concession) about the identification of the substance as a particular drug*].

The law says that [*insert name of drug*] is a drug of dependence. So if you are satisfied beyond reasonable doubt that the substance in question was or included [*insert name of drug*], then this element will be satisfied, and you should go on to consider the second element.

Possession

The second element that the prosecution must prove is that the accused possessed the substance in question.

In this case the prosecution seeks to prove this element by relying on a law that says that a substance is deemed to be in the possession of a person if it is upon any land or premises occupied by him or her, unless the person satisfies the court to the contrary. This requires the prosecution to prove two things beyond reasonable doubt.

Occupation

First, the prosecution must prove that NOA occupied the [land/premises] in question – in this case the [*insert precise details of what it is alleged the accused occupied, e.g. the house, the garage, the whole of a plot of land or a specific part of that land*].

For a person to "occupy" a property, s/he must be in practical control of that property. It is not sufficient for him/her to have simply been present at that location when the drug was found, or to have gone there occasionally. S/he must, for example, be able to control access to the property.

This does not mean that a person always has to be present at a property to be in occupation. For example, a person will still occupy his/her house even when s/he is away on holidays. This is because s/he has the right to occupy that house, even if s/he is temporarily absent.

It is also not necessary for a person to own a property to be in occupation. For example, a person who rents the house where s/he lives occupies that house. In fact, the owner of a house that is leased out no longer occupies that house, because s/he is no longer in practical control of it. S/he is not, for example, able to come and go as s/he pleases. It is the tenant who is in occupation of that house during the period of the lease.

The evidence was [*summarise evidence and arguments concerning occupation, addressing detail only if in issue*].

Drug of dependence in that location

The second part of this element requires the prosecution to prove that the drug of dependence was [on that land/in those premises].

The evidence was [*summarise evidence and arguments concerning the location and chain of custody in respect of the substance, addressing detail only if in issue*].

Defences

[*This section addresses three possible ways the defence may contest the offence: by establishing that the accused did not have* custody or control *of the drug; by establishing the accused did not* intend to possess *the drug; or by establishing that the accused was* authorised or licensed *to possess the drug. Judges will need to adapt these parts of the charge if the defence contests the offence on multiple grounds*.]

The accused did not have custody or control of the drug

[*If the defence argued that the accused did not have custody or control of the drug, add the following shaded section*.]

Even if you are satisfied that NOA occupied [land/premises] where police located a drug of

dependence, you must find him/her not guilty of this offence if the defence satisfies you that s/he did not have custody or control of that drug.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – the defence must prove this matter on the balance of probabilities. That is, the defence must satisfy you that it is more likely than not that NOA did not have custody or control of the drug.

[*If it is alleged that the accused maintained custody or control of a drug from a distance, add the following darker shaded section.*]

The law says that a person can have custody or control of a substance even if he or she is not carrying or watching over it. A person can have custody or control of a substance if s/he has it in a place where s/he [has the power/asserts the right] to place his/her hands on it when s/he wishes.

This means that it is not sufficient for the defence to prove that the accused did not have the drug physically with or near him/her when it was found. To prove that the accused did not have custody or control of the substance in question here, the defence must prove that s/he did not have it in a place where s/he [had the power/asserted the right] to place his/her hands on it when s/he wished.

[*If there is evidence that others had custody or control over the drug, add the darker shaded section.*]

It is possible for more than one person to possess an item. This means that it is not enough for the accused to prove that someone else shared custody or control of the item in question here. The accused must prove that s/he did not also have custody or control of that item.

If the defence cannot prove this to you, and the prosecution has proven the two elements I have described, then you should find the accused guilty of possession of a drug of dependence.

The evidence was [*summarise evidence and arguments concerning custody or control of the drug, addressing detail only if in issue*].

The accused did not intend to possess the drug

[*If the defence argued that the accused did not intend to possess the drug, add the following shaded section.*]

Even if you are satisfied that NOA occupied [land/premises] where police located a drug of dependence, you must find the accused not guilty of this offence if the defence satisfies you that NOA did not intend to have a drug of dependence in his/her custody or under his/her control.

It is not enough for the accused to prove that s/he did not know that the substance in his/her custody or control was the specific drug named in the indictment – in this case [*insert name of drug*]. To prove this matter, the defence must prove that the accused did not intend to have custody or control of any drug of dependence.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – the defence must prove this matter on the balance of probabilities. That is, the defence must satisfy you that it is more likely than not that NOA did not intend to have a drug of dependence in his/her custody or control.

This is a matter that must be proved by inferences. You will need to decide if you can infer from all of the evidence in the case that NOA did not intend to have custody or control of a drug of dependence.

In this case, the defence argued that [*insert basis for the inference that NOA did not have the requisite intention, such as* "NOA did not know, or was not aware of the likelihood, that the drug was in the house" *or* "NOA did not know, or was not aware of the likelihood, that the substance was a drug of dependence"]. They argued that you can infer from this fact that NOA did not intend to have a drug of dependence in his/her custody or control. [*Summarise defence arguments and evidence.*] By contrast, the

prosecution argued [*insert prosecution arguments and evidence*].

It is for you to determine whether [*repeat basis for the defence inference stated above, e.g.* "NOA did not know, or was not aware of the likelihood, that the drug was in the house"], and whether to infer from that fact, and all of the circumstances of the case, that NOA did not intend to have custody or control of a drug of dependence.

Because this is not an inference that the prosecution is asking you to draw, it does not need to be proven beyond reasonable doubt. It only needs to be proven on the balance of probabilities. This means that you do not need to be satisfied that it is the only inference that is reasonably open in the circumstances. You can infer that the accused did not intend to have a drug of dependence in his/her custody or control if you are satisfied that that is more likely than not to have been the case.

If you find that, on the balance of probabilities, NOA did not intend to have custody or control of a drug of dependence, then you must find him/her not guilty of this offence. However, if the defence cannot prove this to you, and the prosecution has proven the two elements I have described, then you should find the accused guilty of possession of a drug of dependence.

The accused was authorised or licensed to possess the drug

[*If it is alleged that the accused was authorised or licensed to possess a drug of dependence, add the following shaded section.*]

Even if you are satisfied that NOA occupied [land/premises] where police located a drug of dependence, you must find the accused not guilty of this offence if the defence satisfies you that NOA was [authorised/licensed] to possess a drug of dependence.

In this case, the defence alleged that NOA was [authorised/licensed] to do so by virtue of [*insert relevant evidence*]. The prosecution disputed this, submitting that [*insert relevant evidence*].[1101]

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this is a matter which the defence must prove on the balance of probabilities. That is, you must be satisfied by the defence that it is more likely than not that NOA was [authorised/licensed] to possess a drug of dependence.

If the defence cannot prove this to you, and the prosecution has proven the two elements I have described, then you should find the accused guilty of possession of a drug of dependence.

Summary

To summarise, before you can find NOA guilty of possession of a drug of dependence, the prosecution must prove to you beyond reasonable doubt:

One – that the substance in question was a drug of dependence; and

Two – that the accused possessed that substance. This will be the case if the substance was found on land or premises occupied by the accused.

If you find that the prosecution has not proved both of these matters beyond reasonable doubt, then you must find NOA not guilty of possession of a drug of dependence.

[1101] Provisions concerning authorisation and licensing are contained in Divisions 2 and 4 of the *Drugs, Poisons and Controlled Substances Act 1981*. See also ss 118 and 119 of that Act for evidentiary provisions that may be of assistance in relation to such matters.

Defences

[*If the accused contested the offence, despite the elements being satisfied, add the following shaded section.*]

However, even if you decide that these elements have been proven, NOA will not be guilty of this offence if the defence has proven, on the balance of probabilities, that s/he [did not have custody or control of a drug of dependence/did not intend to have a drug of dependence in his/her custody or under his/her control/was authorised or licensed by law to possess a drug of dependence].

Last updated: 27 March 2019

7.6.3.2 Checklist: Possession of a Drug of Dependence (Section 5 Occupation Simple)

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This checklist can be used in possession cases in which:

i) The prosecution relied on the section 5 definition of possession; and

ii) The prosecution alleged that the accused occupied the land or premises on which the drug was found; and

iii) The defence did not submit that the accused did not have custody or control of the drug, did not intend to possess the drug, or was authorised or licensed to possess the drug.

The Elements

Two elements the prosecution must prove beyond reasonable doubt :

1. The substance in question was a drug of dependence; and
2. The accused possessed that substance.

A Drug of Dependence

1. Was the substance in question a "drug of dependence"?

Consider – [*Insert name of drug*] *is a "drug of dependence".*

If Yes, then go to 2

If No, then the Accused is Not Guilty of Possession of a Drug of Dependence

Possession of a Drug

2. Did the accused possess the substance in question?

2.1 Did the accused occupy the [land/premises] in question?

Consider – Was the accused in practical control of that property?

If Yes, then go to 2.2

If No, then the Accused is Not Guilty of Possession of a Drug of Dependence

2.2 Was the substance in question found [on that land/in those premises]?

If Yes, then the Accused is Guilty of Possession of a Drug of Dependence (as long as you also answered Yes to questions 1 and 2.1)

If No, then the Accused is Not Guilty of Possession of a Drug of Dependence

Last updated: 11 May 2010

7.6.3.3 Checklist: Possession of a Drug of Dependence (Section 5 Occupation Disputed)

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This checklist can be used in possession cases in which:

i) The prosecution relied on the section 5 definition of possession; and

ii) The prosecution alleged that the accused occupied the land or premises on which the drug was found; and

iii) The defence submitted that the accused did not have custody or control of the drug, did not intend to possess the drug, or was authorised or licensed to possess the drug.

The Elements

Two elements the prosecution must prove beyond reasonable doubt:

1. The substance in question was a drug of dependence; and
2. The accused possessed that substance.

A Drug of Dependence

1. Was the substance in question a "drug of dependence"?

Consider – [Insert name of drug] is a "drug of dependence".

If Yes, then go to 2

If No, then the Accused is Not Guilty of Possession of a Drug of Dependence

Possession of a Drug

2. Did the accused possess the substance in question?

2.1 Did the accused occupy the [land/premises] in question?

Consider – Was the accused in practical control of that property?

If Yes, then go to 2.2

If No, then the Accused is Not Guilty of Possession of a Drug of Dependence

2.2 Was the substance in question found [on that land/in those premises]?

If Yes, then go to 3

If No, then the Accused is Not Guilty of Possession of a Drug of Dependence

Defences

[*Judges should delete whichever of these defences is not relevant in the circumstances of the case. If multiple defences are in issue, the numbering will need to be modified.*]

Even if you are satisfied that the prosecution has proven the two elements outlined above, you must find the accused not guilty if the defence has proven, on the balance of probabilities, that the accused [did not have custody or control of the substance/did not intend to possess a drug of dependence/was authorised or licensed to possess the drug].

Lack of Custody or Control

3. Was it more likely than not that the accused did not have custody or control of the substance?

If Yes, then the Accused is Not Guilty of Possession of a Drug of Dependence

If No, then the Accused is Guilty of Possession of a Drug of Dependence (as long as you also answered Yes to questions 1, 2.1 and 2.2)

No Intention to Possess

4. Was it more likely than not that the accused did not intend to possess a drug of dependence?

Consider – Can you infer from all of the evidence that the accused did not intend to have custody or control of a drug of dependence?

If Yes, then the Accused is Not Guilty of Possession of a Drug of Dependence

If No, then the Accused is Guilty of Possession of a Drug of Dependence (as long as you also answered Yes to questions 1, 2.1 and 2.2)

Authority or Licence

5. Was it more likely than not that the accused was authorised or licensed to possess the drug?

If Yes, then the Accused is Not Guilty of Possession of a Drug of Dependence

If No, then the Accused is Guilty of Possession of a Drug of Dependence (as long as you also answered Yes to questions 1, 2.1 and 2.2)

Last updated: 11 May 2010

7.6.3.4 Charge: Possession of a Drug of Dependence (Section 5 Possession Use, Enjoyment or Control)

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This charge can be used where it is alleged that the accused possessed a drug of dependence, the prosecution relied on the deeming provision in s 5 of the *Drugs, Poisons and Controlled Substances Act*, and alleged that the accused used, enjoyed or controlled the drug.

I must now direct you about the crime of possessing a drug of dependence. To prove this crime, the prosecution must prove the following 2 elements beyond reasonable doubt:

One – that the substance in question was a drug of dependence; and

Two – that the accused possessed the substance.

I will now explain these matters in more detail.

Drug of Dependence

The first element that the prosecution must prove beyond reasonable doubt is that the substance in question was a drug of dependence.

The substance in question here was [*identify relevant material, e.g* "the substance in the three plastic bags tendered as Exhibit X and analysed in the certificate of analysis, Exhibit Y"].

In this case, [*describe the evidence and arguments (or concession) about the identification of the substance as a particular drug*].

The law says that [*insert name of drug*] is a drug of dependence. So if you are satisfied beyond reasonable doubt that the substance in question was or included [*insert name of drug*], then this element will be satisfied, and you should go on to consider the second element.

Possession

The second element that the prosecution must prove is that the accused possessed the substance in question.

In this case the prosecution seeks to prove this element by relying on a law that says that a substance is deemed to be in the possession of a person if it is used, enjoyed or controlled by him or her, unless the person satisfies the court to the contrary.

The prosecution alleges here that the accused [used or enjoyed/controlled] the drug.

[*If it is necessary to define the term "use", add the following shaded section.*]

The phrase "used or enjoyed" is a legal phrase that, in the context of this case, simply means "used" You must determine whether the accused [*describe the alleged basis for finding that the accused "used" the drug of dependence in question*].

It is a question of fact for you whether the accused [used or enjoyed/controlled] the substance in question here. The evidence was [*summarise evidence and arguments concerning use, enjoyment and control, addressing detail only if in issue*].

Defences

[*This section addresses three possible ways the defence may contest the offence, even if the elements outlined above have been proven: by establishing that the accused did not have* custody or control *of the drug; by establishing the accused did not* intend to possess *the drug; or by establishing that the accused was* authorised or licensed *to possess the drug. Judges will need to adapt these parts of the charge if the defence contests the offence on multiple grounds.*]

The accused did not have custody or control of the drug

[*If the defence argued that the accused* did not have custody or control of the drug*, add the following shaded section.*]

Even if you are satisfied that NOA [used or enjoyed] a drug of dependence you must find him/her not guilty of this offence if the defence satisfies you that s/he did not have custody or control of that drug.

[*If the prosecution sought to prove that the accused "controlled" the drug, add the darker shaded section.*]

Clearly, the defence will not be able to do this if the prosecution has satisfied you beyond reasonable doubt that the accused had control of the drug in question. So you will only need to consider this defence if you are satisfied beyond reasonable doubt that the accused used or enjoyed that drug, but you are not satisfied beyond reasonable doubt that s/he had control of it.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – the defence must prove this matter on the balance of probabilities. That is, the defence must satisfy you that it is more likely than not that NOA did not have custody or control of the drug.[1102]

If the defence cannot prove this to you, and the prosecution has proven the two elements I have described, then you should find the accused guilty of possession of a drug of dependence.

To establish this defence, the accused says [*summarise evidence and arguments concerning custody or control of the drug, addressing detail only if in issue*].

The accused did not intend to possess the drug

[*If the defence argued that the accused* did not intend to possess the drug*, add the following shaded section.*]

Even if you are satisfied that NOA [used or enjoyed/controlled] a drug of dependence, you must find the accused not guilty of this offence if the defence satisfies you that NOA did not intend to have a drug of dependence in his/her custody or under his/her control.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – the defence must prove this matter on the balance of probabilities. That is, the defence must satisfy you that it is more likely than not that NOA did not intend to have a drug of dependence in his/her custody or control.

It is not enough for the accused to prove that s/he did not know that the substance in his/her custody or control was the specific drug named in the indictment – in this case [*insert name of drug*]. To prove this matter, the defence must prove that the accused did not intend to have custody or control of any drug of dependence.

This will require you to decide if you can draw a conclusion from all of the evidence in the case that NOA did not intend to have custody or control of a drug of dependence.

In this case, the defence argued that [*insert basis for the conclusion that NOA did not have the requisite intention, such as* "NOA did not know, and was not aware of the likelihood, that the drug was in the car" *or* "NOA did not know, and was not aware of the likelihood, that the substance was a drug of dependence"]. They argued that you can conclude from this fact that NOA did not intend to have a drug of dependence in his/her custody or control. [*Summarise defence arguments and evidence.*] By contrast, the prosecution argued [*insert prosecution arguments and evidence*].

It is for you to determine whether [*repeat basis for the defence inference stated above, e.g.* "NOA did not know, or was not aware of the likelihood, that the drug was in the car"], and whether to conclude from that fact, and all of the circumstances of the case, that NOA did not intend to have custody or control of a drug of dependence.

Because this is a conclusion that the defence is asking you to draw, it does not need to be proven beyond reasonable doubt. It only needs to be proven on the balance of probabilities. This means that you do not need to be satisfied that it is the only conclusion that is reasonably open in the

[1102] If it is necessary in the circumstances of the case to direct the jury on non-manual or joint custody, see 7.6.3.1 Charge: Possession of a Drug of Dependence (Section 5 Possession Occupation).

circumstances. You can conclude that the accused did not intend to have a drug of dependence in his/her custody or control if you are satisfied that that is more likely than not to have been the case.

If you find that, on the balance of probabilities, NOA did not intend to have custody or control of a drug of dependence, then you must find him/her not guilty of this offence. However, if the defence cannot prove this to you, and the prosecution has proven the two elements I have described, then you should find the accused guilty of possession of a drug of dependence.

The accused was authorised or licensed to possess the drug

[*If it is alleged that the accused was* authorised or licensed *to possess a drug of dependence, add the following shaded section.*]

Even if you are satisfied that NOA [was using or enjoying/had in his/her control] a drug of dependence, you must find the accused not guilty of this offence if the defence satisfies you that NOA was [authorised/licensed] to possess a drug of dependence.

In this case, the defence alleged that NOA was [authorised/licensed] to do so by virtue of [*insert relevant evidence*]. The prosecution disputed this, submitting that [*insert relevant evidence*].[1103]

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this is a matter which the defence must prove on the balance of probabilities. That is, you must be satisfied by the defence that it is more likely than not that NOA was [authorised/licensed] to possess a drug of dependence.

If the defence cannot prove this to you, and the prosecution has proven the two elements I have described, then you should find the accused guilty of possession of a drug of dependence.

Summary

To summarise, before you can find NOA guilty of possession of a drug of dependence, the prosecution must prove to you beyond reasonable doubt:

- One – that the substance in question was a drug of dependence; and
- Two – that the accused possessed that substance. This will be the case if the substance was [used or enjoyed by/in the control of] the accused.

If you find that the prosecution has not proven both of these matters beyond reasonable doubt, then you must find NOA not guilty of possession of a drug of dependence.

Defences

[*If the accused* contested *the offence, despite the elements being satisfied, add the following shaded section.*]

However, even if you decide that these elements have been proven, NOA will not be guilty of this offence if the defence has proven, on the balance of probabilities, that s/he [did not have custody or control of a drug of dependence/did not intend to have a drug of dependence in his/her custody or under his/her control/was authorised or licensed by law to possess a drug of dependence].

[1103] Provisions concerning authorisation and licensing are contained in Divisions 2 and 4 of the *Drugs, Poisons and Controlled Substances Act 1981*. See also ss 118 and 119 of that Act for evidentiary provisions that may be of assistance in relation to such matters.

Last updated: 27 March 2019

7.6.3.5 Charge: Possession of a Drug of Dependence (Common Law Possession)

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This charge can be used where it is alleged that the accused possessed a drug of dependence, and the prosecution relied on the *common law definition of possession*.

I must now direct you about the crime of possessing a drug of dependence. To prove this crime, the prosecution must prove the following 2 elements beyond reasonable doubt:

One – the substance in question was a drug of dependence; and

Two – the accused possessed that substance.

I will now explain these elements in more detail.

Drug of Dependence

The first element that the prosecution must prove beyond reasonable doubt is that the substance in question was a drug of dependence.

The substance in question here was [*identify relevant material, e.g* "the substance in the three plastic bags tendered as Exhibit X and analysed in the certificate of analysis, Exhibit Y"].

In this case, [*describe the evidence and arguments (or concession) about the identification of the substance as a particular drug*].

The law says that [*insert name of drug*] is a drug of dependence. So if you are satisfied beyond reasonable doubt that the substance in question was or included [*insert name of drug*], then this element will be satisfied, and you should go on to consider the second element.

Possession

The second element that the prosecution must prove is that the accused possessed this substance. This requires the prosecution to prove two things beyond reasonable doubt.

Custody or Control

First, the prosecution must prove that NOA had the substance physically in his or her custody or otherwise under his or her control.

The evidence was [*summarise evidence and arguments concerning custody/control of the drug, addressing detail only if in issue*].

[*If it is alleged that the accused maintained custody or control of a drug from a distance, add the following shaded section.*]

The law says that a person can have custody or control of a thing even if he or she is not carrying or watching over it. You may therefore find that the accused had custody or control of the substance in issue here if the prosecution satisfies you that it was in a place where the accused [had the power/had the right] to place his/her hands on it when s/he wished.

Intention to Possess

The second part of this element requires the prosecution to prove that the accused intended to possess a drug of dependence.

The prosecution does not need to prove that the accused intended to possess the specific drug named in the indictment – in this case [*insert name of drug*]. This part of the second element will be satisfied as long as the prosecution proves that accused intended to possess any drug of dependence.

In determining whether or not the accused intended to possess a drug of dependence, you will need to decide if you can draw an inference from all of the evidence in the case that s/he had this intention.[1104] You will remember what I have told you about inferences.

You may be able to draw this inference if you find that the accused knew or believed that it was a prohibited drug, such as [*insert name of drug*], over which s/he had custody or control.

However, you do not need to find that the accused actually knew s/he had custody or control over a prohibited drug in order to draw this inference. Proof that the accused was aware that there was a significant and real chance that s/he had custody or control over a prohibited drug is also capable of sustaining the inference that s/he intended to possess a drug of dependence.

This means that, if you find that the accused was aware of the likelihood that the substance over which s/he had custody or control was a drug of dependence, you may draw the inference that s/he had an intention to possess such a drug. That is, you may infer that because the accused was aware that there was a significant and real chance that s/he had custody or control over a prohibited drug, s/he must have intended to possess that drug.

[*If "wilful blindness" as to the nature of the substance arises as an issue, consider the shaded section*.]

"Wilful blindness" may be relevant if there is evidence that the accused realised there was a risk that s/he possessed a drug of dependence, and deliberately chose to close his/her eyes to that risk so that s/he could later deny knowledge and avoid liability.

You could also draw an inference that NOA intended to possess a drug of dependence if you find that, given the circumstances, s/he would have suspected the nature of the substance s/he possessed, and deliberately failed to make further inquiries for fear of learning the truth. That is, s/he was aware that there was a risk that s/he possessed a drug of dependence, but deliberately closed his/her eyes to that risk to avoid possible liability. In such a situation, you may conclude that although NOA did not positively know that s/he possessed a drug of dependence, s/he nevertheless intended to do so.[1105]

It is for you to determine whether to infer, from all of the facts and circumstances of the case, that the accused intended to possess a drug of dependence. However, it is important that you do not draw such an inference unless you are satisfied that it is the only inference that is reasonably open in the circumstances. If any other reasonable explanation is available, then the prosecution will not have proved this part of the second element beyond reasonable doubt.

In this case [*summarise evidence and arguments concerning the accused's intention to possess the drug. The jury must be directed about the evidence that is capable of sustaining the inference of intention*].

[*If the accused denied this intention due to ignorance of the drug's existence or nature, consider the following section.*]

In this case the defence alleged that NOA did not know, or was not aware of the likelihood, that it was a drug of dependence that s/he possessed. [*Insert relevant evidence and arguments.*]

It is important to remember that it is the prosecution who must prove, beyond reasonable doubt, that the accused had the relevant intention. So if you are not satisfied that accused knew or believed or was

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[1104] If it is alleged that the accused admitted having such an intention, this part of the charge will need to be modified accordingly.

[1105] Such cases of "wilful blindness" will be rare, and judges should be cautious before charging the jury about this possibility: *R v Garlick (No.2)* (2007) 15 VR 388; [2007] VSCA 23.

aware of the likelihood that it was a drug of dependence that s/he possessed, and there is no other basis from which you can infer that the accused intended to possess a drug of dependence, then this second element will not be met.

Joint Possession

[*If there was evidence that others had custody or control over the drug, add the following shaded section.*]

It is possible for more than one person to possess an item. This means that the prosecution does not have to prove that no one else shared custody or control of the substance in question here. They only need to prove that, regardless of any involvement that others such as [*identify relevant alternative possessor*] may have had with that substance, the accused also had custody or control of it, and intended to possess it.

Authorisation and licensing

[*If it is alleged that the accused was authorised or licensed to possess a drug of dependence, insert the following shaded section.*]

A person who is [authorised/licensed] to possess a drug of dependence will not be guilty of possession. In this case, the defence alleged that NOA was [authorised/licensed] to do so by virtue of [*insert relevant evidence*]. The prosecution disputed this, submitting that [*insert relevant evidence*].[1106]

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – this is a matter which the defence must prove on the balance of probabilities. That is, you must be satisfied by the defence that it is more likely than not that NOA was [authorised/licensed] to possess a drug of dependence. If the defence cannot prove this to you, and the prosecution has also proven all of the elements of the offence, then you should find the accused guilty of possession of a drug of dependence.

Summary

To summarise, before you can find NOA guilty of possession of a drug of dependence, the prosecution must prove to you beyond reasonable doubt:

One – that the substance in question was a drug of dependence; and

Two – that NOA possessed that drug; that is, s/he had custody or control of that drug, and intended to possess it.

If you find that either of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of possession of a drug of dependence.

[*If it is alleged that the accused was authorised or licensed to possess a drug of dependence add the following shaded section.*]

However, even if you decide that these elements have been proven, NOA will not be guilty if the defence has proven, on the balance of probabilities, that s/he was [authorised/licensed] by law to possess a drug of dependence.

Last updated: 3 December 2012

[1106] Provisions concerning authorisation and licensing are contained in Divisions 2 and 4 of the *Drugs, Poisons and Controlled Substances Act 1981*. See also ss 118 and 119 of that Act for evidentiary provisions that may be of assistance in relation to such matters.

7.6.3.6 Checklist: Possession of a Drug of Dependence (Common Law Possession)

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This checklist can be used in possession cases in which the prosecution relied on the common law definition of possession.

It will need to be modified if it is alleged that the accused was authorised or licensed to possess the drug. See 7.6.3.3 Checklist: Possession of a Drug of Dependence (Section 5 – Occupation – Disputed) for guidance.

Two elements the prosecution must prove beyond reasonable doubt:

1. The substance in question was a drug of dependence; and
2. The accused possessed that substance.

A Drug of Dependence

1. Was the substance in question a "drug of dependence"?

Consider – [*Insert name of drug*] *is a "drug of dependence".*

If Yes, then go to 2

If No, then the Accused is Not Guilty of Possession of a Drug of Dependence

Possession of a Drug

2. Did the accused possess the substance in question?

2.1 Was the substance physically in the accused's custody, or otherwise under the accused's control?

If Yes, then go to 2.2

If No, then the Accused is Not Guilty of Possession of a Drug of Dependence

2.2 Did the accused intend to possess a drug of dependence?

Consider – Can you infer from all of the evidence that the accused intended to have custody or control of a drug of dependence?

If Yes, then then the Accused is Guilty of Possession of a Drug of Dependence (as long as you also answered Yes to questions 1 and 2.1)

If No, then the Accused is Not Guilty of Possession of a Drug of Dependence

Last updated: 11 May 2010

7.7 Occupational Health and Safety

7.7.1 **Employer's Duty to Employees and** Non-Employees

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Overview of OHS Offences

1. Division 2 of Part 3 of the *Occupational Health and Safety Act 2004* ("OHS Act 2004") creates three offences that an employer may be charged with:
    - failing to provide and maintain a safe working environment for employees (s 21);
    - failing to monitor the health of employees or the conditions at a workplace, or to provide information to employees about health and safety (s 22);
    - failing to ensure that people other than employees are not exposed to risks to health and safety (s 23).
2. This topic concerns the first and third of these offences.

Authority to Prosecute

3. Proceedings for offences under the Act may only be brought by:
    - the Victorian Workcover Authority;
    - an inspector with the written authorisation of the Authority; or
    - in the case of indictable offences,[1107] the Director of Public Prosecutions (*OHS Act 2004* s 130).
4. Authority to prosecute is not an element of an offence. Consequently, if the accused does not raise the issue, the presumption of regularity applies and the court may presume the prosecution was validly commenced (*AB Oxford Cold Storage Co v Arnott* (2005) 11 VR 298; *AB Oxford Cold Storage Co v Arnott* (2003) 8 VR 288).
5. Where the accused raises an issue regarding authorisation, the prosecution must prove that the prosecution was validly commenced on the balance of probabilities (*AB Oxford Cold Storage Co v Arnott* (2005) 11 VR 298; *AB Oxford Cold Storage Co v Arnott* (2003) 8 VR 288).
6. Difficulties may arise where the Victorian Workcover Authority only authorises an inspector to prosecute in a particular case (rather than providing an inspector with a general power to prosecute). Such an authorisation is not put in doubt simply because it does not, on its face, identify the specific prosecution commenced. There is a rebuttable presumption that an authorisation which is capable of applying to a proceeding does apply. To rebut the presumption, the accused must show that the apparent authorisation does not apply (*AB Oxford Cold Storage Co v Arnott* (2005) 11 VR 298; *Berwin v Donohoe* (1915) 21 CLR 1).
7. To determine whether an inspector had the necessary authority to prosecute, the court will need to examine the wording of the written authorisation, in conjunction with the charge–sheet or indictment (*AB Oxford Cold Storage Co v Arnott* (2005) 11 VR 298; *Berwin v Donohoe* (1915) 21 CLR 1).

[1107] The offences created by ss 21 and 23 are an indictable offence (*OHS Act 2004* ss 21(4), 23(2)).

Overview of Elements and Circumstances

Elements

8. The offences under ss 21 and 23 both have the following 4 elements:

    i) the accused was an employer at the relevant time;

    ii) there was a risk to health and safety;

    iii) the accused failed to take an identified measure which would have eliminated or reduced the risk (as the case may be);

    iv) it was 'reasonably practicable' in the circumstances for the employer to have taken those measures (*DPP v Vibro-Pile* (2016) 49 VR 676, [6]; *DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [25]).

9. There is no need to prove mens rea, and no defence of honest and reasonable mistake of fact or "due diligence" (*R v Commercial Industrial Construction Group* (2006) 14 VR 321; *ABC Developmental Learning Centres Pty Ltd v Wallace* (2007) 16 VR 409).

10. There is also no need to prove any of the elements of negligence, such as duty of care, loss or foreseeability (*Dinko Tuna Farmers v Markos* (2007) 98 SASR 96).[1108]

Circumstances in which s 21 may be breached

11. Without limiting the general obligation in s 21(1) to provide and maintain a safe working environment for employees, section 21(2) specifies five circumstances in which an employer breaches s 21:

    i) failing to provide or maintain plants or systems of work that are, so far as is reasonably practicable, safe and without risks to health;

    ii) failing to make arrangements for ensuring, so far as is reasonably practicable, safety and the absence of risks to health in connection with the use, handling, storage or transport of plant or substances;

    iii) failing to maintain, so far as is reasonably practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health;

    iv) failing to provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the employer's management and control; and

    v) failing to provide the information, instruction, training or supervision to employees that is necessary to enable them to perform their work in a way that is safe and without risks to health.

12. This list is not exhaustive of the ways in which s 21 may be breached (*Kirk v Industrial Court of NSW* (2010) 239 CLR 531).

[1108] However, foreseeability may be relevant to the fourth element.

13. While this list does not directly apply to charges under s 23, these circumstances inform the assessment of whether an employer has breached its duty to non-employees (*DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [23]).

14. After setting out the general approach that employers must take to workplace safety, this commentary examines the elements of the offence and then the operation of the deemed breach circumstances.

Duty to eliminate or reduce

15. The duties in ss 21 and 23 require the employer to eliminate risks to health and safety, so far as is reasonably practicable. If it is not reasonably practicable to eliminate risks, then the employer must reduce the risks so far as is reasonably practicable (*OHS Act 2004* s 20(1)).

Employers Must Take a Proactive Approach to Safety

16. Compliance with the obligations created by ss 21 and 23 requires employers to be proactive in identifying and responding to risks in a workplace (*Holmes v RE Spence & Co Pty Ltd* (1992) 5 VIR 119).

17. In providing a working environment that is safe and without risks to health, employers must account for employees who are hasty, careless, inattentive or who fail to take reasonable care for their own safety or who fail to comply with a prescribed safe system of work (*R v Commercial Industrial Construction Group* (2006) 14 VR 321, [49]. See also *McLean v Tedman* (1984) 155 CLR 306; *Workcover Authority (NSW) (Inspector Mulder) v Arbor Products International (Aust) Pty Ltd* [2001] NSWIRComm 50; *Dunlop Rubber Australia Ltd v Buckley* (1952) 87 CLR 313 (Dixon CJ); *DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [51]).

18. The jury must not consider the accused's acts or omissions with the benefit of hindsight, but with an understanding that one of the chief responsibilities of an employer is the safety of their employees and non-employees. The Act requires employers to adopt an active, imaginative and flexible approach to potential dangers in the workplace, while recognising that human frailty is an ever-present reality (*Holmes v RE Spence & Co Pty Ltd* (1992) 5 VIR 119; *WorkCover Authority of New South Wales (Inspector Egan) v Atco Controls Pty Ltd* (1998) 82 IR 80; *R v Commercial Industrial Construction Group* (2006) 14 VR 321; *R v Australian Char Pty Ltd* [1999] 3 VR 834; *Director of Public Prosecutions v Amcor Packaging Australia Pty Ltd* (2005) 11 VR 557).

19. From time to time employers must search for and address hazards that may exist in the workplace. The degree of vigilance required in searching for hazards depends in part on the degree of harm that may result from those hazards. It is especially important that employers responsible for inherently dangerous workplaces search for and eliminate hazards (*Rail Infrastructure Corporation v Page* [2008] NSWIRComm 169).

Elements

The accused is an employer

20. The first element the prosecution must prove is that the accused is an employer (*OHS Act 2004* s 21).

21. An employer is defined as a person who employs one or more people under contracts of employment or contracts of training (*OHS Act 2004* s 5).

A risk to health and safety

22. The second element is that there is a risk to health and safety.

23. This element operates differently for the offences under ss 21 and 23.

24. For s 21, the prosecution must prove that there was a risk in the working environment to employee health and safety.

25. For s 23, the prosecution must prove that there was a risk from the conduct of the employer's undertaking to the health and safety of non-employees.

Section 21 – Duty to employees

26. The prosecution must prove that the accused's failure to take the identified measures led to their employees' health or safety being placed at risk (*OHS Act 2004* s 21; *Cahill v State of New South Wales* [2008] NSWIRComm 123; *WorkCover Authority of NSW v Kellogg (Aust) Pty Ltd (No 1)* [1999] NSWIRComm 453).

27. There are three aspects to this requirement:

    i) there must be a risk;

    ii) it must have been a risk to the health or safety of employees; and

    iii) the risk must have arisen in the working environment.

Risk

28. The first part of this element requires the prosecution to identify a particular risk which is said to exist.

29. Proof of the existence of that risk provides the factual framework against which the third and fourth elements are assessed.

30. The prosecution does not need to show that the accused created the risk to their employees' health and safety, or that the risk was caused solely by the accused's failure to take the specified measures (*O'Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training)* (2003) 125 IR 361; *State of New South Wales (NSW Police) v Inspector Covi* [2005] NSWIRComm 303; *WorkCover Authority of NSW v Kellogg (Aust) Pty Ltd (No 1)* [1999] NSWIRComm 453).

31. The risk may arise from a single act or omission, or a combination of acts or omissions (*Diemould Tooling Services v Oaten* (2008) 101 SASR 339).

32. The prosecution must identify the general class of risk that it is alleged existed (*State of New South Wales (NSW Police) v Inspector Covi* [2005] NSWIRComm 303; *O'Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training)* (2003) 125 IR 361).

33. The court must not artificially confine the alleged class of risk. For example, it may not be appropriate to attempt to distinguish between a risk of harm resulting from deliberate conduct and a risk of harm arising from negligent conduct (*State of New South Wales (NSW Police) v Inspector Covi* [2005] NSWIRComm 303; *Cahill v State of New South Wales* [2008] NSWIRComm 123; *O'Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training)* (2003) 125 IR 361).

34. When describing workplace risks, the judge should avoid the term "potential risk", as that may refer to a risk that does not yet exist. The Act does not require employers to address non-existent risks (*Morrison v Powercoal Pty Ltd* (2004) 137 IR 253; *Newcastle Wallsend Coal Company v McMartin* [2006] NSWIRComm 339).

35. In determining whether a risk exists (and whether a measure is necessary to reduce or eliminate that risk), the employer is not entitled to assume that employees are highly trained and experienced (*DPP v Vibro-Pile* (2016) 49 VR 676, [59]).

Employees

36. The prosecution must prove that it was the health and safety of the accused's employees that was placed at risk (*OHS Act 2004* s 21; *Linfox & Ors v The Queen* (2010) 30 VR 507).

37. Section 21(3) defines "employee" to include independent contractors and sub-contractors. See "Independent Contractors" below.

38. Section 21 concerns the accused's failure to protect employees as a class. Consequently, the prosecution does not need to identify a particular employee that was put at risk by the accused's failure to take the specified measure (*Diemould Tooling Services v Oaten* (2008) 101 SASR 339).

39. However, it will sometimes be necessary to specify (in the particulars to the offence) which people it is alleged were exposed to the risk, in order to identify the relevant class of employees (*Diemould Tooling Services v Oaten* (2008) 101 SASR 339).

40. The jury must be satisfied that the accused's employees were placed at risk, rather than employees of some other entity (*Linfox & Ors v the Queen* (2010) 30 VR 507).

41. However, in the case of a work-site involving employees of several entities, each employer will have separate duties to their employees. This is especially relevant in relation to labour-hire companies, which are responsible for the safety of their employees even when the company does not control the employee's work site (*DPP v Vibro-Pile* (2016) 49 VR 676, [151]).

42. In particular, a labour-hire company will need to take steps to take positive steps to ensure the safety of their employees and provide appropriate supervision and monitoring to ensure a safe working environment (*DPP v Vibro-Pile* (2016) 49 VR 676, [151]).

Working environment

43. The risk to employees' health or safety must have arisen in the working environment (*OHS Act 2004* s 21).

44. The concept of the "working environment" is not confined to permanent premises or environments with clear physical boundaries. It covers any environment where an employee may be expected to work, and may move with the employee based on the nature of the work (see, e.g. *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255; *Gough v National Coal Board* [1959] AC 698; *Whittaker v Delmina Pty Ltd* [1998] VSC 175; *DPP v Vibro-Pile* (2016) 49 VR 676).

45. A "working environment" can include:

- a truck driver's truck;
- a construction site;
- the location of high voltage electrical lines;
- segments of road under construction; or
- the area in which a guided tour takes place (see *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255; *Gough v National Coal Board* [1959] AC 698; *Whittaker v Delmina Pty Ltd* [1998] VSC 175).

Section 23 – Duty to non-employees

46. For a charge under s 23, the prosecution must prove that the conduct of the employer's undertaking created a risk to the health and safety of non-employees. There are the three aspects of this element:

i) The employer conducted an undertaking;

ii) The employer's undertaking created a risk;

iii) The risk was to the health or safety of non-employees.

Employer's undertaking

47. The employer's undertaking is the employer's enterprise or business (*R v Associated Octel Co Ltd* [1994] 4 All ER 1051; *DPP v Vibro-Pile* (2016) 49 VR 676; *DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50).

48. The undertaking is not limited to the employer's normal place of work, or where the employer is in control of the workplace. It is assessed based on the nature of the employer's business (*DPP v Vibro-Pile* (2016) 49 VR 676, [175]–[177]; *Whittaker v Delmina Pty Ltd* [1998] VSC 175).

Non-employees

49. For the s 23 offence, the person placed at risk must have been a non-employee.

50. For the purpose of this offence, the deeming provision that extends the definition of employees to certain independent contractors (See "Independent Contractors" below) does not apply. As a result, where the case involves a risk to an independent contractor, the prosecution may choose to bring the charge either under s 21, and rely on the deeming provision, or under s 23 where there is no deeming provision (*Muscat v Magistrates' Court of Victoria* (2018) 59 VR 570, [45]).

Failure to take an identified measure which would have eliminated or reduced the risk

51. The Act requires that employers "provide and maintain … a working environment that is safe and without risks to health" or "ensure … that persons other than employees are not exposed to risks to their health or safety". This is an obligation to achieve a result (that is, the provision and maintenance of a safe environment) (*ABC Development Learning Centres Pty Ltd v Wallace* (2007) 16 VR 409; *DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [24]).

52. However, as a matter of practice, the prosecution must identify, with sufficient precision, the particular measures that it says the accused should have taken to prevent the identified risk from eventuating (*Kirk v Industrial Court of NSW* (2010) 239 CLR 531; *John Holland v Industrial Court of NSW* [2010] NSWCA 338. See also *Baiada Poultry Pty Ltd v The Queen* [2011] VSCA 23).

53. The prosecution must identify, as part of the particulars of the offence, the measure or measures which it claims were necessary to eliminate or reduce the risk. These must be identified before the trial begins, as the adequacy of particulars does not depend on the evidence which is presented (*DPP v Vibro-Pile* (2016) 49 VR 676, [131]).

54. It is not sufficient to make generic allegations that the accused failed to "guarantee" or "ensure" that a workplace was safe, or failed to take "adequate" steps (*Kirk v Industrial Court of NSW* (2010) 239 CLR 531; *John Holland v Industrial Court of NSW* [2010] NSWCA 338).

55. The degree of specificity required will depend on the issues in the case, and whether the particulars identify the act or omission that constitutes the offence (*Baida Poultry Pty Ltd v Glenister* [2015] VSCA 344, [49]; *DPP v Vibro-Pile* (2016) 49 VR 676, [134]).

56. The prosecution does not, however, need to provide particulars that show the proposed actions were 'reasonably practicable' or, in the case of a charge involving s 21(2)(e), that the actions were 'necessary'. The question of 'reasonably practicable' or 'necessity' is a broad jury question that involves a consideration of all of the evidence (*Baida Poultry v Inspector Glenister* [2015] VSCA 344; *Downer EDI Works Pty Ltd v The Queen* (2017) 53 VR 1, [28]–[33]).

57. The measures necessary will depend on the circumstances prevailing at the workplace, the activities undertaken, the skills of the employees and the plant or substances in use (*Kirk v Industrial Court of NSW* (2010) 239 CLR 531; *DPP v Vibro-Pile* (2016) 49 VR 676, [51]; *DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [40]).[1109]

58. In determining whether a measure is necessary, the employer is not entitled to assume that employees are highly trained and experienced (*DPP v Vibro-Pile* (2016) 49 VR 676, [59]).

59. It may be alleged that the accused failed to take one specific measure or a number of identified measures (*Diemould Tooling Services v Oaten* (2008) 101 SASR 339).

60. As ss 21 and 23 do not rely on principles of attribution or vicarious liability, it is not necessary to identify at what level within an organisation the alleged failure occurred. The focus instead is on whether the employer has failed to take all reasonably practicable measures, either by actively implemented an unsafe system of work, or allowing an unsafe system of work to continue (*R v Commercial Industrial Construction Group* (2006) 14 VR 321; *State Rail Authority of New South Wales v Dawson* (1990) 37 IR 110; *ABC Developmental Learning Centres Pty Ltd v Wallace* (2007) 16 VR 409; *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78; *DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [39], [47]).

61. The section does not create a system of vicarious criminal liability where a failure by an employee on a single occasion to follow safe processes necessarily constitutes a failure to maintain a safe system of work (*DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [45]).

62. While it is not necessary to identify the level at which the alleged failure occurred, failures by employees to follow safe systems of work may raise the question of precisely what the duty required in the circumstances. Where the prosecution alleges a failure to maintain a safe system, the jury will need to examine the whole system, including the experience, skill, knowledge and training of employees within that system. The prosecution will also need to show that there was a reasonably practicable step the employer failed to take to maintain its system (*DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [41]–[43]).

63. The prosecution must prove that the proposed measure would have eliminated or reduced the risk. It is insufficient to establish that the measure might have improved workplace safety (*Kirk v Industrial Court of NSW* (2010) 239 CLR 531; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92).

Measures and Accidents (Causation not required)

64. It is commonly the case that OH&S prosecutions occur after an incident has occurred that has demonstrated a system of work was unsafe. In such cases, the parties and the judge must maintain a clear understanding of how the accident may be relevant to proof of the offence.

65. The prosecution does not need to show that the accident was caused by the accused's failure to take the necessary steps. The occurrence of an accident is of evidentiary significance only (*DPP v Vibro-Pile* (2016) 49 VR 676, [10]; *DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [24]).

66. As evidence, the occurrence of an accident may help the prosecution show:

    - that a risk existed;
    - the likelihood of the risk eventuating;
    - the gravity of consequences if the risk does eventuate;

[1109] A non-exhaustive list of ways in which an employer may breach the obligation to provide and maintain a safe working environment is contained in s 21(2): see "Circumstances in which section 21 may be breached" below.

- whether the accused took all reasonably practicable steps to eliminate or reduce that risk (*DPP v Vibro-Pile* (2016) 49 VR 676, [91]. See also *R v Irvine* (2009) 25 VR 75; *R v Australian Char Pty Ltd* [1999] 3 VR 834; *Whittaker v Delmina Pty Ltd* [1998] VSC 175; *Orbit Drilling Pty Ltd v The Queen* (2012) 35 VR 399).

67. In cases where the prosecution relies on an accident for evidentiary purposes:

    (a) the jury should be specifically directed that it is not necessary to show that the relevant measure would have prevented the accident. Further, that any exploration of the circumstances of the accident is only for the purpose of showing or rebutting its evidentiary significance (*DPP v Vibro-Pile* (2016) 49 VR 676, [89], [99]);

    (b) it is best to avoid the language of causation in directions to the jury. References to an act or omission causing or producing a risk is apt to mislead the jury to think that the prosecution must show that the act or omission caused an accident or injury (*DPP v Vibro-Pile* (2016) 49 VR 676, [83]);

    (c) an undue focus on the accident will also lead to an unnecessary narrowing of the relevant risk (*DPP v Vibro-Pile* (2016) 49 VR 676, [86]);

    (d) a judge must be careful to ensure that any directions on the permissible use of evidence of an accident does not mislead the jury into thinking that they need to determine whether the failure to take the prescribed steps caused the accident (*DPP v Vibro-Pile* (2016) 49 VR 676, [91]).

Reasonable practicability

68. The fourth element the prosecution must prove is that it was reasonably practicable for the accused to take the specified measures (*OHSA 2004* s 21; *DPP v Vibro-Pile* (2016) 49 VR 676, [6]).

69. Employers are not required to ensure that accidents never happen. Their obligation is to provide and maintain, so far as is reasonably practicable, a working environment that is safe and without risks to health, or ensure, *so far as is reasonably practicable*, that persons other than employees are not exposed to risks to their health and safety (*Holmes v RE Spence & Co Pty Ltd* (1992) 5 VIR 119. See also *R v Australian Char Pty Ltd* [1999] 3 VR 834; *R v Commercial Industrial Construction Group* (2006) 14 VR 321; *Western Power Corporation v Shepherd* [2004] WASCA 233; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92; *DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [24]).

70. The words "so far as is reasonably practicable" define the scope of the employer's duty. While liability for breaching the duty is absolute, the content of the obligation is not (*ABC Developmental Learning Centres Pty Ltd v Wallace* (2007) 16 VR 409; *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255).

71. The content of the obligation to take reasonably practicable steps may vary over time, due to changes in knowledge about risks, the means available to address risks, and the availability, suitability and cost of remedial action (*Western Power Corporation v Shepherd* [2004] WASCA 233).

72. The question of what is reasonably practicable must be determined objectively, having regard to all sources of knowledge, including those in the particular trade or industry of the employer (*DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [28]).

73. It is not appropriate to ask whether a particular measure was necessary. The statutory question is whether the particular measure was reasonably practicable. An argument that a particular measure was not necessary is better expressed as an argument that, in the circumstances, there was no subsisting risk (*Keilor Melton Quarries v The Queen* [2020] VSCA 169, [43]–[45]).

74. The burden is on the prosecution to prove that the specified measures were reasonably practicable. It is not sufficient to demonstrate that a measure could have been taken and that, if taken, it might have had some effect on the safety of a working environment (*Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92. But see *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249).

75. An obligation to take "reasonably practicable" measures is less onerous than an obligation to take "practical", "physically possible" or "feasible" measures (*Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 (Gaudron J); *Kent v Gunns Ltd* (2009) 18 Tas R 454).

76. The words "so far as is reasonably practicable" do not introduce an element of intention or negligence into the offence (*ABC Developmental Learning Centres Pty Ltd v Wallace* (2007) 16 VR 409; *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255).

Factors relevant to "reasonably practicable"

77. Determining whether a measure is reasonably practicable involves a common sense assessment (*Kirk v Industrial Court of NSW* (2010) 239 CLR 531).

78. The jury must consider the following matters when determining what is reasonably practicable:

    i) the likelihood of the hazard or risk eventuating;

    ii) the degree of harm that would result if the hazard or risk eventuated;

    iii) what the accused knows or reasonably ought to know about the hazard or risk and any ways of eliminating or reducing the hazard or risk;

    iv) the availability and suitability of ways to eliminate or reduce the hazard or risk; and

    v) the cost of eliminating or reducing the hazard or risk (*OHS Act 2004* s 20(2). See also *Tenix Defence Pty Ltd v MacCarron* [2003] WASCA 165; *Holmes v RE Spence & Co Pty Ltd* (1992) 5 VIR 119; *R v Australian Char Pty Ltd* [1999] 3 VR 834).

79. These considerations direct attention to the state of affairs at the accused's workplace at the relevant time (*DPP v Vibro-Pile* (2016) 49 VR 676, [51]).

80. For example, the fact that there is a formal system in place may not be sufficient if that system is not followed. Instead, it may be necessary and reasonably practicable to implement a system which is followed, including a requirement to read, understand and follow relevant instructions (see, e.g. *DPP v Vibro-Pile* (2016) 49 VR 676, [53]).

Level of risk

81. Two of the factors that are relevant to the jury's determination of reasonable practicability are the likelihood of the risk eventuating, and the degree of harm that would result if it did eventuate (*OHS Act 2004* s 20(2)(a)–(b)).

82. As noted above under 'Measures and Accidents (Causation not required)', the prosecution does not need to prove that an accident occurred or that anyone was injured. However, the occurrence of an accident may provide evidence of the existence and seriousness of an existing risk (*Theiss Pty Ltd v Industrial Court of NSW* (2010) 78 NSWLR 94; *Kirk v Industrial Court of NSW* (2010) 239 CLR 531; *R v Irvine* (2009) 25 VR 75, [41]; *R v Australian Char Pty Ltd* [1999] 3 VR 834; *Orbit Drilling Pty Ltd v The Queen* (2012) 35 VR 399). See also Measures and Accidents (Causation not required), above.

83. In some cases minor and less obvious risks may pose a greater danger than major and obvious risks. Where relevant, the jury should be reminded of this fact (*Holmes v RE Spence & Co Pty Ltd* (1992) 5 VIR 119; *R v Australian Char Pty Ltd* [1999] 3 VR 834; *Western Power Corporation v Shepherd* [2004] WASCA 233).

Reasonable foreseeability

84. Another factor that is relevant to the jury's determination of reasonable practicability is whether the accused knew, or reasonably ought to have known, about the risk and ways of reducing that risk (*OHS Act 2004* s 20(2)(c)).

85. Foreseeability of risk is related to reasonable practicability because it is not reasonably practicable to protect against unforeseeable risks (*R v Powercor (Aust)* [2005] VSCA 163; *MacCarron v Coles Supermarkets Australia Pty Ltd & Ors* (2001) 23 WAR 355 (Murray J); *WorkCover v Fletcher Constructions* [2002] NSWIRComm 316; *Marshall v Gotham Co Ltd* [1954] AC 360).

86. It is therefore not sufficient for the prosecution to simply identify a risk in hindsight. They must show that the accused either knew of the risk in advance, or ought to have known of that risk (and thus should have taken the specified measure) (*R v Powercor (Aust)* [2005] VSCA 163; *MacCarron v Coles Supermarkets Australia Pty Ltd & Ors* (2001) 23 WAR 355 (Murray J); *WorkCover v Fletcher Constructions* [2002] NSWIRComm 316; *Marshall v Gotham Co Ltd* [1954] AC 360).

87. A risk will have been reasonably foreseeable if a reasonable employer in the accused's position could have foreseen the risk (*R v Powercor (Aust)* [2005] VSCA 163).

88. The reasonable foreseeability test is objective. The fact that the accused did not foresee the risk in question may be relevant to whether or not the risk was foreseeable, but it will not be conclusive (*R v Australian Char Pty Ltd* [1999] 3 VR 834).

89. In considering whether a risk was reasonably foreseeable, the jury must take into account the general state of knowledge about that risk, as well as any specific knowledge that was available within a relevant industry (Chugg *v Pacific Dunlop (No 2)* [1999] 3 VR 934 (Ormiston JA); *Yamasa Seafood Australia Pty Ltd v Watkins* [2000] VSC 156; *Silent Vector v Shepherd* [2003] WASCA 315).

90. The jury must also consider the risk posed to employees who act inadvertently or carelessly in relation to their own safety.[1110] The range of behaviour that is reasonably foreseeable is not limited to behaviour that is reasonable (*R v Australian Char Pty Ltd* [1999] 3 VR 834; *Smithwick v National Coal Board* (1950) 2 KB 335; *Dunlop Rubber Australia Ltd v Buckley* (1952) 87 CLR 313; *DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [51]).

91. The jury must weigh the chance of spontaneous carelessness against the practicality of taking measures to address the risk of human error (*Holmes v RE Spence & Co Pty Ltd* (1992) 5 VIR 119; *R v Australian Char Pty Ltd* [1999] 3 VR 834; *Western Power Corporation v Shepherd* [2004] WASCA 233).

92. Where an accident has occurred, the jury does not need to consider whether that precise accident was foreseeable. Instead, the question is whether the risk, which manifested in the accident, was reasonably foreseeable. However, the accident may provide evidence that informs whether the risk was reasonably foreseeable (*Holmes v RE Spence & Co Pty Ltd* (1992) 5 VIR 119; *DPP v Vibro-Pile* (2016) 49 VR 676, [56]).

93. While foreseeability of risk is relevant to the jury's determination of whether the accused took all reasonably practicable measures, it is not an element of the offence. It is therefore not appropriate to substitute a test of foreseeability for the statutory test of "reasonably practicable" (see *Chugg v Pacific Dunlop* (1990) 170 CLR 249; *Chugg v Pacific Dunlop (No 2)* [1999] 3 VR 934 (Ormiston JA); *Kent v Gunns Ltd* (2009) 18 Tas R 454).

Regulations, compliance codes and industry standards

94. In some cases, there will be a regulation or a compliance code that contains a provision regarding an employer's duty in certain circumstances. If the employer has complied with the regulation or code, no offence will have been committed (*OHS Act 2004* s 152).

[1110] Although employees are obliged to take reasonable care for their own safety and the safety of others (*OHS Act 2004* s 25), this does not limit the scope or nature of the duty placed on employers by s 21 (*ABC Developmental Learning Centres Pty Ltd v Wallace* (2007) 16 VR 409).

95. In other cases, there will be industry standards documents or former regulations that address the relevant area. As such documents are not legally binding,[1111] compliance does not constitute a defence. However, the court may consider such standards, in conjunction with expert evidence, when determining whether the accused took all reasonably practicable steps to provide a safe working environment (*Yamasa Seafood Australia Pty Ltd v Watkins* [2000] VSC 156; *Kent v Gunns Ltd* (2009) 18 Tas R 454; *Hughes v Van Eyk* [2008] NSWSC 525; *Reed v Peridis* [2005] SASC 136).

96. When standards or former regulations are used in this manner, they are not substituted for the elements of the offence. They merely provide a guide to whether the accused has taken all reasonably practicable steps (*Yamasa Seafood Australia Pty Ltd v Watkins* [2000] VSC 156; *Kent v Gunns Ltd* (2009) 18 Tas R 454; *Hughes v Van Eyk* [2008] NSWSC 525; *Reed v Peridis* [2005] SASC 136).

Foreseeability, experts and independent contractors

97. Where the employer engages a specialist contractor to perform a task, the employer is not expected to foresee dangers known only within the specialist contractor's field of expertise (*Reilly v Devcon* (2008) 36 WAR 492; *Tobiassen v Reilly* [2009] WASCA 26).

98. It is difficult to establish that an employer has breached the Act where it relies on a specialist contractor to perform a task outside the employer's expertise, and the contractor appears to perform its task carefully and safely (*Reilly v Devcon* (2008) 36 WAR 492; *Hamersley Iron Pty Ltd v Robertson*, WASC 2/10/1998; *Tobiassen v Reilly* [2009] WASCA 26; *Complete Scaffolding Services v Adelaide Brighton Cement* [2001] SASC 199).

Non-Delegable Duty

99. The duty that is placed on employers by ss 21 and 23 is non-delegable (*Kirk v Industrial Court of NSW* (2010) 239 CLR 531).

100. Consequently, where a worksite is shared by several employers, the fact that other employers have an obligation to take all reasonably practicable measures to protect the health and safety of their employees will be of little relevance to the case against the accused employer (*Territory Commercial Roofing Pty Ltd v Steven Hart* [2009] ACTSC 119).

101. However, evidence that other employers have undertaken various safety measures may be relevant to demonstrating whether the accused has taken all reasonably practicable steps to provide a safe working environment or to eliminate risks to health and safety (*Territory Commercial Roofing Pty Ltd v Steven Hart* [2009] ACTSC 119).

Circumstances in Which Section 21 may be Breached

102. Without limiting the general obligation in s 21(1) to provide and maintain a safe working environment for employees, section 21(2) specifies five circumstances in which an employer breaches s 21:

i) failing to provide or maintain plants or systems of work that are, so far as is reasonably practicable, safe and without risks to health;

ii) failing to make arrangements for ensuring, so far as is reasonably practicable, safety and the absence of risks to health in connection with the use, handling, storage or transport of plant or substances;

iii) failing to maintain, so far as is reasonably practicable, each workplace under the employer's

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[1111] This includes standards published by the Standards Association of Australia.

management and control in a condition that is safe and without risks to health;

iv) failing to provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the employer's management and control; and

v) failing to provide the information, instruction, training or supervision to employees that is necessary to enable them to perform their work in a way that is safe and without risks to health.

103. These subparagraphs are self-contained. Where the accused's conduct meets the description in any one paragraph, then that will, by itself, constitute a breach of s 21(1) (*DPP v Vibro-Pile* (2016) 49 VR 676, [106], [108]).

104. These subparagraphs do not apply to risks to non-employees which lead to a charge under s 23. However, the failures and measures described in the subparagraphs will inform the assessment of whether an employer has breached the s 23 duty (*DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [23]).

105. To reflect the deeming and self-contained nature of s 21(2), the following sections provide modified statements of elements for use in cases where the prosecution relies on a deemed breach under s 21(2).

Failing to provide and maintain safe systems of work

106. Section 21(2)(a) imposes an obligation to provide and maintain systems of work that are, so far as is reasonably practicable, safe and without risks to health.

107. To meet the statutory obligation to provide and maintain a safe system of work, a system must be sufficiently systematic or comprehensive and contain appropriate detail. Employees must also be sufficiently trained to implement that system (*Genner Constructions Pty Limited v WorkCover Authority of New South Wales (Insp Guillarte)* [2001] NSWIRComm 267; *WorkCover v Fletcher Constructions* [2002] NSWIRComm 316).

108. The phrase "system of work" describes the regularly adopted method of carrying on the employer's business. Isolated day to day acts by an employee, in contravention of general practice or procedures, do not form part of a system of work (*Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424; *English v Wilsons and Clyde Coal Co Ltd* [1936] SC 883).

109. Not every procedure that forms part of a system of work needs to be documented. The need for documentation depends on the particular circumstances and the nature of the work environment (*WorkCover v Fletcher Constructions* [2002] NSWIRComm 316).

110. Because employers must actively manage risks in the workplace, they must monitor the implementation of systems of work. A "paper system" that is not implemented or enforced is not sufficient (*Inspector Campbell v Hitchcock* [2004] NSWIRComm 87; *R v Commercial Industrial Construction Group* (2006) 14 VR 321; *WorkCover Authority of NSW (Inspector Penfold) v Fernz Construction Materials Ltd* [*No 2*] [2000] NSWIRComm 99).

111. Consequently, in determining whether an employer has failed to provide or maintain safe systems of work, the jury should also look at the employer's methods for checking whether their procedures are complied with (*WorkCover v Fletcher Constructions* [2002] NSWIRComm 316).

112. A system of work may break down due to employees becoming lax through routine or over-familiarity. Employers may also need to take steps to protect against this danger (*Rail Infrastructure Corporation v Page* [2008] NSWIRComm 169; *R v Commercial Industrial Construction Group* (2006) 14 VR 321; *R v Australian Char Pty Ltd* [1999] 3 VR 834).

113. It will generally not be sufficient for an employer to simply assign responsibility for safety issues to a supervisor or manager. They must ensure that the supervisor or manager effectively implements the employer's safe system of work. This may require the employer to monitor the supervisor or manager (*Rail Infrastructure Corporation v Page* [2008] NSWIRComm 169; *R v Commercial Industrial Construction Group* (2006) 14 VR 321; *WorkCover v Fletcher Constructions* [2002] NSWIRComm 316).

114. Where an employer sets up and properly implements a safe system of work, the mere fact that the system is not complied with does not, of itself, establish that s 21(2)(a) has been breached. The prosecution must prove that it was reasonably practicable for the employer to have taken further steps to guard against the breach of an established and properly implemented system. This may depend on whether the breach of the existing system of work was reasonably foreseeable (*WorkCover v Fletcher Constructions* [2002] NSWIRComm 316. See also *DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50).

115. In cases where the prosecution relies on s 21(2)(a), the judge should modify the charge to refer to the following four elements:

    i) the accused is an employer;

    ii) there was a risk in the working environment to employee health and safety;

    iii) the accused failed to provide or maintain plant or systems of work that would have eliminated or reduced the risk (as the case may be);

    iv) it was 'reasonably practicable' in the circumstances for the employer to have provided or maintained that plant or systems of work (*DPP v Vibro-Pile* (2016) 49 VR 676, [6], [106]).

Failing to maintain a workplace in a safe condition

116. Section 21(2)(c) requires employers, as far as is reasonably practicable, to maintain workplaces under their management and control in a condition that is safe and without risks to health.

117. A person may have control over a workplace without having control over every activity engaged in at the workplace (*Tobiassen v Reilly* [2009] WASCA 26).

118. Consequently, the fact that an employer generally cannot control the specific manner in which a specialist contractor performs a task does not mean that the employer does not have control over the workplace where the contractor performs that task (*Tobiassen v Reilly* [2009] WASCA 26).[1112]

119. Where a work site is shared by two or more employers, the fact that one employer has assumed control or authority over the workplace does not diminish the duty of the other employer to ensure the health and safety of its employees (*Morrison v Waratah Engineering* [2005] NSWIRComm 63).

120. An employer only has management and control of a site when it has the ability to address risks to health. The employer's absence from a site, such as a workplace that is shut down on a weekend, may mean that the employer does not have management or control of the site during that absence (*Markos v Commercial and General Projects Pty Ltd* [2009] SAIRC 45).

121. In cases where the prosecution relies on s 21(2)(c), the judge should modify the charge to refer to the following four elements:

    i) the accused is an employer;

[1112] See "Independent Contractors" below for further information concerning an employer's duty in relation to such contractors.

ii) there was a risk in the working environment to employee health and safety;

iii) the accused failed to maintain the condition of each workplace under the employer's management and control so as to eliminate or reduce the risk (as the case may be);

iv) it was 'reasonably practicable' in the circumstances for the employer to maintain each workplace in this manner (*DPP v Vibro-Pile* (2016) 49 VR 676, [6], [106]).

Failing to provide information, instruction or training or supervision

122. Under s 21(2)(e) employers must provide the information, instruction, training and supervision necessary to enable employees to work safely and without risks to health.

123. This may include appropriately disseminating safety alerts to employees who need such information (*DPP v Coates Hire Operations Pty Ltd* (2012) 36 VR 361).

124. Under this sub-paragraph, the question of fact for the jury is to consider what training (or information, instruction or supervision) is necessary to perform the work safely and without risks to health. This will be fact-dependent and involve consideration of the nature of the risks and the available options. It may, for instance, involve practical, hands-on, training (see, e.g. *DPP v Vibro-Pile* (2016) 49 VR 676, [119] and [124]).

125. However, as noted above under 'Measures and Accidents (Causation not required)', where the case involves an accident, it is not necessary to show that the lack of training caused the accident (*DPP v Vibro-Pile* (2016) 49 VR 676, [128]).

126. Unlike the other obligations set out in s 21(2), this obligation is not qualified by the words "so far as is reasonably practicable". The obligation is, under this subparagraph, absolute (*R v Commercial Industrial Construction Group* (2006) 14 VR 321, [44]; *DPP v Vibro-Pile* (2016) 49 VR 676, [104]; c.f. *R v H Waterhouse & Son Pty Ltd* [2009] VSCA 121, [59]–[65]).

127. In cases where the prosecution relies on s 21(2)(e), the judge should modify the charge to only refer to three elements:

(a) the accused is an employer;

(b) there was a risk in the working environment to employee health and safety;

(c) the accused failed to provide such information, instruction, training or supervision as is necessary to eliminate or reduce the risk (see *DPP v Vibro-Pile* (2016) 49 VR 676, [6], [104]).

128. Despite the absence of the requirement of 'so far as is reasonably practicable' for proof of the offence under this limb of s 21(2), the statement of the charge in the indictment may be drafted as follows:

> [The accused, at a named place and date] being an employer, failed so far as was reasonably practicable to provide and maintain for its employees a working environment that was safe and without risks to health in that it failed to provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health (*Downer EDI Works Pty Ltd v The Queen* (2017) 53 VR 1, [12]).

129. This style of drafting reflects the fact that the offence provision is s 21(1) and complies with the requirement in *Criminal Procedure Act 2009* Schedule 1, clause 1 to 'state the offence that the accused is alleged to have committed' (*Downer EDI Works Pty Ltd v The Queen* (2017) 53 VR 1, [19]. See also *Criminal Procedure Act 2009* Schedule 1, clauses 1, 3).

Independent Contractors

130. As noted above, the offence in s 21 only addresses the duties an employer owes to its employees. An employer's duty to non-employees is primarily governed by s 23.

131. While the duty to independent contractors under s 21 depends on whether the employer controls the conduct of the contractor, the duty under s 23 does not. Section 23 can therefore apply to an independent contractor, whether or not that contractor is also treated as an employee for the purpose of section 21 (*Muscat v Magistrates' Court of Victoria* [2018] VSC 650, [45]).

132. The following discussion should not be transposed to a case involving s 23 (see *DPP v Vibro-Pile* (2016) 49 VR 676, [170]–[173]).

133. Independent contractors engaged by an employer are considered to be employees for the purpose of s 21, as are the employees of those independent contractors (*OHS Act 2004* s 21(3); *DPP v Coates Hire Operations Pty Ltd* (2012) 36 VR 361).

134. To be included within the scope of s 21(3), an independent contractor must have been "engaged by" the employer. It is for the judge to determine the meaning of the word "engaged". He or she must instruct the jury on its meaning, as well as the facts necessary to establish engagement (*R v ACR Roofing Pty Ltd* (2004) 11 VR 187).

135. The term "engaged by" is complex and can be factually dependent. The judge should therefore invite the prosecution to identify at the start of the trial the particular matters that give rise to engagement.

136. Engagement of a contractor exists in relation to any matters over which the employer has control, whether by privity of contract or arising from a contract between the contractor and another person. This covers direct contracts, sub-contracts and any further layers of contractual relations (*R v ACR Roofing Pty Ltd* (2004) 11 VR 187).

Scope of the duty owed to independent contractors

137. While independent contractors engaged by an employer are considered to be employees for the purpose of s 21, the duties owed to independent contractors are more limited than the duties owed to other employees. An employer only owes a duty to an independent contractor "in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control" (s 21(3)(b)).

138. Consequently, where it is alleged that an employer breached his or her duty to an independent contractor, it is necessary for the jury to determine whether the employer had control over the matter in issue (see, e.g. *Baiada Poultry Pty Ltd v The Queen* [2011] VSCA 23).

139. An employer has control over the work of an independent contractor where:

- there is a legal right to direct the contractor; or
- where the employer considered that it had the right to direct the contractor and the contractor would accept and act on that direction (*Stratton v Van Driel Ltd* [1998] VSC 75).

140. While employers are unlikely to have control over certain matters (such as the way expert contractors performs the specific tasks they are engaged to perform), they may nonetheless retain control over other matters (such as where the work is to be undertaken or the safety measures that must be observed) (*Baiada Poultry Pty Ltd v The Queen* [2011] VSCA 23; *Reilly v Devcon Australia Pty Ltd* (2008) 36 WAR 492; *R v Associated Octel Ltd* [1994] 4 All ER 1051; *R v ACR Roofing Pty Ltd* (2004) 11 VR 187; [2004] VSCA 215).

141. To determine whether an employer has control over a matter, the court will look at the details of the contractual relationship between the employer and the contractor, as well as any other indications that the employer had the right to direct the contractor in the performance of its work (*Stratton v Van Driel Ltd* [1998] VSC 75; *Baiada Poultry Pty Ltd v The Queen* [2011] VSCA 23).

142. Contractual interpretation is a mixed question of fact and law that involves three stages:

i) the judge must determine, as a question of law, whether the words used in the contract have a legal meaning, a technical meaning or their ordinary meaning;

ii) if the words have a legal meaning, the judge must explain that meaning to the jury. If the

words have their ordinary meaning or a technical meaning, the judge must instruct the jury to determine, as a question of fact, what that meaning is;

iii) the judge must direct the jury about the legal effect of the relevant contractual provisions, depending on the jury's findings of fact at the second stage (*Baiada Poultry Pty Ltd v The Queen* [2011] VSCA 23).

Sub-contractors

143. Employers do not only owe duties to those contractors they have directly engaged. They also owe duties to the employees of those contractors, in relation to matters over which the employer has control (or would have control if not for any agreement purporting to limit or remove that control) (*OHS Act 2004* s 21(3); *R v ACR Roofing Pty Ltd* (2004) 11 VR 187).

144. Where the prosecution relies on principles of agency to establish that the accused had control over the sub-contractor, the judge must explain the relevant principles and relate them to the evidence (*R v ACR Roofing Pty Ltd* (2004) 11 VR 187).

Content of the duty owed to independent contractors

145. The prosecution must prove that the accused did not, so far as is reasonably practicable, provide and maintain a working environment that was safe and without risks to the health of those independent contractors or sub-contractors who fall within the scope of s 21(3).

146. As noted above (see "Use of experts and independent contractors"), an employer who lacks the expertise necessary to safely complete a task may fulfil its duties under s 21 by relying on an external expert. Consequently, the prosecution will need to prove that engaging the relevant contractor was not sufficient to discharge its obligations under the Act (*Baiada Poultry Pty Ltd v The Queen* [2011] VSCA 23).

147. This may depend on whether it was reasonably practicable for the employer to have directed the independent contractor to undertake their task in a certain way. This will be a matter of fact and degree (*Baiada Poultry Pty Ltd v The Queen* [2011] VSCA 23).

148. Determining what was reasonably practicable may depend on:

- the size of the employer;
- the employer's expertise in relation to the particular task and knowledge of the risks involved;
- the nature and gravity of the risk;
- the competence and expertise of the independent contractor and its employees; and
- the nature of the precautions the contractor was taking and whether the employer was aware of any defects in the contractor's safety practices (*R v ACR Roofing Pty Ltd* (2004) 11 VR 187; *R v Associated Octel Pty Ltd* [1994] 4 All ER 1051; *Baiada Poultry Pty Ltd v The Queen* [2011] VSCA 23).

Employee or independent contractor?

149. Because the scope and content of the duty owed to employees and independent contractors differs slightly, it may be important to determine whether a particular individual was an employee or an independent contractor.

150. Determining whether a person is an employee or an independent contractor is a matter of substance, not form. It depends on the rights and obligations under the relevant contract between the employer and the other party, and not on the labels used by the parties or their subjective views (*Tobiassen v Reilly* [2009] WASCA 26; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16).

151. One factor that is relevant to determining whether a person is an employee or an independent contractor is whether the employer has the right to control the performance of the person's work. Control of work is a characteristic of an employer-employee relationship (*Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561; *Tobiassen v Reilly* [2009] WASCA 26).

Duplicity and Multiple Offences

152. While s 21(1) creates a single offence, the specific types of breaches identified in s 21(2) may each be charged as separate offences (*Newcastle Wallsend Coal Company v Inspector McMartin* [2006] NSWIRComm 339; *DPP v Coates Hire Operations Pty Ltd* (2012) 36 VR 361).

153. Alternatively, if the breaches arose out of the same factual circumstances, they may be charged as a single offence (subject to any contrary court order) (*OHS Act 2004* s 33. See also *John Holland v Industrial Court of NSW* [2010] NSWCA 338, [66]; *Diemould Tooling Services v Oaten* (2008) 101 SASR 339).

154. Section 33 is a facilitative provision that overrides the common law prohibition on duplicity (See *John Holland v Industrial Court of NSW* [2010] NSWCA 338; *Coombs v Patrick Stevedores* [2002] NSWIRComm 215).[1113]

155. An aggregated charge under s 33 differs from a "rolled-up" charge at common law (*DPP v Coates Hire Operations Pty Ltd* (2012) 36 VR 361).

156. For s 33 to apply, the court must find that the alleged contraventions arose out of the same factual circumstances (See *John Holland v Industrial Court of NSW* [2010] NSWCA 338; *Coombs v Patrick Stevedores* [2002] NSWIRComm 215).

157. The same factual circumstances will only exist where the relevant act or omission constituting the offence is the same. Common factual circumstances do not exist merely because there is an accident caused by multiple breaches of workplace safety (*DPP v Vibro-Pile* (2016) 49 VR 676, [144]).

158. While s 33 alleviates the strictness of the rule against duplicity, there are risks associated with this provision and the prosecution should be selective in its use. First, a jury verdict to a s 33 charge will be inscrutable, and this may present problems for sentencing. Second, errors in relation to one part of a case under a s 33 charge may leave the charge vulnerable on appeal, even if there were other paths to conviction which were free of error (*DPP v Vibro-Pile* (2016) 49 VR 676, [137], [143]).

159. Because of these risks, the prosecution should not use s 33 where the allegations involve different factual or legal issues, or where the question of reasonable practicability may be different for different allegations (*DPP v Vibro-Pile* (2016) 49 VR 676, [141]).

160. The prosecution cannot lay separate charges for each employee who is exposed to a risk of harm from a single incident. However, where there are multiple acts or omissions giving rise to risks of harm to different employees, the prosecution may bring separate charges for each separate failure to provide a safe working environment (*Diemould Tooling Services v Oaten* (2008) 101 SASR 339).

[1113] The section reverses the position that existed under the *OHS Act 1985*, which held that each factual matter giving rise to a breach of the employer's duty to provide a safe working environment needed to be separately charged (See *R v Australian Char Pty Ltd* [1999] 3 VR 834; *Chugg v Pacific Dunlop Ltd* [1988] VR 411).

Overlap Between sections 21 and 23

161. In some cases, the accused's failure to take a certain measure may give rise to a risk to both employees and non-employees. A jury may return a verdict of guilty on charges under both s 21 and s 23 of the Act (*Director of Public Prosecutions Reference (No 1 of 1992)* [1992] 2 VR 405).

162. Where a risk is posed to an independent contractor in relation to matters over which the employer has control, a prosecutor can choose to bring charges under either section 21 or 23 (*Muscat v Magistrates' Court of Victoria* [2018] VSC 650, [52]–[54]).

Witness Warnings

163. Where an employee is called to give evidence against their employer, it may be necessary to give a criminally concerned witness warning or a Faure warning. However, this will usually not be necessary, as:

- any incentive to minimise the employee's involvement in the offending will usually be obvious to the jury; and
- a witnesses' guilt of an OH&S offence as an employee might not affect the guilt of the employer or another employee (*R v Irvine* (2009) 25 VR 75; *R v Powercor (Aust) Pty Ltd* [2005] VSCA 163).

Last updated: 21 July 2021

7.7.1.1 ***Charge: Employer's Duty to Employees***

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At the start of the trial, the judge should seek particulars from the prosecution regarding:

i) What the accused should have done to avoid creating a risk to the health and safety of employees; and

ii) If it is in issue, the basis for establishing the employee/employer relationship.

iii) If it is in issue, the facts necessary to support a finding that an employee or independent contractor relationship existed

These matters will inform the content of the charge.

If the prosecution relies on a breach of s 21(2) to establish the offence, this charge must be adapted accordingly. See Employer's Duty to Employees and non-Employees for guidance.

NOA has been charged with failing to provide and maintain a safe working environment. This crime consists of four elements:

One – The accused was an employer at the relevant time;

Two – There was a risk in the accused's working environment to the health and safety of employees;

Three – The accused failed to do something which would have eliminated or reduced that risk;

Four – It was reasonably practicable in the circumstances to have taken steps to eliminate or reduce that risk.

Before you can find NOA guilty of failing to provide and maintain a safe workplace you must be satisfied that the prosecution has proven all four of these elements beyond reasonable doubt.

I will now explain these elements in detail.[1114]

The Accused was an Employer

The first element that the prosecution must prove is that on [*identify relevant date(s)*], the accused was an employer.

An employer is someone who employs at least one person under a contract of employment or training.

[*Summarise evidence and arguments concerning the accused's status as an employer*.]

Risk in the working environment to employee health and safety

The second element is that there was a risk in the accused's working environment to the health and safety of employees.

There are three parts to this element.

First – Risk. The prosecution says that there was a risk of [*identify relevant risk*].

Second – Working environment. The prosecution says that [*identify location*] was part of NOA's working environment.

Third – Employees. The risk must be to the health and safety of the accused's employees. That is, people under a contract of employment with NOA.[1115]

[*If the offence relates to an* independent contractor*, add the following shaded section*.]

Because this case involves independent contractors, there are two additional matters that the prosecution must prove. First, they must prove that [*identify relevant contractors*] were hired by the accused to do some work.[1116]

[*If this matter is not in issue, add the following darker shaded section*.]

In this case, it is not disputed that [*identify relevant contractors*] were hired by the accused. You will not have any difficulty with this matter.

[*If this matter is in issue, add the following darker shaded section*.]

In this case, this matter is in dispute. [*Summarising prosecution and defence evidence and arguments*]. In order to find that [*identify relevant contractors*] were hired by the accused to do some work, you must be satisfied that [*identify facts necessary to prove contractor relationship*].

Second, they must prove that the accused had sufficient control over the contractors that s/he could

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[1114] If an element or part of an element is not in issue it should not be explained in full. Instead, it should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this [element/matter] proven."

[1115] Where the risk extends to independent contractors who are treated as employees under *OHSA 2004* s 21(3), this direction should be modified accordingly and the shaded text added.

[1116] This statement should be modified if a different form of engagement is alleged.

have directed them to [*identify suggested measure, e.g.* 'use safety goggles while working'].[1117]

In relation to this second matter, it is useful to note that employers generally do not control the way in which competent independent contractors perform their work. However, they may have control over certain aspects of the contractors' work, such as where and when they undertake it. They may also have other rights to direct the contractor, based on their contract or the relationship between them.

[*Identify relevant evidence and arguments on any parts of this element in dispute*.]

Failure to eliminate or reduce risk

The third element that the prosecution must prove is that the accused failed to do something that would have eliminated or reduced the risk.

The law requires the prosecution to identify a particular measure which the accused should have done to address the risk.

In this case, the prosecution say that NOA was required to [*identify relevant measures, e.g.* "install an isolation switch on the mulcher"].

The prosecution must prove that if NOA had done so, then the risk of [*identify relevant risk*] would have been eliminated or reduced. It is not enough to say that the risk might have been reduced if the accused had taken that measure.

[*Summarise relevant evidence and arguments*.]

Reasonable Practicability

The fourth element that the prosecution must prove is that [*describe specific measure*] was a reasonably practicable means of addressing the risk of [*identify relevant risk*].

Practicable is a word that is not commonly used. It means that something is able to be done or put into practice. This element requires you to determine whether [*describe specific measure*] was reasonably feasible or reasonably capable of being done.

To determine whether the proposed measure was reasonably practicable, you must consider matters such as:

- How likely it was that [*describe relevant risk*] would occur;
- What harm was likely to be caused if [*describe relevant risk*];
- What could be done to eliminate or reduce the risk;
- How suitable those options were, and how much they would have cost; and
- What the accused knew about the risk and the ways of eliminating or reducing it, or reasonably should have known.

You must consider these matters by reference to the position of a reasonably prudent employer. It is no answer for the accused to say that s/he did not know about the risk, or thought that things were unlikely to go wrong, or could not afford to do what was suggested.

[1117] If the accused would have had sufficient control over the contractor, but there was an agreement to the contrary, this part of the charge will need to be modified to reflect the fact that the agreement is not operative for the purpose of this element.

You must also consider these matters without the benefit of hindsight. You must decide whether the proposed measure was reasonably practicable before [*identify event which raised accused's awareness of risk*].

If the risk was reasonably foreseeable by a reasonable employer, then the accused may have been required to take steps to prevent it, even if s/he had no personal knowledge of the risk.

However, employers do not need to guard against risks that are unforeseeable. This is because it is not reasonably practicable to protect against unforeseeable risks.

[*If it is necessary to direct the jury that the duty is non-delegable, add the following shaded section.*]

The law says that the employer's duty to eliminate or reduce risks cannot be delegated to anyone else. This means that when you are deciding whether [*identify relevant measure*] is reasonably practicable, the accused cannot say [*identify how the issue of delegation arose in the context of the case, e.g.* "that they did not need to do anything further, because they had a health and safety officer and Mr Smith should have identified the risk"].

Employers must proactively search for and address risks in the workplace. They must adopt an active, imaginative and flexible approach to workplace safety. They may need to protect against risks that arise where an employee acts inadvertently or carelessly.

However, the law does not require an employer to eliminate all dangers that could conceivably arise. That would involve imposing an unrealistic standard of perfection. The test is whether the accused failed to do what was reasonably practicable.

[*If multiple measures are identified, add the following shaded section.*]

The prosecution has identified [*insert number of measures*] things NOA should have done to eliminate or reduce the risk. These are alternatives. For each of them, you must ask "Would it have eliminated or reduced the risk" and "Was it reasonably practicable". If all of you answer yes to both questions for a particular measure, then you are satisfied of both the third and fourth elements of this offence. If half of you say [*insert first measure*] was not reasonably practicable, but [*insert second measure*] was and half of you say [*insert second measure*] was not reasonably practicable but [*insert first measure*] was, then you have not reached agreement on this fourth element.

[*If evidence is led of an accident involving the workplace, add the following shaded section.*]

You have heard evidence that [*describe circumstances of accident*]. NOA has not been charged with causing that accident, or causing NOV's [death/injury]. Instead, NOA has been charged with failing to address a risk.

You might wonder "how can I use the evidence of the accident then?"

The evidence that [*identify relevant accident*] may help you decide:

- Did a risk exist?
- How likely was this risk to occur?
- What would happen if this risk occurs?
- Did NOA taken all reasonably practicable steps to eliminate the risk?

But don't use the benefit of hindsight. Remember that just because an accident has happened it does not mean that this was due to a relevant failure on the part of the employer. Sometimes accidents happen and no one is to blame.

You do not need to decide whether [*identify relevant measure*] would have prevented [*describe relevant accident*]. There are two important questions. "Would [*identify relevant measure*] have eliminated or reduced the risk of [*identify relevant risk*]?" and "Was it reasonably practicable to [*identify relevant measure*]?" If you answer yes to both questions, then you are satisfied of both the third and fourth

elements of this offence.

[*If the case concerns a hidden risk, add the following shaded section.*]

In making your determination, you must consider the fact that hidden risks are sometimes more dangerous than obvious risks. While people will often be aware of the need to avoid obvious risks, they may overlook the need to avoid hidden risks.

[*If the offence relates to an* independent contractor*, add the following shaded section.*]

In this case, the defence argued that NOA had met his/her obligations by hiring NOC, a specialist contractor, to [*describe work*]. It is for the prosecution to prove that this was not sufficient, and that it was reasonably practicable for NOA to have gone further and [*identify measure*].

When deciding whether it was reasonably practicable for NOA to have taken other measures in these circumstances, you must consider:

- The nature and seriousness of the risks involved;
- NOC's competence and expertise;
- NOA's expertise in relation to [*describe the tasks engaged in by the contractor*] and his/her knowledge of the risks involved;
- The nature of the precautions NOC was taking, and whether NOA was aware of any defects in NOC's safety practices; and
- The size of NOA's business.

Ultimately, determining what is reasonably practicable is a balancing exercise that requires you to use your common sense. Consider the danger posed by the risk and the difficulty of addressing the risk. Using that, decide whether the measure(s) posed by the prosecution were reasonably practicable.

[*Summarise relevant evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of failing to provide and maintain a safe workplace, the prosecution must prove to you, beyond reasonable doubt:

One – The accused was an employer at the relevant time;

Two – There was a risk in the accused's working environment to the health and safety of employees;

Three – The accused failed to do something which would have eliminated or reduced that risk;

Four – It was reasonably practicable in the circumstances to have taken steps to eliminate or reduce that risk.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of failing to provide and maintain a safe workplace.

Last updated: 27 March 2019

7.7.1.2 Checklist: Employer's Duty to Employees

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Note – If a breach of s 21(2) is alleged, these elements and questions must be adapted. See 7.7.1 Employer's Duty to Employees for guidance.

Four elements the prosecution must prove beyond reasonable doubt:

1. The accused was an employer at the relevant time; and

2. There was a risk in the working environment to employee health and safety; and

3. The accused failed to take an identified measure which would have eliminated or reduced the risk; and

4. It was reasonably practicable in the circumstances to have taken that measure.

Accused as an Employer

1. Was the accused an employer at the relevant time?

If yes, then go to 2

If no, then the accused is not guilty of breaching the duty to employees

Risk

2. Was there a risk in the working environment to employee health and safety?

Consider – The prosecution claims that there was a risk of [insert relevant risk]

If yes, then go to 3

If no, then the accused is not guilty of breaching the duty to employees

Failure to eliminate or reduce risk

3. Did the accused fail to take an identified measure which would have eliminated or reduced the risk?

Consider – The prosecution argues that the accused should have [insert relevant measure]?

Consider – Would [insert relevant measure] have eliminated or reduced the risk of [insert relevant risk]?

If yes, then go to 4

If no, then the accused is not guilty of breaching the duty to employees

Reasonably practicable

4. Was [*insert relevant remedial act*] a reasonably practicable way of addressing [*insert relevant risk*]?

Consider – How likely was [insert relevant risk] to occur?

Consider – What harm would follow if [insert relevant risk] occurred?

Consider – What could be done to eliminate or reduce the risk?

Consider – How suitable were those options and how much would these options have cost?

Consider – What did the accused know about the risk and ways of addressing it or what should the accused have reasonably known?

If yes, then the accused is guilty of breaching the duty to employees (as long as you also answered yes to questions 1, 2 and 3)

If no, then the accused is not guilty of breaching the duty to employees

Last updated: 15 April 2016

*7.7.1.3 **Charge: Employer's Duty to Non-Employees***

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At the start of the trial, the judge should seek particulars from the prosecution regarding:

i) What the accused should have done to avoid creating a risk to the health and safety of non-employees; and

ii) The extent of the employer's business.

These matters will inform the content of the charge.

NOA has been charged with failing to eliminate risks to the health of safety of non-employees. This crime consists of four elements:

One – The accused was an employer at the relevant time;

Two – There was a risk from the conduct of the accused's undertaking to the health and safety of non-employees;

Three – The accused failed to do something which would have eliminated or reduced that risk;

Four – It was reasonably practicable in the circumstances to have taken steps to eliminate or reduce that risk.

Before you can find NOA guilty of failing to eliminate risks to the health of safety of non-employees you must be satisfied that the prosecution has proven all four of these elements beyond reasonable doubt.

I will now explain these elements in detail.[1118]

The Accused was an Employer

The first element that the prosecution must prove is that on [*identify relevant date(s)*], the accused was an employer.

An employer is someone who employs at least one person under a contract of employment or training.

[*Summarise evidence and arguments concerning the accused's status as an employer.*]

[1118] If an element or part of an element is not in issue it should not be explained in full. Instead, it should be described briefly, followed by an instruction such as: "It is [admitted/not disputed] that NOA [*describe conduct, state of mind or circumstances that meets the element*], and you should have no difficulty finding this [element/matter] proven."

Risk from the conduct of the employer's undertaking to the health and safety of non-employees

The second element is that the conduct of the employer's undertaking created a risk to the health and safety of non-employees.

There are three parts to this element.

First – Conduct of the employer's undertaking. This means the conduct of the employer's business or enterprise. The prosecution says that NOA's business or enterprise was [*identify scope of enterprise*].

Second – Risk to health and safety. The prosecution says that NOA's business or enterprise created a risk of [*identify relevant risk*].

Third – Non-Employees. The risk must be to the health and safety of *non-employees*. That is, people who are not under a contract of employment with NOA.

[*Identify relevant evidence and arguments on any parts of this element in dispute.*]

Failure to eliminate or reduce risk

The third element that the prosecution must prove is that the accused failed to do something that would have eliminated or reduced the risk.

The law requires the prosecution to identify a particular measure which the accused should have done to address the risk.

In this case, the prosecution say that NOA was required to [*identify relevant measures, e.g.* "install an isolation switch on the mulcher"].

The prosecution must prove that if NOA had done so, then the risk of [*identify relevant risk*] would have been eliminated or reduced. It is not enough to say that the risk might have been reduced if the accused had taken that measure.

[*Summarise relevant evidence and arguments.*]

Reasonable Practicability

The fourth element that the prosecution must prove is that [*describe specific measure*] was a reasonably practicable means of addressing the risk of [*identify relevant risk*].

Practicable is a word that is not commonly used. It means that something is able to be done or put into practice. This element requires you to determine whether [*describe specific measure*] was reasonably feasible or reasonably capable of being done.

To determine whether the proposed measure was reasonably practicable, you must consider matters such as:

- How likely it was that [*describe relevant risk*] would occur;
- What harm was likely to be caused if [*describe relevant risk*];
- What could be done to eliminate or reduce the risk;
- How suitable those options were, and how much they would have cost; and
- What the accused knew about the risk and the ways of eliminating or reducing it, or reasonably should have known.

You must consider these matters by reference to the position of a reasonably prudent employer. It is no answer for the accused to say that s/he did not know about the risk, or thought that things were unlikely to go wrong, or could not afford to do what was suggested.

You must also consider these matters without the benefit of hindsight. You must decide whether the proposed measure was reasonably practicable before [*identify event which raised accused's awareness of risk*].

If the risk was reasonably foreseeable by a reasonable employer, then the accused may have been required to take steps to prevent it, even if s/he had no personal knowledge of the risk.

However, employers do not need to guard against risks that are unforeseeable. This is because it is not reasonably practicable to protect against unforeseeable risks.

[*If it is necessary to direct the jury that the duty is non-delegable, add the following shaded section.*]

The law says that the employer's duty to eliminate or reduce risks cannot be delegated to anyone else. This means that when you are deciding whether [*identify relevant measure*] is reasonably practicable, the accused cannot say [*identify how the issue of delegation arose in the context of the case, e.g.* "that they did not need to do anything further, because they had a health and safety officer and Mr Smith should have identified the risk"]. An employer also cannot say "NOV should have taken better care of him/herself". It is the accused's duty to eliminate or reduce risks to non-employees, as far as reasonably practicable.

Employers must proactively search for and address risks in the workplace. They must adopt an active, imaginative and flexible approach to workplace safety. They may need to protect against risks that arise where an employee acts inadvertently or carelessly.

However, the law does not require an employer to eliminate all dangers that could conceivably arise. That would involve imposing an unrealistic standard of perfection. The test is whether the accused failed to do what was reasonably practicable.

[*If multiple measures are identified, add the following shaded section.*]

The prosecution has identified [*insert number of measures*] things NOA should have done to eliminate or reduce the risk. These are alternatives. For each of them, you must ask "Would it have eliminated or reduced the risk" and "Was it reasonably practicable". If all of you answer yes to both questions for a particular measure, then you are satisfied of both the third and fourth elements of this offence.

If half of you say [*insert first measure*] was not reasonably practicable, but [*insert second measure*] was and half of you say [*insert second measure*] was not reasonably practicable but [*insert first measure*] was, then you have not reached agreement on this fourth element.

[*If evidence is led of an accident involving the workplace, add the following shaded section.*]

You have heard evidence that [*describe circumstances of accident*]. NOA has not been charged with causing that accident, or causing NOV's [death/injury]. Instead, NOA has been charged with failing to address a risk.

You might wonder "how can I use the evidence of the accident then?"

The evidence that [*identify relevant accident*] may help you decide:

- Did a risk exist?
- How likely was this risk to occur?
- What would happen if this risk occurs?
- Did NOA take all reasonably practicable steps to eliminate the risk?

But don't use the benefit of hindsight. Remember that just because an accident has happened it does not mean that this was due to a relevant failure on the part of the employer. Sometimes accidents happen and no one is to blame.

You do not need to decide whether [*identify relevant measure*] would have prevented [*describe relevant accident*]. There are two important questions. "Would [*identify relevant measure*] have eliminated or

reduced the risk of [*identify relevant risk*]?" and "Was it reasonably practicable to [*identify relevant measure*]?" If you answer yes to both questions, then you are satisfied of both the third and fourth elements of this offence.

[*If the case concerns a hidden risk, add the following shaded section.*]

In making your determination, you must consider the fact that hidden risks are sometimes more dangerous than obvious risks. While people will often be aware of the need to avoid obvious risks, they may overlook the need to avoid hidden risks.

[*If the offence relates to an* independent contractor*, add the following shaded section.*]

In this case, the defence argued that NOA had met his/her obligations by hiring NOC, a specialist contractor, to [*describe work*]. It is for the prosecution to prove that this was not sufficient, and that it was reasonably practicable for NOA to have gone further and [*identify measure*].

When deciding whether it was reasonably practicable for NOA to have taken other measures in these circumstances, you must consider:

- The nature and seriousness of the risks involved;
- NOC's competence and expertise;
- NOA's expertise in relation to [*describe the tasks engaged in by the contractor*] and his/her knowledge of the risks involved;
- The nature of the precautions NOC was taking, and whether NOA was aware of any defects in NOC's safety practices; and
- The size of NOA's business.

Ultimately, determining what is reasonably practicable is a balancing exercise that requires you to use your common sense. Consider the danger posed by the risk and the difficulty of addressing the risk. Using that, decide whether the measure(s) posed by the prosecution were reasonably practicable.

[*Summarise relevant evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of failing to eliminate risks to the health of safety of non-employees, the prosecution must prove to you, beyond reasonable doubt:

One – The accused was an employer at the relevant time;

Two – There was a risk from the conduct of the accused's undertaking to the health and safety of non-employees;

Three – The accused failed to do something which would have eliminated or reduced that risk;

Four – It was reasonably practicable in the circumstances to have taken steps to eliminate or reduce that risk.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of failing to eliminate risks to the health of safety of non-employees.

Last updated: 27 March 2019

7.7.1.4 ***Checklist: Employer's duty to*** *Non-Employees*

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Four elements the prosecution must prove beyond reasonable doubt:

1. The accused was an employer at the relevant time; and

2. There was a risk from the conduct of the accused's undertaking to the health and safety of non-employees; and

3. The accused failed to do something which would have eliminated or reduced that risk; and

4. It was reasonably practicable in the circumstances to have taken steps to eliminate or reduce that risk.

Accused as an Employer

1. Was the accused an employer at the relevant time?

If Yes, then go to 2

If No, then the accused is not guilty of breaching the duty to non-employees

Risk

2. Did the conduct of the accused's business create a risk to the health and safety of non-employees?

Consider – ***The prosecution claims that the scope of the accused's business included*** *[insert relevant conduct]*

Consider – ***The prosecution claims that the accused's business created a risk of*** *[insert relevant risk]*

If Yes, then go to 3

If No, then the accused is not guilty of breaching the duty to non-employees

Failure to eliminate or reduce risk

3. Did the accused fail to take an identified measure which would have eliminated or reduced the risk?

Consider – The prosecution argues that the accused should have [insert relevant measure]?

Consider – Would [insert relevant measure] have eliminated or reduced the risk of [insert relevant risk]?

If Yes, then go to 4

If No, then the accused is not guilty of breaching the duty to non-employees

Reasonably practicable

4. Was [*insert relevant remedial act*] a reasonably practicable way of addressing [*insert relevant risk*]?

Consider – How likely was [insert relevant risk] to occur?

Consider – What harm would follow if [insert relevant risk] occurred?

Consider – What could be done to eliminate or reduce the risk?

Consider – How suitable were those options and how much would these options have cost?

Consider – What did the accused know about the risk and ways of addressing it or what should the accused have reasonably known?

If Yes, then the accused is guilty of breaching the duty to non-employees (as long as you also answered yes to questions 1, 2 and 3)

If No, then the accused is not guilty of breaching the duty to non-employees

Last updated: 12 September 2019

7.7.2 Discrimination Offence

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1. Section 76 of the *Occupational Health and Safety Act 2004* is entitled 'Prohibition on discrimination'. The section creates an indictable offence that applies where an employer engages in adverse conduct as a result of a person's actions in relation to health and safety issues.
2. The offence consists of 5 elements:
   (a) the accused is an employer or prospective employer;
   (b) the complainant is employed by the accused or was a prospective employee of the accused;
   (c) the complainant engaged in protected action;
   (d) the accused engaged in adverse conduct against the complainant;
   (e) the dominant reason why the accused engaged in that conduct was because the complainant engaged in protected action (Occupational Health and Safety Act 2004 s 76).

Accused an employer or prospective employer

3. The first element is that the accused is an employer or prospective employer (*Occupational Health and Safety Act 2004* s 76).
4. For information on this element, see 7.7.1 Employer's Duty to Employees.

Complainant an employee or prospective employee of accused

5. The second element is that the complainant was an employee or prospective employee of the accused (*Occupational Health and Safety Act 2004* s 76).
6. For information on employment relationships and distinguishing employees from independent contractors, see 7.7.1 Employer's Duty to Employees.

Complainant engaged in protected action

7. The third element is that the complainant:
   (a) is or has been a health and safety representative or a member of a health and safety committee;
   (b) exercises or has exercised a power as a health and safety representative or as a member health and safety representative or as a member of a health and safety committee; or
   (c) assists or has assisted, or gives or has given any information to, an inspector, the Authority, an authorised representative of a registered employee organisation, a health and safety representative or a member of a health and safety committee; or

(d) raises or has raised an issue or concern about health or safety to the employer, an inspector, the Authority, an authorised representative of a registered employee organisation, a health and safety representative, a member of a health and safety committee or an employee of the employer (Occupational Health and Safety Act 2004 s 76(2)).

8. Proof for Occupational Health and Safety Act 2004 s 76(2)(d) that the employee raised an issue or concern about health or safety, is a question of fact for the jury to be assessed in the circumstances of the case (*DPP v Acme Storage Pty Ltd* [2017] VSCA 90, [26]).

9. While the jury may consider evidence that the employee acted disingenuously and did not genuinely seek to raise a health and safety issue, it is not necessary for the prosecution to affirmatively prove that the employee's actions were genuine (*DPP v Acme Storage Pty Ltd* [2017] VSCA 90, [27]).

10. In assessing whether an employee has raised a health and safety issue, it is not appropriate to draw a distinction between "genuine" concern about health and safety and an "industrial" objective. This is a false dichotomy, as there is no necessary inconsistency between health and safety objectives and industrial objectives (*DPP v Acme Storage Pty Ltd* [2017] VSCA 90, [33]).

Adverse conduct

11. The fourth element is that the accused engaged in one or more forms of proscribed adverse conduct (*Occupational Health and Safety Act 2004* s 76).

12. The prohibited forms of adverse conduct are:

(a) dismiss or threaten to dismiss an employee;

(b) injure or threaten to injure an employee in the accused's employment;

(c) alter or threaten to alter the position of an employee to the employee's detriment;

(d) refuse or fail to offer employment to a prospective employee;

(e) treats a prospective employee less favourably than another prospective employee would be treated in offering terms of employment (Occupational Health and Safety Act 2004 s 76(1)).

13. The word "threat" carries its ordinary meaning. In *DPP v Acme Storage Pty Ltd* [2017] VSCA 90, [40], the Court of Appeal quoted with approval the following parts of the Macquarie Dictionary definition of threat:

> 1. a declaration of an intention or determination to inflict punishment, pain or loss on someone in retaliation for, or conditionally upon, some action or course; menace.
> 2. an indication of probable evil to come; something that gives indication of causing evil or harm.

14. There is no part of this element which requires the prosecution to prove that the accused intended to carry out the threat, intended that the employee believe the threat or that the accused was reckless as to whether the employee would believe that the threat would be carried out (*DPP v Acme Storage Pty Ltd* [2017] VSCA 90, [42]).

15. It is also not necessary to prove that the threat was communicated to the employee who was said to be the subject of the threat (*DPP v Acme Storage Pty Ltd* [2017] VSCA 90, [43]).

16. Terms such as "dismiss", "injure", "alter" and "detriment" are not used in a special legal sense. They are ordinary words and the judge does not need to give the jury a special legal definition. However, the judge can give the jury assistance on matters to consider when deciding whether the relevant form of conduct has been proved (*DPP v Acme Storage Pty Ltd* [2017] VSCA 90, [78]–[84]).

Reason for prohibited conduct

17. The fifth element involves showing that the protected action was the dominant reason for the prohibited (*Occupational Health and Safety Act 2004* s 76(3))

18. The accused bears the onus of showing that the reason alleged in the charge was not the dominant reason for the conduct (*Occupational Health and Safety Act 2004* s 77).

19. There is no basis for reading in a word like "genuine" into the language of section 77, or requiring the jury to consider whether the alleged dominant reason was genuinely held by the accused (*DPP v Acme Storage Pty Ltd* [2017] VSCA 90, [92]).

Last updated: 22 August 2018

7.7.2.1 Charge: Discrimination Offence

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NOA has been charged with discriminating against an employee because of health and safety. This crime consists of five elements:

One – The accused was an employer at the relevant time;

Two – NOC was an employee of the accused;

Three – NOC engaged in protected conduct;

Four – The accused took action against NOC;

Five – The accused took action against NOC because of NOC's protected conduct.

I will now explain these elements in detail.

Accused was an employer

The first element is that the accused was an employer. There is no dispute about this matter and so you should have no difficulty finding this element proved.[1119]

Employed by the accused

The second element is that NOC was an employee of the accused. There is also no dispute about this matter and so you should have no difficulty finding this element proved.[1120]

Protected actions

The third element is that the complainant engaged in protected conduct.

The law recognises many types of protected conduct. In this case, the prosecution must prove that NOC [*identify relevant form of protected conduct, in accordance with Occupational Health and Safety Act 2004* s 76(2)].

[*Refer to competing prosecution and defence evidence and arguments.*]

[1119] If this element is disputed, this part of the charge will need to be modified. The judge should set out the matters the jury needs to consider to determine whether the accused was an employer and identify the competing arguments of the parties.

[1120] If this element is disputed, this part of the charge will need to be modified. The judge should set out the matters the jury needs to consider to determine whether the complainant was employed by the accused and identify the competing arguments of the parties.

Adverse conduct

The fourth element is that accused took action against NOC.

In this case, that means the prosecution must prove that NOA [*identify relevant form of adverse conduct as stated in the indictment, e.g. "*dismissed NOC*"*].

[*Refer to competing prosecution and defence evidence and arguments.*]

Prohibited reason

The fifth element is that the accused took action against NOC because of [his/her] protected conduct.

The law has created a special rule for this element. For this element, the defence must prove that [his/her/its] dominant reason for taking action against NOC was not because [*identify relevant prohibited reason as stated in the indictment, e.g. "*NOC was a health and safety representative*"*]. This is an exception to the usual rule that the prosecution must prove all elements beyond reasonable doubt.

Unlike the other elements of the offence, the defence only needs to prove this matter on what is called the "balance of probabilities". This is a much lower standard than that required of the prosecution. It only requires the defence to prove that it is more likely than not that NOA's dominant reason for taking action against NOC was not because [*identify relevant prohibited reason as stated in the indictment, e.g. "*NOC was a health and safety representative*"*].

When you are considering this matter, you are looking at what NOA has proved about the dominant reason for the action against NOC. In other words, what was NOA's main or most influential reason? Another way of looking for the dominant reason is to ask: Would NOA have taken that action if [*identify the converse of the relevant prohibited reason as stated in the indictment, e.g. "*NOC was not a health and safety representative*"*]? If NOA would have engaged in the conduct anyway, then [*identify relevant prohibited reason as stated in the indictment, e.g. "*NOC being a health and safety representative*"*] was not the dominant purpose.

[*Refer to competing prosecution and defence evidence and arguments.*]

Summary

To summarise, before you can find NOA guilty of discriminating against an employee because of health and safety, the prosecution must prove three elements beyond reasonable doubt:

One – NOA was an employer at the relevant time;

Two – NOC was an employee of NOA;

Three – NOC [*identify relevant form of protected action*];

Four – NOA [*identify relevant form of adverse conduct as stated in the indictment, e.g. "*dismissed NOC*"*].

If you find these four elements proved, then you may find NOA guilty unless NOA has proved, on the balance of probabilities, that [his/her/its] dominant reason for [*identify relevant form of adverse conduct as stated in the indictment, e.g. "*dismissing NOC*"*] was not that [*identify relevant prohibited reason as stated in the indictment, e.g. "*NOC was a health and safety representative*"*].

Last updated: 22 August 2018

7.7.2.2 Checklist: Discrimination Offence

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This offence consists of five elements:

1. The accused was an employer; and

2. The complainant was an employee of the accused; and

3. The complainant was engaged in protected conduct; and

4. The accused took action against the complainant; and

5. The dominant reason the accused took that action was because the complainant engaged in protected conduct.

Accused as an Employer

1. Has the prosecution proved that the accused was an employer?

If yes, then go to 2

If no, then the accused is not guilty of discriminating against an employee

Complainant as an Employee

2. Has the prosecution proved that the complainant was an employee of the accused?

If yes, then go to 3

If no, then the accused is not guilty of discriminating against an employee

Protected conduct

3. Has the prosecution proved that the complainant engaged in protected conduct?

Consider – In this case, protected conduct is [*identify relevant form of protected conduct*].

If yes, then go to 4

If no, then the accused is not guilty of discriminating against an employee

Action against complainant

4. Has the prosecution proved that the accused took action against the complainant?

Consider – In this case, taking action against the complainant means [*identify relevant form of adverse conduct*]*?*

If yes, then go to 5

If no, then the accused is not guilty of discriminating against an employee

Dominant reason

5. Has the accused proved that the complainant's protected conduct was not the dominant reason for taking action against the complainant?

Consider – ***The standard of proof for this element is 'the balance of probabilities', which means 'more likely than not'.***

Consider – The dominant reason is the main, or most influential, reason.

If yes, then the accused is not guilty of discriminating against an employee

If no, then the accused is guilty of discriminating against an employee (provided you have answered yes to questions 1, 2, 3 and 4)

Last updated: 22 August 2018

7.8 Offences against Justice

7.8.1 Statutory Perjury

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Introduction

1. Perjury is an offence under *Crimes Act 1958* s 314, as well as at common law (see *Crimes Act 1958* s 314(3)).
2. This topic addresses the statutory offence of perjury. See 7.8.2 Common Law Perjury for information concerning the common law offence.

Charging an accused who has made multiple false statements

3. As each false statement constitutes a separate crime, each false statement should usually be charged as a separate offence (*Traino v R* (1987) 45 SASR 473).
4. Consequently, where the accused has made multiple false statements, the prosecution should usually either:
    - Select one of the statements as the basis for a single charge of perjury; or
    - Charge the accused with multiple offences (one charge for each false statement) (*Stanton v Abernathy* (1990) 19 NSWLR 656).
5. However, where the accused has made a series of false statements about the same matter, it may be appropriate to lay only one charge of perjury, which consists of the cumulative effect of all of the statements (*Traino v R* (1987) 45 SASR 473; *Stanton v Abernathy* (1990) 19 NSWLR 656).
6. Courts should adopt a common sense approach when deciding whether the prosecution can lay one charge for multiple statements (*Traino v R* (1987) 45 SASR 473; *Stanton v Abernathy* (1990) 19 NSWLR 656).

Elements

7. Statutory perjury has the following three elements:

    i) The accused made a false statement;

    ii) That statement was made in prohibited circumstances; and

    iii) The accused made the false statement knowingly.

8. Unlike at common law, the prosecution does not need to prove that the statement was material to the proceeding. All evidence is deemed to be material (*Crimes Act 1958* s 315).

The accused made a false statement

9. The accused must have made a false statement about a fact, matter or thing (*Crimes Act 1958* s 314(3)).

10. The word "false" is to be given its ordinary English meaning: a statement is "false" if it is untrue (*R v Davies* (1974) 7 SASR 375).

11. Under s 314(3), there appear to be three ways in which an accused can make a "false" statement:

    i) By making an untrue assertion about a fact, matter or thing;

    ii) By purporting to verify the truth of a statement which is untrue wholly or in part; or

    iii) By omitting to mention information which the law requires him or her to mention.

12. The prosecution must specify the statement that is alleged to be false. It will usually not be sufficient for the prosecution to rely upon an entire transcript of testimony and allege that the witness gave false evidence (*Stanton v Abernathy* (1990) 19 NSWLR 656).

Proving the accused made the statement

13. The prosecution must be able to prove, on the basis of admissible evidence, that the accused made the relevant statement.

14. This may not be possible where:

    - There is a legislative provision limiting the subsequent admissibility of statements made in a certain kind of proceeding (see, e.g. *Royal Commissions Act 1902* (Cth) s 6DD); and
    - The statement was only made in that kind of proceeding (see, e.g. *Giannarelli v R* (1983) 154 CLR 212).

Proving the statement was false

15. Although *Evidence Act 2008* s 164 abolished the general requirement for corroboration, an exception is made with respect to the offence of perjury (s 164(2)).

16. Consequently, where the prosecution is relying on oral evidence to prove that the accused's statement was false, the prosecution's evidence must either come from two witnesses, or one witness with corroboration. Failure to comply with this requirement will entitle the accused to an acquittal (*R v Linehan* [1921] VLR 582; *R v Hoser* [1998] 2 VR 535).

17. The requirement for corroboration only applies to proving that the accused's statement was false. Corroboration is not required to prove that the accused made the statement or knew the statement was false (*R v Linehan* [1921] VLR 582; *R v O'Connor* [1980] Crim LR 43; *R v Mondon* [2003] 1 Qd R 200, [11]).

18. The requirement for corroboration only applies where the prosecution is relying on oral evidence to prove that the accused's statement was false. Corroboration is not required where the accused has clearly admitted that his or her statement was false (*R v Townley* (1986) 24 A Crim R 76; *R v Sumner* [1935] VLR 197. See also *R v Mondon* [2003] 1 Qd R 200, [14]).

19. However, corroboration is required where the accused has simply made contradictory statements (*R v Townley* (1986) 24 A Crim R 76; *R v Sumner* [1935] VLR 197).

What is Corroboration Evidence?

20. Corroboration can be found in both direct and circumstantial evidence (*R v Baskerville* (1916) 2 KB 658; *R v Rayner* [1998] 4 VR 818; *R v Holmes* [2008] VSCA 128).

21. To be capable of amounting to corroboration, evidence must:

    i) Come from a source independent of the witness to be corroborated; and

    ii) Be capable of confirming, in some material particular, that the accused made a statement that was false (*R v Linehan* [1921] VLR 582; *R v Baskerville* (1916) 2 KB 658; *R v Rosemeyer* [1985] VR

945).

22. Each of these requirements is discussed in turn below.

Independent Evidence

23. In most cases there will be little difficulty in determining whether corroborative evidence comes from a source independent of the witness to be corroborated. However, particular care should be exercised where it is suggested that the following types of evidence amount to corroboration:

    - Evidence of oral admissions made to the witness to be corroborated;
    - Post-offence conduct evidencing a consciousness of guilt;
    - Circumstantial evidence generally;
    - Evidence where there is a possibility of joint concoction.

24. Evidence given by a witness of oral admissions that the accused allegedly made to him or her is not evidence from a source independent of that witness, and cannot provide corroboration. If such evidence is led, the judge should give directions that ensure the jury does not misuse it as corroborative evidence (*R v Robertson* [1998] 4 VR 30).

25. If a "lie" evidencing a consciousness of guilt is to be used as corroboration, the falsity of the lie must be established by evidence that is independent of the witness to be corroborated (*Edwards v R* (1993) 178 CLR 193). See 4.6 Incriminating Conduct (Post Offence Lies and Conduct).

26. The true source of direct evidence will generally be clear, but this is often not the case with circumstantial evidence. As a result, care should always be taken to ensure that circumstantial evidence comes from a source independent of the witness concerned (*R v Martin* (2003) 142 A Crim R 153. See also *R v Hoser* [1998] 2 VR 535).

27. In relation to accomplices, it was accepted at common law that accomplices could not provide mutual corroboration, because there would be both an opportunity and a motive for joint fabrication (*Pollitt v R* (1991) 174 CLR 558).

28. It is unclear whether this principle has any potential application in relation to corroboration requirements for perjury. The original formulation of the corroboration rule for perjury states that the prosecution requires two witnesses, or one witness with corroboration. The potential for joint fabrication has not been explicitly identified as an exception to that 'two witness' rule.

29. However, in *R v Hoser* [1998] 2 VR 535, the accused was charged with perjury relating to a claim that he had been sent a letter from VicRoads. Two employees of VicRoads testified that the letter had not come from VicRoads. The trial judge treated those two witnesses as a single entity, as they came from different departments in VicRoads, rather than independent. On appeal, the Court described that position as favourable to the accused, but did not explore the matter further.

Confirming Evidence

30. The requirement that the corroborative evidence be capable of confirming or supporting the evidence in question has been stated in a number of different ways. For example, in *R v Baskerville* (1916) 2 KB 658 it was held that evidence may be corroborative if it:

    - Connects or tends to connect the accused with the crime; or
    - Implicates the accused by confirming, in some material particular, not only the evidence that the crime has been committed, but also that the accused committed it; or
    - Shows, or tends to show, that the witness's story that the accused committed the crime is true.

31. Most of the law about when evidence will provide corroboration was developed in the context of warnings about the dangers of acting on uncorroborated evidence. The following paragraphs, which describe when evidence provides corroboration, must be treated with some caution, as corroboration for perjury only required to prove that the statement was false and is not necessary for other elements of the offence (see *R v Linehan* [1921] VLR 582).

32. To be corroborative, the evidence does not need to be capable of establishing any proposition beyond reasonable doubt (*Doney v R* (1990) 171 CLR 207; *R v Pisano* [1997] 2 VR 342), nor does it need to be directly probative of guilt. It merely needs to be capable of "confirming", "supporting" or "strengthening" the evidence in question. It is evidence which "helps to determine the truth of the matter". In other words, it is evidence which renders the evidence in question more probable (*DPP v Kilbourne* [1973] AC 729; *R v Taylor* (2004) 8 VR 213; *R v Holmes* [2008] VSCA 128).

33. The mere fact that an accused can advance an innocent explanation for a potentially corroborative fact does not deprive that fact of its capacity to corroborate. The jury may well regard the proffered explanation as implausible in the circumstances, or for some other reason properly reject it out of hand (*BRS v R* (1997) 191 CLR 275; *R v Challoner* (2000) 110 A Crim R 102; *R v Taylor* (2004) 8 VR 213; *R v Strawhorn* [2008] VSCA 101; *R v Holmes* [2008] VSCA 128).

34. In such cases, as long as the evidence is reasonably capable of corroborating matters which require corroboration, it may be left to the jury (*R v Holmes* [2008] VSCA 128).

35. Corroborative evidence must bear upon the issue or issues joined at the trial. Evidence that merely confirms facts in the common ground between the parties will therefore not be corroborative (*R v Pisano* [1997] 2 VR 342; *R v Nanette* [1982] VR 81).

36. However, the law does not permit an accused to deprive facts of their corroborative quality by making a timely admission. An admitted fact may be corroborative if, when seen in the light of the prosecution case, that fact (or an inference drawn from it) is capable of implicating the accused (*R v Lindsay* (1977) 18 SASR 103; *R v Arundell* [1999] 2 VR 228; *BRS v R* (1997) 191 CLR 275).

Evidence Consistent with Guilt and Innocence

37. To be corroborative, evidence need not prove the offence, but it must be capable of confirming or tending to confirm the evidence of the witness requiring corroboration (*R v Baskerville* (1916) 2 KB 658; *Doney v R* (1990) 171 CLR 207; *R v Kerim* [1988] 1 Qd R 426; *R v Pisano* [1997] 2 VR 342).

38. Evidence will not have this capacity (and will not be corroborative) if it is "intractably neutral" (*R v Pisano* [1997] 2 VR 342; *R v Kerim* [1988] 1 Qd R 426).

39. So long as the evidence is more consistent with guilt than innocence, it is no bar that corroborative evidence has a certain consistency with both guilt and innocence (*R v Pisano* [1997] 2 VR 342; *R v Kerim* [1988] 1 Qd R 426).

Directions on corroboration

40. When identifying the relevant evidence, the judge should not explain that s/he has ruled that the identified evidence is capable of corroboration. Juries may mistake this for a direction that the evidence actually is corroborative (*R v Zorad* (1990) 19 NSWLR 91; *R v Kendrick* [1997] 2 VR 699; *R v Jolly* [1998] 4 VR 495; *R v Williams* [2007] VSCA 208).

41. It is preferable that the judge simply identify the relevant evidence as "evidence that the prosecution relies upon as amounting to corroboration". Alternately, the judge may tell the jury that they may consider whether the specific evidence which s/he identifies amounts to corroboration (*R v Zorad* (1990) 19 NSWLR 91, *R v Kendrick* [1997] 2 VR 699).

42. Where a combination of circumstantial facts (rather than individual facts standing alone) is relied upon as corroboration, the jury should be directed to consider those facts in combination rather than in isolation (*R v Kendrick* [1997] 2 VR 699; *R v Tadic* CCA Vic 31/8/1993).

The false statement was made in prohibited circumstances

43. The second element relates to the circumstances in which the false statement was made. It must have been made while on oath or affirmation, or in a declaration or affidavit (*Crimes Act 1958* s 314(3)).[1121]

44. For this element to be met, the oath, affirmation, declaration or affidavit must have been lawfully made or administered (*R v Charles* (1866) 3 WW & A'B).

45. For an oath or affirmation to have been lawfully administered, the body that administered it must have:

    - Had the power to administer oaths or affirmations (*R v Shuttleworth* [1909] VLR 431. See also *Evidence (Miscellaneous Provisions) Act 1958* s 111); and
    - Had the jurisdiction to hear the matter before it (*R v Kilkenny* (1890) 16 VLR 139; *R v Charles* (1866) 3 WW & A'B; *R v Ashby* (2010) 25 VR 107; *R v Dobos* (1984) 58 ACTR 10. See also *Evidence (Miscellaneous Provisions) Act 1958* s 151).

46. An oath will be lawfully effective even if:

    - A religious text is not used;
    - The accused did not have a religious belief, or a religious belief of a particular kind; or
    - The accused did not understand the nature and consequences of the oath (*Evidence Act 2008* s 24).

47. An affidavit must be sworn before an authorised person. See *Evidence (Miscellaneous Provisions) Act 1958* s 123C for a list of authorised persons. See also *Evidence (Miscellaneous Provisions) Act 1958* ss 112, 124, 125, 126, 126A and 165 and *Evidence Act 2008* s 186.

48. A statutory declaration must be signed in the presence of an authorised person (*Evidence (Miscellaneous Provisions) Act 1958* ss 107). See *Evidence (Miscellaneous Provisions) Act 1958* s 107A for a list of authorised persons.

49. The accused must have been legally competent to take the oath or make the affirmation, declaration or affidavit (*R v Kilkenny* (1890) 16 VLR 139).

The false statement was made knowingly

50. Section 314 refers to the false statement having been made "knowingly wilfully and corruptly". However, it is unclear what the words "wilfully and corruptly" add to the word "knowingly".[1122] Consequently, for the sake of simplicity, this topic focuses solely on the requirement for knowledge. However, if in a case there appears to be a need to separately address the terms "wilful" or "corrupt", a trial judge should do so.

51. To have acted "knowingly", the accused must have:

    - Actually known that the statement was false; or

[1121] This differs from the common law offence of perjury, which only applies to false statements made under oath in a judicial proceeding: see 7.8.2 Common Law Perjury.

[1122] In this context, the term wilfully has been defined to mean "intentionally" or "deliberately and not inadvertently or by mistake" (*R v Ryan* (1914) 10 Cr App R 4; *R v Millward* [1985] QB 519; *R v Lowe* [1917] VLR 155).

- Not believed that the statement made was true (*R v Aylett* (1785) 99 ER 973).

52. This element will not be met where:
    - The accused has an honest but mistaken belief in the truth of the statement; or
    - The statement is made with inadvertence, carelessness or misunderstanding (*R v Mackenzie* (1996) 190 CLR 348; *R v Liristis* [2004] NSWCCA 287, [121]).
53. There is no requirement that the accused's belief in the truth of the statement be reasonable (*R v Mackenzie* (1996) 190 CLR 348).
54. A trial judge must direct the jury on the distinction between "knowingly" making a false statement and honestly or innocently making a false statement. A failure to do so could deprive the accused of the possibility of an acquittal (*R v Mackenzie* (1996) 190 CLR 348; *R v Liristis* [2004] NSWCCA 287, [132]).
55. Such a direction must be given even if the accused does not believe that he or she was mistaken. It is important to distinguish between honesty and accuracy. An inaccurate statement is not the same as a dishonest statement (*R v Mackenzie* (1996) 190 CLR 348).

Last updated: 11 July 2018

7.8.1.1 Charge: Statutory Perjury

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I must now direct you about the crime of perjury. To prove this crime, the prosecution must prove the following three elements beyond reasonable doubt.

One – the accused made a false statement.

Two – the accused made the false statement [under oath/on affirmation/in a declaration/in an affidavit].

Three – the accused knew that the statement was false, or did not believe that it was true.

I will now explain each of these elements in more detail.

The Accused Made a False Statement

The first element that the prosecution must prove beyond reasonable doubt is that the accused made a statement which was false.

In this case the prosecution alleged that NOA made the following false statement: [*identify alleged false statement*].[1123]

[*Summarise relevant evidence and arguments about whether the statement was false*].

[*Where a corroboration direction is required, add the following shaded section.*]

The law says that you must not find this element to have been proven on the basis of the evidence of one witness alone. You must be satisfied that there is additional evidence in the case that supports the witness's allegation that the statement was false.

In this case, the prosecution relies on the following evidence to support NOW's allegation: [*Identify*

[1123] This charge is designed for use in cases where the accused makes an untrue assertion, or purports to verify the truth of a statement which is untrue. It will need to be modified if it is alleged that the accused made a false statement by omitting to mention information which the law required him or her to mention.

evidence capable of providing corroboration]. This is the only evidence that can support NOW's evidence for this purpose.

It is for you to determine, based on all the evidence, whether NOA made a false statement. It is only if you are satisfied, beyond reasonable doubt, that s/he did, that this first element will be met.

The False Statement was made in Prohibited Circumstances

The second element that the prosecution must prove beyond reasonable doubt is that the accused made the false statement [under oath/on affirmation/in a declaration/in an affidavit].

In this case it is not disputed that the relevant statement was made [under oath/on affirmation/in a declaration/in an affidavit]. You should therefore have no difficulty finding this element proven.[1124]

The False Statement was made Knowingly

The third element relates to the state of mind the accused had when s/he made the statement. The prosecution must prove that the accused either knew that the statement was false, or did not believe that it was true.

This element will not be met if NOA honestly but mistakenly believed the statement was true. A person cannot be convicted of perjury simply because they made a mistake. For this element to be satisfied NOA must have actually known that it was untrue to state that [*identify statement*], or at least not believed that was true.

[*Summarise evidence and/or arguments about the accused's state of mind.*]

Relate Law to the Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of perjury the prosecution must prove to you beyond reasonable doubt:

One – that s/he made a false statement; and

Two – that the false statement was made [under oath/on affirmation/in a declaration/in an affidavit]; and

Three – that NOA knew that the statement was false, or did not believe that it was true.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of perjury.

Last updated: 11 July 2018

7.8.1.2 Checklist: Statutory Perjury

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[1124] If there is a factual dispute over whether the accused was under a legal obligation to tell the truth, or whether the oath, affirmation, declaration or affidavit was lawfully made or administered, this section will need to be modified.

Three elements the prosecution must prove beyond reasonable doubt:

1. The accused made a false statement; and

2. The accused made the false statement under oath or on affirmation; and

3. The accused knew the statement was false or did not believe it was true.

False Statement

1. Did the accused make a false statement?

*Consider – **There must be evidence supporting the primary witness' evidence that the statement is false.***

If yes, then go to 2

If no, then the accused is not guilty of perjury

Oath or affirmation

2. Did the accused make the false statement on oath or under affirmation?

If yes, then go to 3.1

If no, then the accused is not guilty of perjury

Knowledge that the statement was false

3.1 Did the accused know the statement was false?

If yes, then the accused is guilty of perjury (as long as you also answered yes to questions 1 and 2)

If no, then go to 3.2

3.2 Did the accused believe the statement was true?

Consider – The accused is not guilty of perjury if he or she honestly but mistakenly believed that the statement was true

If no, then the accused is guilty of perjury (as long as you also answered yes to questions 1 and 2)

If yes, then the accused is not guilty of perjury

Last updated: 11 July 2018

7.8.2 Common Law Perjury

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Introduction

1. Perjury is an indictable common law offence (*R v Aylett* (1785) 99 ER 973), as well as statutory offence (see 7.8.1 Statutory Perjury).

2. The operation of common law perjury has been specifically preserved by *Crimes Act 1958* s 314(3).

Charging an accused who has made multiple false statements

3. As each false statement constitutes a separate crime, each false statement should usually be charged as a separate offence (*Traino v R* (1987) 45 SASR 473).
4. See 7.8.1 Statutory Perjury for further information concerning this issue.

Elements

5. Common law perjury has the following five elements:

    i) The accused made a false statement;

    ii) The false statement was made on oath or affirmation

    iii) The false statement was made in a judicial proceeding;

    iv) The false statement was material to the judicial proceeding; and

    v) The accused made the false statement knowingly.

The accused made a false statement

6. The first element that the prosecution must prove is that the accused made a false statement.
7. The word "false" is to be given its ordinary English meaning: a statement is "false" if it is untrue (*R v Davies* (1974) 7 SASR 375).[1125]
8. The prosecution must specify the statement that is alleged to be false. It will usually not be sufficient for the prosecution to rely upon an entire transcript of testimony and allege that the witness gave false evidence (*Stanton v Abernathy* (1990) 19 NSWLR 656).
9. Where the prosecution relies on oral evidence to prove the statement was false, the prosecution must either call two witnesses, or one witness who is corroborated (*R v Linehan* [1921] VLR 582). See 'Proving the statement was false' in 7.8.1 Statutory perjury for information on the requirement of corroboration.

The false statement was made on oath or affirmation

10. The second element relates to the circumstances in which the false statement was made. It must have been made on oath or affirmation.
11. For this element to be met, the oath or affirmation must have been lawfully administered (*R v Charles* (1866) 3 WW & A'B).
12. For an oath or affirmation to have been lawfully administered, the body that administered it must have:

    - Had the power to administer oaths or affirmations (*R v Shuttleworth* [1909] VLR 431. See also Evid*ence (Miscellaneous Provisions) Act 1958* s 111); and

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[1125] There is some early authority (*Ockley and Whitlebye's Case* (1622); *Allen v Westley* (1629)) which suggests that an accused who has made a true statement believing it to be false (or being reckless as to whether it was true or false) could be convicted of perjury. However, modern authorities (e.g. *R v Davies* (1974) 7 SASR 375) seem to require that the statement actually be false.

- Had the jurisdiction to hear the matter before it (*R v Kilkenny* (1890) 16 VLR 139; *R v Charles* (1866) 3 WW & A'B; *R v Ashby* (2010) 25 VR 107; *R v Dobos* (1984) 58 ACTR 10.

13. See also *Evidence (Miscellaneous Provisions) Act 1958* s 151).
14. An oath will be lawfully effective even if:
    - A religious text is not used;
    - The accused did not have a religious belief, or a religious belief of a particular kind; or
    - The accused did not understand the nature and consequences of the oath (*Evidence Act 2008* s 24).
15. The accused must have been legally competent to take the oath or make the affirmation, declaration or affidavit (*R v Kilkenny* (1890) 16 VLR 139).

The false statement was made in a judicial proceeding

16. The third element requires the oath or affirmation to have been sworn or made in a judicial proceeding (*R v Aylett* (1785) 99 ER 973).
17. A judicial proceeding is a 'proceeding which takes place in or under the authority of any court of justice, or which relates to the administration of justice, or which legally ascertains any right or liability' (Stephan, A Digest of the Criminal Law (5th ed, 1894), 107).
18. Judicial proceedings include the civil and criminal processes and judgments of the courts (*Lipohar v R* (1999) 200 CLR 485).
19. The internal arrangements of a court (e.g. its internal administrative procedures) are not a 'judicial proceeding' (*R v Fingleton* (2005) 227 CLR 166).

The statement must be 'material' to the judicial proceeding

20. The fourth element requires the statement to have been material to the relevant judicial proceeding (*R v Davies* (1974) 7 SASR 375).
21. A statement will have been material if it was significant enough to have been capable of affecting a decision concerning a fact in issue. This includes statements about the defendant's credit or a witness' credit. The effect may be direct or indirect (*R v Davies* (1974) 7 SASR 375; *R v Lewis* (1914) 10 TASLR 48).
22. To be 'material', the statement must have been practically relevant to the proceeding. Statements which are too remote, or which are only theoretically relevant, are not 'material' (*R v Davies* (1974) 7 SASR 375).
23. The standard by which materiality is measured is an objective one (*R v Millward* [1985] 1 All ER 859).
24. Materiality turns on the significance of the false statement actually made, and not on the significance a true statement would have had (*R v Millward* [1985] 1 All ER 859).
25. It is for the judge to determine, as a matter of law, whether a statement is capable of constituting a material statement. It is for the jury to determine, as a matter of fact, whether the statement actually was material (*R v Davies* (1974) 7 SASR 375).

The false statement was made knowingly

26. The fifth element requires the false statement to have been made 'knowingly'.
27. See 7.8.1 Statutory Perjury for further information concerning this element.

Last updated: 11 July 2018

7.8.2.1 Charge: Common Law Perjury

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I must now direct you about the crime of perjury. To prove this crime, the prosecution must prove the following five elements beyond reasonable doubt.

One – the accused made a false statement.

Two – the accused made the false statement [under oath/on affirmation].

Three – the accused made the false statement in a judicial proceeding.

Four – the statement was material to the judicial proceeding.

Five – the accused knew that the statement was false, or did not believe that it was true.

I will now explain each of these elements in more detail.

The Accused Made a False Statement

The first element that the prosecution must prove beyond reasonable doubt is that the accused made a statement which was false.

In this case the prosecution alleged that NOA made the following false statement: [*identify alleged false statement*].[1126]

[*Summarise relevant evidence and arguments about whether the statement was false.*]

[*Where a* corroboration direction *is required, add the following shaded section.*]

The law says that you must not find this element to have been proven on the basis of the evidence of one witness alone. You must be satisfied that there is additional evidence in the case that supports the witness's allegation that the statement was false.

In this case, the prosecution relies on the following evidence to support NOW's allegation: [*Identify evidence capable of providing corroboration*]. This is the only evidence that can support NOW's evidence for this purpose.

It is for you to determine, based on all the evidence, whether NOA made a false statement. It is only if you are satisfied, beyond reasonable doubt, that s/he did, that this first element will be met.

The False Statement was made in Prohibited Circumstances

The second element that the prosecution must prove beyond reasonable doubt is that the accused made the false statement [under oath/on affirmation].

[1126] This charge is designed for use in cases where the accused makes an untrue assertion, or purports to verify the truth of a statement which is untrue. It will need to be modified if it is alleged that the accused made a false statement by omitting to mention information which the law required him or her to mention.

In this case it is not disputed that the relevant statement was made [under oath/on affirmation]. You should therefore have no difficulty finding this element proven.[1127]

The Statement was made in a Judicial Proceeding

The third element that the prosecution must prove beyond reasonable doubt is that the accused made the statement in a judicial proceeding.

In this case, it is not disputed that the statement was made [*identify relevant proceeding*], and that [*identify relevant proceeding*] is a "judicial proceeding". You should therefore have no difficulty finding this element proven.[1128]

The Statement was Material to the Judicial Proceeding

The fourth element that the prosecution must prove beyond reasonable doubt is that the statement was material to the judicial proceeding. This will only be the case if the statement could have affected the court's decision, or whether the accused or another witness was believable.

To find that this element is proved, you do not need to be satisfied that the statement actually did affect the outcome in some way. It is sufficient if it was capable of having such an effect.

In this case the prosecution alleged that the statement was capable of affecting [*identify relevant determination of fact/credibility of accused/credibility of witness*].

[*Summarise evidence and/or arguments about materiality.*]

The False Statement was made Knowingly

The fifth element relates to the state of mind the accused had when s/he made the statement. The prosecution must prove that the accused either knew that the statement was false, or did not believe that it was true.

This element will not be met if NOA honestly but mistakenly believed the statement was true. A person cannot be convicted of perjury simply because they made a mistake. For this element to be satisfied NOA must have actually known that it was untrue to state that [*identify statement*], or at least not believed that was true.

[*Summarise evidence and/or arguments about the accused's state of mind.*]

Relate Law to the Evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, before you can find NOA guilty of perjury the prosecution must prove to you beyond reasonable doubt:

One – that s/he made a false statement; and

[1127] If there is a factual dispute over whether the accused was under a legal obligation to tell the truth, or whether the oath or affirmation was lawfully made or administered, this section will need to be modified.

[1128] If there is a dispute over whether the relevant proceeding was a "judicial proceeding", this section will need to be modified.

Two – that the false statement was made [under oath/on affirmation]; and

Three – the statement was made in a judicial proceeding; and

Four – the statement was material to the judicial proceeding; and

Five – that NOA knew that the statement was false, or did not believe that it was true.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of perjury.

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7.8.2.2 Checklist: Common Law perjury

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Five elements the prosecution must prove beyond reasonable doubt:

1. The accused made a false statement; and

2. The accused made the false statement on oath or under affirmation; and

3. The accused made the false statement in a judicial proceeding; and

4. The statement was material to the proceeding; and

5. The accused knew the statement was false or did not believe it was true.

False Statement

1. Did the accused make a false statement?

*Consider – **There must be evidence supporting the primary witness' evidence that the statement is false.***

If yes, then go to 2

If no, then the accused is not guilty of perjury

Oath or affirmation

2. Did the accused make the false statement on oath or under affirmation?

If yes, then go to 3

If no, then the accused is not guilty of perjury

Judicial Proceedings

3. Was the false statement made in a judicial proceeding?

If yes, then go to 4

If no, then the accused is not guilty of perjury

Statement was material

4. Was the false statement material to the proceeding?

*Consider – **A statement is material if it could have affected the court's decision, or the credibility of a witness.***

If yes, then go to 5.1

If no, then the accused is not guilty of perjury

Knowledge that the statement was false

5.1 Did the accused know the statement was false?

If yes, then the accused is guilty of perjury (as long as you also answered yes to questions 1, 2, 3 and 4)

If no, then go to 5.2

5.2 Has the prosecution proved that the accused did not believe the statement was true?

Consider – The accused is not guilty of perjury if he or she honestly but mistakenly believed that the statement was true

If yes, then the accused is guilty of perjury (as long as you also answered yes to questions 1, 2, 3 and 4)

If no, then the accused is not guilty of perjury

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7.8.3 Perverting and Attempting to Pervert the Course of Justice

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1. The offences of attempting to pervert the course of justice and perverting the course of justice are common law offences in Victoria (*R v Vreones* [1891] 1 QB 360; *R v Murphy* (1985) 158 CLR 596).
2. The existence of these offences is recognised in s 320 *Crimes Act 1958*.
3. At common law, both the offences of attempting to pervert the course of justice and perverting the course of justice are substantive and not inchoate (*R v Rogerson* (1992) 174 CLR 268 at 279; *R v Beckett* (2015) 256 CLR 305, [37]).

Elements of the offences

4. The offence of attempting to pervert the course of justice has the following elements:
   (a) The accused engaged in conduct that had the tendency to pervert the course of justice.
   (b) The accused intended for that conduct to pervert the course of justice.
5. The offence of perverting the course of justice has the following elements:
   (a) The accused engaged in conduct that did pervert the course of justice.
   (b) The accused intended for that conduct to pervert the course of justice.
6. Due to the overlap between these two offences, this commentary will describe both offences.

The accused engaged in conduct that tends to pervert or did pervert the course of justice

What is a course of justice?

7. Police investigations of an actual or suspected offence are not part of the course of justice because the police do not administer justice (*R v Rogerson* (1992) 174 CLR 268, 276 (Mason CJ) and 283 (Brennan and Toohey JJ)).

8. Historically, the offences of perverting and attempting to pervert the course of justice existed to protect the processes and procedures of the Sovereign's courts and through this protect the administration of justice (*R v Rogerson* (1992) 174 CLR 268, 303).

9. The course of justice begins when the jurisdiction of a court or competent judicial body has been invoked (*R v Rogerson* (1992) 174 CLR 268, 276 (Mason CJ), 283 (Brennan and Toohey JJ) and 303 (McHugh J)).

10. In criminal proceedings, it was said "the course of justice [commences with]… the laying of information against or the arrest of an accused person" (*R v Rogerson* (1992) 174 CLR 268, 303).

11. However, in light of the s 5 of the *Criminal Procedure Act 2009* (Vic) a criminal proceeding (or the invocation of the court's jurisdiction) does not commence until the

    (a) the filing of a charge sheet in accordance with s 6;

    (b) direct indictment under s 159 or

    (c) a direction under s 415 to be tried for perjury.

12. This suggests that the notion that a course of justice begins when a person is arrested is not correct in Victoria.

13. For conduct to amount to the actus reus of the offence of perverting the course of justice, the conduct must have been engaged in after the jurisdiction of a court or competent judicial body has been invoked. Conduct frustrating a police investigation, before the invocation of a court's jurisdiction, therefore does not amount to the actus reus of the offence of perverting the course of justice.

14. In contrast, the offence of attempting to pervert the course of justice can be committed by engaging in the relevant conduct before the institution of judicial proceedings (*R v Rogerson* (1992) 174 CLR 268, 277 (Mason CJ), 283 (Brennan and Toohey JJ), 293–4 (Deane J) and 304–5 (McHugh J); *R v Beckett* (2015) 256 CLR 305, [34]).

15. Therefore, it is possible for the frustration of a police investigation, before judicial proceedings have been instituted, to amount to the *actus reus* of *attempting to pervert the course of justice*. This is because frustrating a police investigation, in the circumstances of the case, could have the tendency to pervert the course of justice by hindering the ability of the police to invoke a court's jurisdiction or ascertain the truth of facts presented to a court.

16. The course of justice ends when the rights and liabilities of the parties are finally determined and declared by the court or other competent judicial body (*R v Rogerson* (1992) 174 CLR 268, 304).

17. The course of justice includes sentencing hearings (see, e.g. *Saleem v The Queen* [2014] VSCA 190) and appeals (see, e.g. *Zotos v The Queen* [2014] VSCA 324).

Defining perversion of the course of justice

18. The course of justice involves the exercise by a court, or competent judicial authority, of its jurisdiction to enforce, adjust or declare the rights and liabilities of the parties to a proceeding (*R v Rogerson* (1992) 174 CLR 268 at 280 (Brennan and Toohey JJ)).

19. The perversion of the course of justice therefore, occurs when the conduct of an accused impairs, obstructs, adversely interferes or prevents the court from administering justice (*R v Rogerson* (1992) 174 CLR 268, 280 (Brennan and Toohey JJ); *Meissner v R* (1995) 184 CLR 132, 148 (Deane J)).

20. This definition captures all judicial proceedings, including civil and criminal proceedings.

21. The following are recognised ways in which the proper administration of justice can be interfered with and thus the course of justice perverted:

    (a) Erosion of the integrity of the court or competent judicial authority; or

    (b) Hindering access to the court or competent judicial authority; or

    (c) Deflecting applications that would be made to the court or competent judicial authority; or

    (d) Denying the court or competent judicial authority knowledge of relevant law; or

    (e) Denying the court or competent judicial authority knowledge of the true circumstances and facts of the case; or

    (f) Impeding the free exercise of the jurisdiction and power of the court or competent judicial authority including the power to execute its decisions (R v Rogerson (1992) 174 CLR 268, 280 (Brennan and Toohey JJ)).

22. This list is not exhaustive, but merely illustrative.

23. For the offence of perverting the course of justice, the conduct of the accused must result in the perversion of the course of justice. Therefore, the prosecution must prove there has been an adverse interference with the course of justice, for example in one of the ways listed in paragraph 21. The tendency to pervert the course of justice (e.g. in one of the ways listed in paragraph 21) is sufficient for the attempt offence [see below on 'Defining tendency'].

Defining tendency

24. For the attempt offence, conduct must objectively tend to pervert the course of justice. This will be satisfied, for example, when conduct has the objective capacity to result in one of the things listed in paragraph 21 (*R v Rogerson* (1992) 174 CLR 268 at 280; *Meissner v R* (1995) 184 CLR 132 at 148 (Deane J)).

25. The tendency of conduct to pervert the course of justice will be proved by showing that without further action by the accused, there is a real possibility or risk that what he or she said or did had the capacity to interfere with the proper administration of justice (*R v Murray* [1982] 1 WLR 475; *Healy v The Queen* (1995) 15 WAR 104 at 107 (Malcolm CJ)).

26. "Without further action" does not mean the accused cannot be guilty of the attempt offence unless it is shown that the conduct of the accused "without more" risks perverting the course of justice (*R v Allan* [1995] 2 VR 468, 472). Rather, the first act committed that has the tendency to pervert the course of justice is sufficient.

27. The tendency of the conduct is not to be judged on the particular circumstances of the case but by the risk it poses to the course of justice in the ordinary course. This is so even if, in the particular circumstances of the case, there was no actual risk of perverting the course of justice (*R v Aydin* (2005) 11 VR 544 at 546; see also *Smith v R* (2013) 39 VR 336, [46]–[47]).

28. Therefore, impossibility is no defence to attempting to pervert the course of justice (*R v Aydin* (2005) 11 VR 544 at 546).

29. For example, in *R v Aydin*, the alleged threats and bribes were made to a police officer who was part of a controlled operation. Therefore, there was no actual risk of the officer being induced to act on the threats or bribes. The defendant was still convicted of attempting to pervert the course of justice because in the ordinary course bribing or threatening a police officer does pose a real risk (or have the tendency to) interfere the course of justice (*R v Aydin* (2005) 11 VR 544, at 546).

Proof of a specific offence in relation to possible criminal proceedings

30. Where the conduct is engaged in before the commencement of judicial proceedings, the conduct must still tend to pervert "imminent, probable or even possible judicial proceedings" (*R v Rogerson* (1992) 174 CLR 268 at 277).

31. The prosecution does not need to prove the commission of an identifiable or specific offence committed by the accused or third party, in order to satisfy the requirement that a future prosecution was "imminent, probable or possible". It is sufficient if the conduct had the tendency to deflect the police from bringing a prosecution for some offence (see *R v Rogerson* (1992) 174 CLR 268, 278 (Mason CJ), 288 (Brennan and Toohey JJ) and 294 (Deane J), c.f. 307 (McHugh J in dissent)).

32. If the prosecution case is that the accused's conduct perverted a future prosecution for some offence, this will generally require proof that the conduct deflected an inevitable police inquiry and consequently deflected the police from instituting an "imminent, probable or possible" prosecution for the subject matter of the inquiry (*R v Rogerson* (1992) 174 CLR 268 at 285 (Brennan and Toohey JJ)).

33. However, in the absence of proof of an identifiable offence, it is likely to be more difficult to prove that the conduct of the accused had the tendency to pervert an "imminent, probable or possible" course of justice (and that it was intended to bring about that result) (*R v Rogerson* (1992) 174 CLR 268 at 279 (Mason CJ), 286 (Brennan and Toohey JJ) and 294 (Deane J)).

34. The case of *R v Rogerson* provides an example of how this principle applies in a case where there is no proof of an identifiable offence. There was evidence that the accused had received bags of white powder in exchange for cash at an airport, raising the suspicion of criminal conduct. The prosecution did not seek to prove this was a drug related transaction, but did prove after the swap the accused then conspired with others to concoct a false story about the origins of the money. At the time the false story was formulated, no police investigation or prosecution had commenced. It was held to be open to the jury to find the accused had fabricated a story to deceive police about the true origins of the money, and this deception had the tendency to deflect a probable prosecution (i.e. the course of justice), even though the offence could not be identified with precision (*R v Rogerson* (1992) 174 CLR 268 at 279 (Mason CJ) and 288 (Brennan and Toohey JJ)).

35. See also the section below titled 'Penalty notices and warning about prosecution' in respect the impact of warnings about future prosecution and how it relates to the possibility of future proceedings.

Inducing a person to alter evidence or plea

36. Conduct that involves threatening or bribing a person to alter their evidence (see *Librizzi v Western Australia* (2006) 33 WAR 104) or plead guilty when that person would not have otherwise done so (see *Meissner v R* (1995) 184 CLR 132) has the tendency to pervert the course of justice.

37. If the conduct of the accused is merely lawful persuasion aimed at securing a legitimate end, namely an end consistent with the administration of justice, then the course of justice will not tend to or be perverted (*Meissner v R* (1995) 184 CLR 132 at 142 (Brennan, Toohey and McHugh JJ), see also 149 (Deane J) and 157 (Dawson J)).

38. For example, it is lawful to give reasoned argument or advice, no matter how strongly that advice or argument is put, to persuade someone to plead guilty (*Meissner v R* (1995) 184 CLR 132 at 142 (Brennan, Toohey and McHugh JJ)). This is because deciding to plead guilty is an end compatible with the proper administration of justice. Furthermore, merely giving advice to a person recommending they plead guilty (e.g. by their lawyer) generally maintains their free choice in the matter.

39. However, a plea resulting from intimidation is not made freely. This would amount to the actus reus of the attempt offence. This is because when the court acts on this plea it has been misled or denied the true circumstances of the case (*Meissner v R* (1995) 184 CLR 132, 142 (Brennan, Toohey and McHugh JJ)).

40. It is recognised that the line between lawful persuasion and improper means is difficult to draw. This difficulty is resolved by assessing whether in all the circumstances of the case the inducement, argument or advice could reasonably be regarded as compatible with the maintenance of free choice by that person (*Meissner v R* (1995) 184 CLR 132, 143 (Brennan, Toohey and McHugh JJ)).

41. Evidence of:

    (a) The existence of an ulterior or improper motive;

    (b) The nature of the relationship between the accused and other person;

    (c) The nature of the persuasion (e.g. was the conduct aimed at advancing a legitimate interest of the person entering the plea?); and

    (d) Harassment or intimidation;

    are all relevant to determining whether the conduct of the accused amounted to improper or unlawful pressure and therefore tended to pervert the course of justice (*Meissner v R* (1995) 184 CLR 132, 143 (Brennan, Toohey and McHugh JJ), 149 (Deane J)).

42. Where the means employed by the accused extend beyond lawful persuasion into improper or unlawful pressure, the actus reus of the attempt offence will be satisfied, even if the purpose for engaging in the conduct was compatible with the administration of justice (i.e. preventing a person from committing perjury). In contrast, if the aim of the conduct is not compatible with the administration of justice then the actus reus will be met even if the conduct of the accused only amounts lawful persuasion (*Meissner v R* (1995) 184 CLR 132 at 142 (Brennan, Toohey and McHugh JJ), 149 (Deane J) and 159 (Dawson J); see also *R v Kellett* [1976] QB 372, 388).

Intention to pervert the course of justice

43. The second element of both offences is that the accused intended to pervert the course of justice (*R v Rogerson* (1992) 174 CLR 268 at 277 (Mason CJ) and 282 (Brennan and Toohey JJ)).

44. However, a person can be guilty of either offence even if s/he does not have the concepts of 'course of justice' or 'pervert' in mind when they engage in the relevant conduct (*Meissner v R* (1995) 184 CLR 132 at 159 (Dawson J); see also *Librizzi v R* (2006) 33 WAR 104, [48]).

45. It is sufficient to prove the person engaged in conduct for a purpose that would result in the perversion of the course of justice, if that purpose was carried out successfully (*Meissner v R* (1995) 184 CLR 132 at 144 (Brennan, Toohey and McHugh JJ) and 159 (Dawson J); see also *Librizzi v R* (2006) 33 WAR 104, [48]; cf *Hatty v Pilkinton (No 2)* (1992) 35 FCR 433 at 439).

46. For example in *Meissner v R*, the relevant mens rea was the intention to induce the entry of a guilty plea when the person induced would not, or might not, have entered that plea when exercising free choice (*Meissner v R* (1995) 184 CLR 132 at 144–147).

47. Another example is *Tognolini v R*, where the accused attempted to prevent a prosecution for offences for which he believed he was innocent. The defence argued the accused did not have the requisite intention to pervert the course of justice because of the belief in his innocence. The court held the accused did intend to induce and threaten witnesses to alter their evidence and this conduct, if successful, result in the perversion of the course of justice (*Tognolini v R* (2011) 32 VR 104, [44]).

Proving intention before a course of justice has commenced

48. For the offence of attempting to pervert the course of justice, the prosecution must prove the accused's intention related to a "course of justice". Therefore, the conduct must be directed towards perverting "imminent, probable or even possible judicial proceedings" (*R v Rogerson* (1992) 174 CLR 268, 277 (Mason CJ)).

49. It is not sufficient to prove a mere intention to deceive a police investigation without a connection to future judicial proceedings (*R v Rogerson* (1992) 174 CLR 268 at 284 (Brennan and Toohey JJ)).

50. The evidence must be capable of showing that:

    - The accused believed, or contemplated, a court's jurisdiction might be invoked in the future unless s/he deflected certain investigations (e.g. police investigations); and
    - The accused knew that the act would have the manifest tendency to pervert that course of justice or intended that the act would have that effect (*R v Rogerson* (1992) 174 CLR 268, 277, 282 (Mason CJ); 284 (Brennan and Toohey JJ); see also *Reg v Spezzano* (1977) 76 DLR (3d) 160 at 163).

51. It is only necessary for the prosecution to prove the accused contemplated "imminent, probable or possible" judicial proceedings (*R v Rogerson* (1992) 174 CLR 268, 277 (Mason CJ) and 284 (Brennan and Toohey JJ)).

52. Therefore, the prosecution does not need to prove the possibility of proceedings in fact and as such it is not necessary for any other party, agency or person (including the police) to have contemplated proceedings before the accused engaged in the alleged conduct (*R v Rogerson* (1992) 174 CLR 268, 277 (Mason CJ) and 284 (Brennan and Toohey JJ)).

Penalty notices and warning about prosecution

53. If the prospect of judicial proceedings are distant or hypothetical, and there is no indication that the accused contemplated such proceedings, this will not be sufficient to amount to an intention to pervert the course of justice (*R v Einfeld* (2008) 71 NSWLR 31, [134]).

54. For example, making false statements in respect of penalty notices issued under an administrative system, will not in the ordinary course amount to the attempt offence.

55. Typically, under an administrative system, judicial proceedings are only instituted if the person who had received the notice wished to appeal it. Where there is no indication that the accused had contemplated such an appeal, there is no "imminent, probable or possible" judicial proceeding to be perverted (*Police v Zammitt* [2007] SASC 37, [54]–[56]; *R v Einfeld* (2008) 71 NSWLR 31).

56. Conversely if at the time the accused engaged in the relevant conduct, the accused had previously been warned of a probable prosecution, or had otherwise contemplated one (i.e. considering an appeal of a penalty notice), then it is likely to be open to find the accused engaged in the alleged conduct intending to deflect the contemplated proceedings (see, e.g. *R v Beckett* (2015) 256 CLR 305).

Differences between the two offences

57. The two offences both involve conduct with an intention to pervert the course of justice, but are distinguished by result (*R v Beckett* (2015) 256 CLR 305, [37]).

58. There are two key differences between the two offences:

    (a) First, to prosecute the offence of perverting the course of justice, a judicial proceeding must be on foot at the time the relevant conduct was undertaken and thus a course of justice commenced [see the section above on the commencement of the course of justice].

(b) Second, for the offence of attempting to pervert the course of justice, the prosecution must only prove the conduct had the tendency to pervert the course of justice. In contrast, for the offence of perverting the course of justice it must be proved that the conduct actually did effect such a perversion.

59. Under s 320 of the *Crimes Act 1958* both offences have the same maximum sentence of 25 years imprisonment.

Last Updated: 27 April 2016

7.8.3.1 Charge: Perverting the Course of Justice

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This charge should only be used for the offence of perverting the course of justice.

The elements

I must now direct you about the offence of perverting the course of justice. To convict the accused of this offence, the prosecution must prove the following 2 elements beyond reasonable doubt:

One – the accused engaged in conduct that perverted the course of justice.

Two – the accused intended for that conduct to pervert the course of justice.

I will now explain each of these elements in more detail.

Perversion of the course of justice

The first element requires you to be satisfied the accused engaged in conduct that perverted the course of justice.

The 'course of justice' is the administration of the law by a court. Perversion of the course of justice means NOA's conduct interfered with the administration of justice by a court.

The prosecution say [*describe NOA's alleged conduct*] interfered with the administration of justice because [*describe how NOA's conduct is alleged to have interfered with the administration of justice*].

[*If the defence dispute that the accused engaged in the alleged conduct, add the following shaded section.*]

The defence argue the prosecution has not proved, beyond reasonable doubt, that NOA [*describe alleged conduct*].

[*Refer to competing prosecution and defence evidence and arguments.*]

[*If the defence dispute that the conduct perverted the course of justice, add the following shaded section.*]

The defence argues NOA's conduct did not interfere with the administration of justice because [*refer to relevant defence and prosecution evidence and arguments*].

If you are satisfied NOA [*describe conduct and how it is alleged to have interfered with the administration of justice*], the first element of this offence be met.

Intention to pervert the course of justice

The second element the prosecution must prove is at the time the accused engaged in the relevant conduct, s/he intended to pervert the course of justice.

In this case, the prosecution argues when NOA [*describe alleged conduct*], s/he intended that [*describe basis for alleged perversion of the course of justice*].[1129]

I direct you as a matter of law, this element does not require the prosecution to prove NOA realised or understood the conduct would result in a perversion of the course of justice.

[*Summarise relevant prosecution and defence evidence and arguments*]

If you are satisfied, at the time the NOA [*describe alleged conduct*], s/he intended to pervert the course of justice in [*describe relevant proceeding*], then this element will be met.

Summary

To summarise, before you can find NOA guilty of perverting the course of justice the prosecution must prove to you beyond reasonable doubt:

One – NOA engaged in conduct that perverted the course of justice; and

Two – NOA intended to pervert the course of justice.

If you find that either of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of perverting the course of justice.

Last Updated: 27 April 2016

7.8.3.2 Checklist: Perverting the Course of Justice

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Two elements the prosecution must prove beyond reasonable doubt:

1. The accused engaged in conduct that perverted the course of justice; and

2. The accused intended for that conduct to pervert the course of justice.

Perversion of the course of justice

1. Did the accused's conduct interfere with the administration of justice by a court?

If Yes, then go to 2

If No, then the accused is not guilty of perverting the course of justice

---

Intention to pervert the course of justice

2. Did the accused intend to pervert the course of justice?

If Yes, then the accused is guilty of perverting the course of justice (as long as you have answered yes to question 1)

If No, then the accused is not guilty of perverting the course of justice

Last updated: 12 September 2019

[1129] For example, when NOA threatened NOW to alter NOW's evidence, NOA intended that NOW would give false evidence to the court in favour of NOA's innocence.

7.8.3.3 Charge: Attempting to Pervert the Course of Justice (Course of Justice Commenced)

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This charge should only be used for the offence of attempting to pervert the course of justice where it is not in dispute the accused engaged in the relevant conduct after a course of justice had commenced.

The elements

I must now direct you about the offence of attempting to pervert the course of justice. To convict the accused of this offence, the prosecution must prove the following 2 elements beyond reasonable doubt:

One – the accused engaged in conduct that had the tendency to pervert the course of justice.

Two – the accused intended for that conduct to pervert the course of justice.

I will now explain each of these elements in more detail.

Tendency to pervert the course of justice

The first element requires you to be satisfied the accused engaged in conduct that tended to pervert the course of justice.

The 'course of justice' is the administration of the law and justice in a court proceeding. The phrase 'tendency to pervert the course of justice' means NOA's conduct posed a real risk or possibility of interfering with the administration of justice by a court.

The prosecution say [*describe NOA's alleged conduct*] posed a real risk or possibility of interfering with the administration of justice because [*describe how this is alleged to have potentially interfered with the administration of justice*].[1130]

[*If the defence dispute that the accused engaged in the alleged conduct, add the following shaded section.*]

The defence argues that the prosecution has not proved, beyond reasonable doubt, that NOA [*describe alleged conduct*].

[*Refer to competing prosecution and defence evidence and arguments.*]

[*If the defence dispute that the conduct had a tendency to pervert the course of justice, add the following shaded section.*]

The defence argues that NOA's conduct did not pose a real risk or possibility of interfering with the administration of justice because [*refer to relevant defence evidence and arguments*].

[*If the issue of impossibility arises, add the following shaded section.*]

In deciding whether NOA's conduct had a tendency to pervert the course of justice, I direct you as a matter of law it is not relevant that [*describe basis of impossibility*]. Instead, you must look at NOA's conduct objectively and decide whether [*describe alleged conduct without reference to basis of impossibility, e.g.* "offering a bribe to a police officer"] in general poses a real risk or possibility of interfering with the administration of justice by a court.

If you are satisfied NOA engaged in conduct that tended to interfere with the administration of justice in the [*describe relevant court proceeding*], this first element will be met.

[1130] If required, see 7.8.3 Perverting and attempting to pervert the course of justice for guidance on when conduct may tend to pervert the course of justice.

Intention to pervert the course of justice

The second element the prosecution must prove is at the time the accused engaged in the relevant conduct, s/he intended to pervert the course of justice.

In this case, the prosecution must prove, beyond reasonable doubt, that when NOA [*describe alleged conduct*], s/he intended that [*describe basis for alleged perversion of the course of justice*].[1131]

I direct you as a matter of law, this element does not require the prosecution to prove NOA realised or understood the conduct would result in a perversion of the course of justice.

[*Summarise relevant prosecution and defence evidence and arguments*]

If you are satisfied, at the time the NOA [*describe alleged conduct*], s/he intended to pervert the course of justice in [*describe relevant proceeding*], then this element will be met.

Summary

To summarise, before you can find NOA guilty of attempting to pervert the course of justice the prosecution must have proved to you beyond reasonable doubt:

One – NOA engaged in conduct that tended to pervert the course of justice; and

Two – NOA intended to pervert the course of justice.

If you find that either of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of attempting to pervert the course of justice.

Last Updated: 27 April 2016

7.8.3.4 Checklist: Attempting to Pervert the Course of Justice (Course of Justice Commenced)

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Two elements the prosecution must prove beyond reasonable doubt:

1. The accused engaged in conduct that had the tendency to pervert the course of justice; and

2. The accused intended for that conduct to pervert the course of justice.

Attempting to pervert the course of justice

1. Did the accused engage in conduct that posed a real risk or possibility of interfering with a court proceeding?

If Yes, then go to 2

If No, then the accused is not guilty of attempting to pervert the course of justice

---

Intention to pervert the course of justice

2. Did the accused intend to pervert the course of justice?

[1131] For example, when NOA threatened NOW, she intended that NOW would give false information to police which would prevent them from charging NOA with assaulting NO3P.

If Yes, then the accused is guilty of attempting to pervert the course of justice (as long as you have answered yes to Question 1)

If No, then the accused is not guilty of attempting to pervert the course of justice

Last updated: 13 September 2019

7.8.3.5 Charge: Attempting to Pervert the Course of Justice (No Course of Justice Commenced)

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This charge should only be used for the offence of attempting to pervert the course of justice where it is not in dispute the accused engaged in the relevant conduct before a course of justice had commenced.

The elements

I must now direct you about the offence of attempting to pervert the course of justice. To convict the accused of this offence, the prosecution must prove the following 2 elements beyond reasonable doubt:

One – the accused engaged in conduct that had the tendency to pervert the course of justice.

Two – the accused intended for that conduct to pervert the course of justice.

I will now explain each of these elements in more detail.

Tendency to pervert the course of justice

The first element requires you to be satisfied the accused engaged in conduct that tended to pervert the course of justice. This involves two questions.

One – Was there a course of justice?

Two – Did the conduct create a real risk or possibility of interfering with that course of justice?

Connection to a future proceeding

For the purpose of this offence, a 'course of justice' is the administration of the law in a court proceeding.

At the time NOA [*describe alleged conduct*] a court proceeding had not yet commenced. The prosecution must therefore prove that a court proceeding was "imminent, probable or possible" at the time NOA [*describe alleged conduct*].

[*Where the prosecution identifies a specific offence/cause of action for which proceedings would have been instituted add the following.*]

The prosecution says [*describe alleged conduct of NOA or any other person likely to lead to a future court proceeding*] was likely to lead to [*describe future prosecution/court proceeding*] because [*summarise relevant prosecution arguments and evidence*].

You must decide if the prosecution has proved beyond reasonable doubt the commencement of a court proceeding was likely. In other words, were future proceedings for [*describe conduct of NOA or any other person likely to lead to a future court proceeding*] "imminent, probable or possible"?

[*Where the prosecution does not identify a specific offence/cause of action add the following.*]

The prosecution does not need to identify a specific [offence/cause of action] to satisfy this requirement. However, the prosecution must prove future proceedings were not 'distant or hypothetical' but were likely to result from [*summarise relevant inquiries, e.g.* "police investigations into

the alleged criminal conduct of NOA"].

[*If the defence dispute the likelihood of a future proceeding add the following shaded section.*]

The defence argues that proceedings for [*describe future prosecution/court proceeding*] were not "imminent, probable or possible" because [*summarise relevant defence arguments and evidence*].

[*Refer to competing prosecution and defence evidence and arguments.*]

Defining tendency

The second question is whether NOA's conduct created a real risk or possibility of interfering with that proceeding.

The prosecution say [*describe NOA's alleged conduct*] posed a real risk or possibility of interfering with the administration of justice because [*describe how this is alleged to have potentially interfered with the administration of justice*].[1132]

[*If the defence dispute that the accused engaged in the alleged conduct, add the following shaded section.*]

The defence argues that the prosecution has not proved, beyond reasonable doubt, that NOA [*describe alleged conduct*].

[*Refer to competing prosecution and defence evidence and arguments.*]

[*If the defence dispute that the alleged conduct had a tendency to pervert the course of justice, add the following shaded section.*]

The defence argues that NOA's conduct did not pose a real risk or possibility of interfering with the administration of justice because [*refer to relevant defence and prosecution evidence and arguments*].

[*Refer to competing prosecution and defence evidence and arguments.*]

[*If the issue of impossibility arises, add the following shaded section.*]

In deciding whether NOA's conduct had a tendency to pervert the course of justice, I direct you as a matter of law it is not relevant that [*describe basis of impossibility*]. Instead, you must look at NOA's conduct objectively and decide whether [*describe alleged conduct without reference to basis of impossibility, e.g.* "offering a bribe to a police officer"] in general poses a real risk or possibility of interfering with the administration of justice by a court.

If you are satisfied the prosecution has proved beyond reasonable doubt there was an "imminent, probable or possible" court proceeding and NOA's conduct posed a real risk or possibility of interfering with that proceeding, then this first element will be met.

Intention to pervert the course of justice

The second element the prosecution must prove is that at the time the accused engaged in the relevant conduct, s/he intended to pervert the course of justice.

[1132] If required, see 7.8.3 Perverting and attempting to pervert the course of justice for guidance on when conduct may tend to pervert the course of justice.

In this case, the prosecution must prove, beyond reasonable doubt, that when NOA [*describe alleged conduct*], s/he intended that [*describe basis for alleged perversion of the course of justice*].[1133]

I direct you as a matter of law, this element does not require the prosecution to prove NOA realised or understood the conduct would result in a perversion of the course of justice.

[*Summarise relevant prosecution and defence evidence and arguments.*]

[*If the defence argues that the accused did not have any future proceedings in contemplation at the time of the alleged conduct, add the following shaded section.*]

The defence argues NOA did not intend to interfere with the administration of justice because at the time s/he [*describe alleged conduct*] it cannot be proved NOA thought future proceedings were "imminent, probable or possible".

[*Identify relevant defence evidence and arguments.*]

In response, the prosecution argues that [*identify relevant prosecution evidence and arguments*].

If you are satisfied, at the time the NOA [*describe alleged conduct*], s/he intended to pervert the course of justice, then this element will be met.

Summary

To summarise, before you can find NOA guilty of attempting to pervert the course of justice the prosecution must have proved to you beyond reasonable doubt:

One – NOA engaged in conduct that tended to pervert the course of justice; and

Two – NOA intended to pervert the course of justice.

If you find that either of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of attempting to pervert the course of justice.

Last updated: 27 April 2016

7.8.3.6 Checklist: Attempting to Pervert the Course of Justice (No Course of Justice Commenced)

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Two elements the prosecution must prove beyond reasonable doubt:

1. The accused engaged in conduct that had the tendency to pervert the course of justice; and

2. The accused intended for that conduct to pervert the course of justice.

Attempting to pervert the course of justice

1. Did the accused engage in conduct that had a tendency to pervert the course of justice?

    1.1 Was there a court proceeding imminent, probable or possible?

[1133] For example, when NOA threatened NOW, she intended that NOW would give false information to police which would prevent them from charging NOA with assaulting NO3P.

If Yes, then go to 1.2

If No, then the accused is not guilty of attempting to pervert the course of justice

1.2 Did the accused's conduct create a real risk or possibility of interfering with that court proceeding?

If Yes, then go to 2

If No, then the accused is not guilty of attempting to pervert the course of justice

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Intention to pervert the course of justice

2. Did the accused intend to pervert the course of justice?

If Yes, then the accused is guilty of attempting to pervert the course of justice (as long as you have answered yes to Question 1)

If No, then the accused is not guilty of attempting to pervert the course of justice

Last updated: 12 September 2019

7.9 Prohibited Person Possess, Carry or Use a Firearm

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1. Section 5(1) of the *Firearms Act 1996* creates the offence of a prohibited person possessing, carrying or using a firearm.
2. The offence consists of three elements:
    - The item was a firearm
    - The accused possessed, carried or used the firearm
    - The accused is a prohibited person.

Firearm

3. Firearm is defined in *Firearms Act 1996* s 3 as follows:

firearm means any device, whether or not assembled or in parts—

(a) which is designed or adapted, or is capable of being modified, to discharge shot or a bullet or other missile by the expansion of gases produced in the device by the ignition of strongly combustible materials or by compressed air or other gases, whether stored in the device in pressurised containers or produced in the device by mechanical means; and

(b) whether or not operable or complete or temporarily or permanently inoperable or incomplete—

and which is not—

(c) an industrial tool powered by cartridges containing gunpowder or compressed air or other gases which is designed and intended for use for fixing fasteners or plugs or for similar purposes; or

(d) a captive bolt humane killer; or

(e) a spear gun designed for underwater use; or

(f) a device designed for the discharge of signal flares; or

(h) a device commonly known as a kiln gun or ringblaster, designed specifically for knocking out or down solid material in kilns, furnaces or cement silos; or

(i) a device commonly known as a line thrower designed for establishing lines between structures or natural features and powered by compressed air or other compressed gases and used for rescue purposes, rescue training or rescue demonstration; or

(j) a device of a prescribed class;

4. One effect of this definition is that a device continues to be a firearm even if it is rendered inoperable, such as through disassembly, or modifications to the barrel or firing pin (see, e.g. *Keys v Kitto* (1996) 90 A Crim R 288; *Carlson v Karlovsky* [1988] WAR 59; *Ali v The Queen* [2019] NSWCCA 207, [44]–[50]; *Beaton v Wray-Watts* [2003] WASCA 314, [35]).
5. Similarly, an object may be a firearm even if it has never been operable or complete. An object may be a firearm even if critical parts are missing (see *DPP v Morgan* (2013) 235 A Crim R 491, [40], [47]–[52], but c.f. *Jacob v The Queen* (2014) 240 A Crim R 239, [147]–[148] (Hulme J).
6. While it has not been the subject of consideration in Victoria, the equivalent provision in New South Wales has been the source of divergent judicial views on the extent to which disassembled parts can be treated as the whole item, or whether there must be some limitation on the capacity of a provision like paragraph (b) of the definition to transform unassembled or incomplete items into the whole item (compare *DPP v Morgan* (2013) 235 A Crim R 491, [40], [47]–[52] and *Jacob v The Queen* (2014) 240 A Crim R 239, [12]–[17] (Ward JA)[147]–[148] (Hulme AJ). See also *Ali v The Queen* [2019] NSWCCA 207, [45]–[50]). It is suggested that whether parts of a firearm should be treated as a disassembled firearm is a question of fact and degree.
7. In *Beaton v Wray-Watts*, the Western Australian Court of Appeal drew a distinction between whether the changes required to make an item into an operable firearm should be characterised as alterations (in which case the device would remain a firearm, even if inoperable) or manufacture (in which case the device would not be a firearm). The Court noted that it would be a matter of fact and degree whether the required changes amount to alteration or manufacture (*Beaton v Wray-Watts* [2003] WASCA 314, [35]–[39]).

Possession, carrying or use

8. The second element is that the accused possessed, carried or used the firearm.

9. *Firearms Act 1996* s 3(1) states that possession, in relation to a firearm, includes:

    i) Actual physical possession of the firearm;

    ii) Custody or control of the firearm;

    iii) Having and exercising access to the firearm, either solely or in common with others.

10. In each case, the directions required on the element of possession will depend on the issues which the evidence raises for consideration. The jury only needs to be directed about so much of possession as is in issue (*R v Bandiera* [1999] 3 VR 103, [20]; *R v Henderson & Warwick* (2009) 22 VR 662, [114]).

11. This definition, in substance, matches the definition of possession from s 3(1) of the *Firearms Act 1958*.

12. In the context of the *Firearms Act 1958* definition of possession, possession was held to cover:

    - Actual possession, in the sense explained in *Moors v Burke* (1919) 26 CLR 265 at 275 – 'in actual fact and without the necessity of taking any further step, the complete present personal physical control of the property to the exclusion of others not act in concert' whether by having 'present manual custody, or by having it where he alone has the exclusive right of power to place his hands on it, and so have manual custody when he wishes'; and

    - Physical custody or control, or having and exercising access to a weapon, whether alone or with others, regardless of any propriety or exclusive possessory rights. For this purpose, custody has its ordinary meaning of safe keeping, protection, charge or care, and control refers to actual power to deal with the firearm by restraint or direction. When dealing with the words custody, control and access, there is no "need for some physical act in connection with the weapon consistent with ownership or dominion" (*Yeates v Hoare* [1981] VR 1034, 1038. See also *Keys v Kitto* (1996) 90 A Crim R 288, 293).

13. Under the common law meaning of possession, the prosecution must prove that the accused:

    - Had physical custody or control of the firearm;
    - Intended to have or exercise physical custody or control of the firearm
    - Knew of the existence and nature of the firearm (*R v Maio* [1989] VR 281, 285; *He Kaw Teh v The Queen* (1985) 157 CLR 523, 537-539, 546, 585-587, 599-600; *Momcilovic v The Queen* (2011) 245 CLR 1, [16]; *R v Henderson & Warwick* (2009) 22 VR 662, [82], [86], [106], [107]; *Yeates v Hoare* [1981] VR 1034, 1039; *Seifeddine v The Queen* [2021] NSWCCA 214, [8]).

14. "Physical custody or control" is not limited to the accused having the firearm on their person. It also is apt to describe the situation where the person has placed the firearm somewhere that they have the exclusive right or power to take it into their hands. This may include where the accused has hidden the firearm somewhere, even if the hiding place is in a public location (*Moors v Burke* (1919) 26 CLR 265, 274; *Williams v Douglas* (1949) 78 CLR 521, 527; *Musa v The Queen* [2019] NSWCCA 279).

15. However, in *R v Dib* (1991) 52 A Crim R 64, Hunt J spoke of the requirement that the goods must be in a place where the accused and any others acting in concert with the accused may go without physical bar to obtain manual possession of the goods (at 66-67).

16. The form of knowledge required to prove possession is often an issue of some complexity. In the context of drug offences, it is recognised that the accused must know that the goods in question are drugs, as distinct from being some other item or prohibited import, but does not need to know the precise identity of the drug in question (see, e.g. *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Weng v The Queen* (2013) 279 FLR 119). It is likely that the same principle applies in the case of firearms – the prosecution must prove as part of possession that the accused intended to possess a firearm[1134] and a belief that the item is a firearm of a different type would not be exculpatory. Similarly, if the jury is satisfied that the item meets the definition of firearms, the fact that the accused did not realise that the definition includes incomplete or inoperable firearms would not be exculpatory, provided the accused was aware that they had an incomplete or inoperable firearm.

17. A lack of knowledge that the definition of firearms includes incomplete or inoperable firearms would not be exculpatory, if the accused knew they had an incomplete firearm.

18. Mere knowledge that the firearm is present is not sufficient to prove possession under *Firearms Act 1996* s 3 (but see the discussion of deemed possession under *Firearms Act 1996* s 145, below). Where firearms are located in a place where the accused has access, the prosecution must also prove that the accused intended to control the firearms (see, e.g. *R v Henderson & Warwick* (2009) 22 VR 662, [178]–[180]). However, where the accused gives someone permission to leave a firearm on the accused's premises, the accused may then have custody or control of the firearm (see, e.g. *Yeates v Hoare* [1981] VR 1034, 1039; *Keys v Kitto* (1996) 90 A Crim R 288 and compare *R v Hussain* [1969] 2 QB 567).

19. Where the accused leaves the firearm with another person who will return the firearm on request, the accused might retain possession in the form of control even while separated from the firearm (see, e.g. *R v Cottrell* [1983] 1 VR 143; *R v Sleep* (1861) 169 ER 1296).

20. Conventionally, the prosecution must prove that the accused exercised possession to the exclusion of others not acting in concert ('exclusive possession'). This has been said to require proof of a legal right to exclude all persons from the premises in which the property is located (*Moors v Burke* (1919) 26 CLR 265, 271, 274; *R v Dib* (1991) 52 A Crim R 64, 66-67; *R v Flippetti* (1984) 13 A Crim R 335).

21. The need to prove exclusive possession means that two people cannot be in possession of the same item unless they have joint possession of that item (*Lee v The Queen* [2013] NSWCCA 68, [281]). This can be relevant for consistency of verdicts, and for the availability of factual alternative charges, where several people are accused of being in possession of a single item at a given time.

22. However, in some cases, the requirement that the accused have exclusive possession is better treated as a requirement (where the matter arises on the facts) that the jury exclude any reasonable possibility that a specific person could take possession or control of the firearms, or interfere with the accused's possession or control (see, e.g. *Audsley v The Queen* [2013] VSCA 41, [81], [98]–[99], noting though that this was a case concerning handling stolen goods, rather than possession of firearms, and that the meaning of possession can vary depending on its statutory context).

[1134] Note that while *Whelan v Kallane* [2021] WASC 74 and *R v Fuller & Zazzaro* [2012] SASCFC 101, [71]-[75], [81] both considered that a belief that the object was not a firearm engaged the relevant mistake of fact defences (provided the accused knew of the existence of the object), it is suggested that under the Victorian legislation, a belief that the object is not a firearm would be treated as raising a doubt about whether the accused had possession of the item, in accordance with the principles discussed in *He Kaw Teh v The Queen* (1985) 157 CLR 523 and *R v Maio* [1989] VR 281.

23. The need to prove exclusive possession must be treated with caution where items are found in a location where several people have access (such as items in a house, or a storage shed). In such cases, the question will be who is actually responsible for the item, rather than finding that no one is in possession because co-tenants were not excluded (see *R v Henderson & Warwick* (2009) 22 VR 662, [113]).

24. While it is common for courts to speak of the need to prove that the accused possessed the goods to the exclusion of anyone *not acting in concert with them*, some courts have disapproved of the idea that joint possession requires proof of concert. Instead, it may be sufficient for the prosecution to prove that several people, between them, intended to exercise control to the exclusion of any other person. This does not require proof of a joint enterprise as to the future use or disposal of the goods (*R v Nguyen* (2010) 108 SASR 66, [66]; *R v Becirovic* [2017] SASCFC 156. See also *R v Colenso* [2016] SASCFC 128, [39]–[44]. See also *R v Wan* [2003] NSWCCA 225, [14]).

25. Carry is defined to include "the carriage of that firearm either as a whole or in parts and either by one person or more than one person" (*Firearms Act 1996* s 3(1)).

26. Use is not defined in the Act and so is presumed to carry its ordinary meaning.

27. Section 145 of the *Firearms Act 1996* is a deeming provision which supports proof of possession. The section states:

> (1) A firearm is taken to be in the possession of a person if the firearm is found—
>
> (a) on land or premises occupied by, in the care of or under the control or management of the person; or
>
> (b) in a vehicle of which the person is in charge.
>
> (2) Subsection (1) does not apply if, at the time the firearm was found—
>
> (a) the firearm was in the possession of another person who was lawfully authorised under this Act to possess the firearm; or
>
> (b) the person believed on reasonable grounds that the firearm was in the possession of another person who was lawfully authorised under this Act to possess the firearm; or
>
> (c) the person did not know, and could not reasonably be expected to know, that the firearm was on the premises or in the vehicle.

28. In relation to a similarly worded South Australian provision, Kourakis CJ observed that the provision should be construed widely, that forms of control or relationship less than ownership are sufficient, and that care or management of premises will generally be significantly less than control of premises (*R v Marafioti* (2014) 118 SASR 511, [23]–[25]).

29. When interpreting the similar South Australian provisions, Lovell and Hinton JJ held that:

- Care is synonymous with 'safe-keeping'
- Control supposes physical possession of the property, and uses the conventional meaning of possession
- Management means effective control of the premises (*R v Becirovic* [2017] SASCFC 156, [226]–[227]).

30. When the prosecution relies on s 145(1)(a), it must show that the accused was in practical control of the premises, bearing in mind that the consequence of this conclusion is that the accused would be deemed to be in possession of firearms unless s 145(2) applies. One important consideration will be whether the accused was able to control who had access to the premises, and hence control access to the firearm (*R v Phung* [2003] VSCA 32, [28]; *R v Henderson & Warwick* (2009) 22 VR 662, [87]; *R v Tran* [2007] VSCA 19, [20]–[21]; *Conant v The Queen* (2021) 138 SASR 239, [41]).

31. A person may be the occupier of premises without living at those premises, such as by keeping the premises ready for habitation whenever they wish (*R v Clarke & Johnstone* [1986] VR 643, 651, citing *Shire of Poowong and Jeetho v Gillen* [1907] VLR 37, 40), or where the person considers themselves as having power to grant or deny others access to the premises (*R v Clarke & Johnstone* [1986] VR 643, 652).

32. A person does not cease to be an occupier merely because they are away from the premises for a period of time. However, the reason for the departure, and whether it is of indefinite duration, may be significant (*Conant v The Queen* (2021) 138 SASR 239, [40]).

33. A person may be the occupier of more than one location, such as where a person lives at several houses over the course of a week, or where the person has a holiday home that they use infrequently (see, e.g. *Conant v The Queen* (2021) 138 SASR 239).

34. When the prosecution relies on s 145(1)(b), it must prove that the accused had "a degree of practical control over the vehicle that is suggestive of some knowledge of, or connection with, items located in the vehicle" (*R v Gjergji* (2016) 126 SASR 106, [43]).

35. The most natural and obvious way for a person to be in charge of a vehicle is to be the driver of the vehicle (*R v Marafioti* (2014) 118 SASR 511, [26]).

36. Another common way to be "in charge of" a vehicle is through ownership, though that may not be enough if it does not provide practical control. For example, when a vehicle is lent to another person, the owner may cease having the degree of practical control required to engage s 145(1)(b) (see *R v Gjergji* (2016) 126 SASR 106, [44], [55]).

37. Whether a person other the driver can be in charge of the vehicle is a question of fact and degree. A person who has legal or de facto authority to dictate how the driver manages the vehicle (*R v Marafioti* (2014) 118 SASR 511, [27]), or the vehicle owner who travels in the vehicle as a passenger (*R v Gjergji* (2016) 126 SASR 106, [46]) may be in charge of the vehicle. More than one person can be "in charge of" a vehicle at the same time (*R v Marafioti* (2014) 118 SASR 511, [28]; *R v Gjergji* (2016) 126 SASR 106, [46]).

38. The result of s 145(1)(b) is that a person who voluntarily drives a vehicle will have a practical responsibility to take steps to ascertain whether the vehicle carries a firearm (*R v Marafioti* (2014) 118 SASR 511, [29]).

39. In the context of drug offences, deemed possession due to occupation can be rebutted by the accused proving, on the balance of probabilities, that they were unaware that the drug was on the premises or they had no intention to exercise control over the drug or the place where it was kept. This reflects the fact that the onus is on the accused to rebut possession as it is defined at common law (*R v Clarke & Johnstone* [1986] VR 643, 647-648; *R v Tran* [2007] VSCA 19, [24]). However, *Firearms Act 1996* provides a more narrow set of circumstances in which deemed possession due to occupation can be rebutted:

    - Lack of knowledge of the firearm is not enough by itself. The accused must not reasonably be expected to know of the firearm;
    - Knowledge of the firearm accompanied by a lack of intention to possess is not enough. The firearm must be in the possession of someone lawfully authorised to possess it, or the accused must believe on reasonable grounds that the other person was lawfully authorised to possess it (see *Firearms Act 1996* s 145(2)).

40. The *Firearms Act 1996* is silent on whether the accused bears the onus of establishing the exceptions to deemed possession in s 145. While there are two decisions which held that the section imposes a legal onus on the accused, these decisions do not appear to have been the product of considered submissions on the question of onus and do not appear to have engaged closely with the terms of the Act (see *R v Henderson & Warwick* (2009) 22 VR 662, [64]; *R v Lowe* [2014] VSC 543, [24]).[1135]

41. Out of an abundance of caution, the approach taken in this Charge Book is that, where there is sufficient evidence to raise the exceptions, the onus is on the prosecution to exclude the exceptions.

42. *Firearms Act 1996* s 145(2) may be compared to *Drugs, Poisons and Controlled Substances Act 1981* s 5, both of which extend the concept of possession to the situation in which goods are found on premises occupied by the accused. However, *Drugs, Poisons and Controlled Substances Act 1981* s 5 states that the deemed possession applies "unless the person satisfies the court to the contrary". The express statement that the accused must satisfy the court to the contrary has been influential in the interpretation of *Drugs, Poisons and Controlled Substances Act 1981* s 5 (see, e.g, *R v Clarke & Johnstone* [1986] VR 643; *R v Tragear* (2003) 9 VR 107; *Momcilovic v The Queen* (2011) 245 CLR 1, [56] (French CJ), [191] (Gummow J), [464]–[468] (Heydon J), [510]–[511] (Crennan and Kiefel J) [670] (Bell J)).

43. Similarly, the South Australian equivalent provisions, *Firearms Act 1977* (SA) s 5(15) provides that the accused must 'establish[]' the defence, which has led to the conclusion that the accused bears a legal onus (*R v Fuller & Zazzaro* [2012] SASCFC 101, [45]–[50]). The New South Wales equivalent states that the deemed possession operates "unless the court is satisfied", which has also been held to put the onus on the accused (*May v The Queen* [2012] NSWCCA 250, [32]; *Strachan v The Queen* [2017] NSWCCA 322, [33]). These may be contrasted with s 145(2), which states that the deeming provision "does not apply if" one of the exceptions applies.

44. Without equivalent language, interpretative principles which presume that the prosecution bears the onus of proving all elements (see, e.g. *He Kaw Teh v The Queen* (1985) 157 CLR 523, 582 (Brennan J)) and s 25 of the *Charter of Human Rights and Responsibilities Act 2006* weigh in favour of the onus resting on the prosecution.

45. Contrary indications, such as the potential for inconsistent directions in a prosecution where there are both drugs and firearms charges, the distinction between provisos and exceptions explained in *Vines v Djordjevitch* (1995) 91 CLR 512, the fact that the provision is designed to extend liability and that several of the matters in s 145(2) may be peculiarly within the accused's knowledge are suggested not to be of sufficient weight to produce a different conclusion in the absence of explicit wording putting the onus on the accused.

46. While knowledge of the firearms is a requirement of possession under the definition in s 3, it is not a requirement when the prosecution relies on deemed possession due to occupation (*R v Henderson & Warwick* (2009) 22 VR 662, [112]). A person therefore cannot rely on any of the grounds of exception in s 145(2) on the basis that they knew an object was on the premises, but they did not realise it was a firearm (see, in relation to similar South Australian provisions, *R v Fuller & Zazzaro* [2012] SASCFC 101, [72]).

[1135] French CJ in *Momcilovic v The Queen* (2011) 245 CLR 1, footnote 38 observed that s 145 of the *Firearms Act 1996* is a "similar provision" to *Drugs, Poisons and Controlled Substances Act 1981* s 5, and that neither were amended as part of changes introduced by the *Statute Law Amendment (Charter of Human Rights and Responsibilities) Act 2009* to replace legal burdens of proof with either evidentiary burdens or to remove the burdens entirely.

Prohibited person

47. "Prohibited person" is defined in *Firearms Act 1996* s 3(1). The Act contains four and a half pages of conditions which will lead to a person being a prohibited person. Many of the conditions involve the accused serving, or having recently served, a sentence of imprisonment for certain specified offences, or being the subject of certain orders.

48. As a practical matter, the accused's status as a prohibited person will rarely be in issue in a trial. If it were in issue, then it would likely be one of the rare cases where the probative value of proof of prior convictions outweighs the prejudicial effect of such evidence (compare *Mokbel v The Queen* [2010] VSCA 354, [33]).

49. In most cases, it is expected that the parties will tender a statement of agreed facts under *Evidence Act 2008* s 191 on whether the accused was a prohibited person at the relevant time (see, e.g. *Farrugia v The King* [2023] VSCA 248, [17]).

50. It may also be necessary for the judge to give strong anti-speculation directions in relation to this element, to minimise the risk of prejudice which might arise if the jury were to speculate about why the accused was a prohibited person. These directions may also need to inform the jury that there are a wide range of circumstances in which a person can be prohibited from possessing a firearm, and they must not use the fact of prohibition in any way adverse to the accused (see, e.g. *Huynh v The Queen* [2020] VSCA 222, [26]).

51. In *Huynh v The Queen*, Priest JA (Maxwell P and Weinberg JA agreeing) called for legislative reform so that the question of the accused being a prohibited person could be determined by the trial judge and the jury would only need to determine the elements of possession and that the object is a firearm, without the 'prohibited person' element being mentioned in the trial (*Huynh v The Queen* [2020] VSCA 222, [55]–[58]). This has not yet occurred.

Legislative history

52. *Firearms Act 1996* s 5 was significantly amended by the *Control of Weapons and Firearms Acts Amendment Act 2012* s 8 on 16 May 2012. Before the amendment, the section contains separate offence provisions depending on whether the accused possessed a registered or unregistered firearm, with different maximum penalties. The effect of the 2012 amendments was to remove this distinction, and adopt the single lower maximum penalty. The result was that for offences alleged to be committed after 16 May 2012, the prosecution no longer needed to lead evidence about the registration status of the firearm in question.

53. For offences alleged to have been committed before the amendments, the offence contains an additional element, requiring the prosecution to prove either that the firearm was registered (in the case of offences against s 5(1)) or was not registered (in the case of offences against s 5(2)).

Last updated: 4 March 2024

7.9.1 Charge: Prohibited Person Possess, Carry or Use a Firearm

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Note: This direction is designed for a case where the accused is alleged to have possessed the firearm. The direction must be modified if the prosecution relies on proof of carrying or use of the firearm.

I must now direct you about the crime of being a prohibited person in possession of a firearm. To prove this crime, the prosecution must prove the following 3 elements beyond reasonable doubt:

One – The item in question is a firearm.

Two – The accused had possession of the firearm.

Three – The accused is prohibited from possessing firearms.

I will now explain each of these elements in more detail.

Firearm

The first element is that the item in question is a firearm. For the purpose of this charge, the item is the [*describe relevant item*].[1136]

[*If this element is not in issue, add the following shaded section.*]

There is no dispute that the [*describe relevant item*] is a firearm. The only issue in this case is whether NOA had possession of it.

[*If this element is in issue, add the following shaded section.*]

The law states that a firearm is a device which is designed to fire shot, a bullet or other projectile by the expansion of gases produced in the device by the ignition of strongly combustible material or by compressed air or other gases, whether stored in the device in pressurised containers or produced in the device by mechanical means.[1137]

The law also says that it does not matter whether the device is assembled or in parts, or whether it functions or does not function. A firearm remains a firearm even if it is temporarily or permanently inoperable or incomplete.

[*Identify relevant evidence and arguments about this element.*]

Possession

The second element is that the accused had possession of the firearm.

[*If the prosecution relies on actual physical possession, add the following shaded section.*]

One way the prosecution can prove the accused had possession of the firearm is to show that NOA had personal and physical control of the firearm to the exclusion of anyone else [*who did not jointly possess the firearm*].

This requires proof that the accused either had the firearm on his/her/their body, or by having it in a place where the accused had the exclusive right to take it, and so able to take it when he/she/they wish.

As part of this, the prosecution must also prove that the accused intended to have the firearm, and knew that it was a firearm.

The prosecution does not need to prove the accused knew the legal definition of a firearm. Instead, they must prove the accused knew the facts which make the item, in law, a firearm. To give you two examples which are not related to this case, a person will not intend to possess a firearm if it has been put into their bag without their knowledge. A person will not know something is a firearm if they think it is an imitation firearm which never has and never will be able to fire bullets.

[1136] If there are multiple charges of this offence, the judge should identify each of the relevant alleged firearms.

[1137] This charge is written on the assumption that the dispute is about whether the device is capable of firing (either in its current form, or if assembled). If the dispute relates to one of the exceptions to the definition of a firearm in paragraphs (c) to (j), then the jury will need to be directed about those exceptions.

[*Identify relevant evidence and arguments.*]

[*If the prosecution relies on custody and control, add the following shaded section.*]

One way the prosecution can prove the accused had possession of the firearm is to show that NOA had custody or control of the firearm.

This requires proof that the accused has the firearm somewhere they can take it back, whenever they wish.

There are many situations in which a person has something in their custody or control. It includes when a person leaves something with someone else, who will return it on request.

It also includes where the person leaves something in a place where they have access, and intend to retain control over, provided the prosecution also proves the accused either had a right to exclude others from the place, or the place is somewhere others are unlikely to discover the firearm, except by accident. For example, a person might have custody and control over something they have left at their home, or have hidden at their workplace.

[*Identify relevant evidence and arguments.*]

[*If the prosecution relies on access, add the following shaded section.*]

One way the prosecution can prove the accused had possession of the firearm is to show that NOA had and exercised access to the firearm, whether alone or in common with others.

This requires proof that the accused could access the firearm and did access the firearm.

[*Identify relevant evidence and arguments.*]

[*If the prosecution relies on deemed possession from the firearm being on land, add the following shaded section.*]

One way the prosecution can prove the accused had possession of the firearm is to show that the firearm was found on land or premises occupied by, in the care of, or under the control or management of the accused. This is because the law says that a person is responsible for firearms that are on their land or in their premises.

The prosecution says that you can find the accused had possession of the firearm on this basis because the firearm was found at [*identify location*] and the accused [*identify accused's relationship with the relevant premises*]. You must consider whether the accused had practical control over [*identify location*]. This requires you to consider whether the accused could control who had access to the premises.

[*If there is evidence that the accused was the occupier of multiple premises, add the following darker shaded section.*]

When you are considering this issue, you should know that a person can be the occupier of more than one location at the same time. For example, if you own a holiday house and a primary residence, you could be the occupier of both houses, even if you only went to the holiday house a few times a year. Whether you are the occupier of the holiday house while living at your primary residence depends on what you do with the holiday house while you are not there.

Here, you have heard evidence that NOA [*identify relevant evidence, e.g.* "moved between two different houses"]. For this element, the question is whether the prosecution has proved that NOA occupied, or had the care, control or management of [*identify relevant location*]. Deciding that NOA occupied [*identify location 1*] does not answer whether NOA occupied [*identify location 2*].

[*Identify relevant evidence and arguments.*]

[*If the prosecution relies on deemed possession from the firearm being in a vehicle, add the following shaded section.*]

One way the prosecution can prove the accused had possession of the firearm is to show that the firearm was found in a vehicle in which the accused was in charge. This is because the law says that a person is responsible for firearms that are in their car, or in other vehicles which they are in charge of. The law treats the driver as a person who is in charge of a vehicle. Someone other than the driver may also be in charge of the vehicle, if they have practical control of the vehicle and that control suggests they know or are connected to what is in the vehicle. It is a matter of fact and degree for you to decide whether a person is in charge of a vehicle.

[*Identify relevant evidence and arguments.*]

[*If the prosecution relies on deemed possession and there is evidence that someone else lawfully possessed the firearm, add the following shaded section*.]

Even if you are satisfied that the firearm was found [on the accused's land or premises/in their vehicle], the prosecution must also prove that the firearm was not in the possession of someone else who was lawfully authorised to possess it.

In this case, there is some evidence that [*identify third person*] lawfully possessed the firearm. The prosecution must therefore prove one of three matters to establish that the accused possessed the firearm and not [*identify third person*]. First, the prosecution can prove that [*identify third person*] was not lawfully authorised to possess firearms. Second, the prosecution can prove that [*identify third person*] did not have the firearm on his/her/their person, or in a place where he/she/they had exclusive right to take it. Third, the prosecution can prove that [*identify third person*] did not know of the firearm or intend to possess it.

If the prosecution proves any of these three matters beyond reasonable doubt, and proves that the firearm was [on the accused's land or premises/in their vehicle], then the prosecution has proved the second element.

[*Identify relevant evidence and arguments.*]

[*If the prosecution relies on deemed possession and there is evidence that the accused reasonably believed that someone else lawfully possessed the firearm, add the following shaded section.*]

Even if you are satisfied that the firearm was found [on the accused's land or premises/in their vehicle], the prosecution must also prove that the accused did not believe on reasonable grounds that the firearm was in the possession of someone else who was lawfully authorised to possess it.

In this case, there is some evidence that NOA believed on reasonable grounds that [*identify third person*] lawfully possessed the firearm. The prosecution must therefore prove one of three matters to establish that the accused possessed the firearm and not [*identify third person*]. First, the prosecution can prove that NOA did not believe on reasonable grounds that [*identify third person*] was lawfully authorised to possess firearms. Second, the prosecution can prove that NOA did not believe on reasonable grounds that [*identify third person*] had the firearm on his/her/their person, or in a place where he/she/they had exclusive right to take it. Third, the prosecution can prove that NOA did not believe on reasonable grounds that [*identify third person*] knew of the firearm and intended to possess it. For each of these three matters, must prove either that the accused did not personally believe the matter, or the accused did not have reasonable grounds to believe that matter. A person has reasonable grounds to believe something if they have information which could lead a reasonable person to also hold that belief.

If the prosecution proves any of these three matters beyond reasonable doubt, and proves that the firearm was [on the accused's land or premises/in their vehicle], then the prosecution has proved the second element.

[*Identify relevant evidence and arguments.*]

[*If the prosecution relies on deemed possession and there is evidence that the accused did not know and could not reasonably be expected to know that the firearm was there, add the following shaded section*.]

Even if you are satisfied that the firearm was found [on the accused's land or premises/in their vehicle], the prosecution must also prove that the accused either knew or could reasonably be expected to know that the firearm was [on the premises/in the vehicle]. When deciding whether the prosecution has proved that the accused knew the firearm was there, you must look at NOA's state of mind and state of knowledge. When deciding whether the accused could reasonably be expected to know the firearm was there, you must look at whether a reasonable person could have known of the firearm. You should consider what steps the accused took to be familiar with the [house/car]. Was there anything which should have raised the accused's suspicions? Was the firearm concealed from the accused? You must look at this evidence and make a value judgment about whether you are satisfied that the accused could reasonably be expected to know that the firearm was [on the premises/in the car].

If the prosecution proves that the accused either knew or could reasonably be expected to know that the firearm was [on the premises/in the vehicle], then the prosecution has proved the second element.

[*Identify relevant evidence and arguments.*]

Prohibited Person[1138]

The third element is that the accused is prohibited from possessing firearms. I mention this only as a formality. I told you at the start of the trial that it is an agreed fact that the accused is prohibited from possessing firearms. There are many reasons why a person might be prohibited from possessing firearms, and you must not speculate why the accused is prohibited from possessing firearms.

You must not treat this agreed fact as relevant to your assessment of the evidence in this case, or your assessment of the accused.

While I must tell you this is an element of the offence, there is no dispute about it. As you have heard, the real issue is whether [*identify element(s) in dispute*].

Summary

To summarise, before you can find the accused guilty of being a prohibited person in possession of a firearm, the prosecution must prove to you beyond reasonable doubt:

One – that there was a firearm;

Two – that NOA possessed that firearm;

Three – that NOA was prohibited from possessing that firearm.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of this offence.

Last updated: 4 March 2024

[1138] This direction is written on the assumption that the judge will have instructed the jury, at an early point in the trial, that the accused's status as a prohibited person is not in issue.

8 Victorian Defences

8.1 Statutory Self-Defence (From 1/11/14)

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Commencement Information

1. Prior to 2005, self-defence in Victoria was governed solely by the common law. This situation was first altered by the passage of the *Crimes (Homicide) Act 2005*, which introduced two statutory self-defence provisions into the *Crimes Act 1958*: one for use in murder cases (s 9AC) and the other for use in manslaughter cases (s 9AE).
2. The provisions of the *Crimes (Homicide) Act 2005* commenced operation on 23 November 2005, and applied to offences committed on or after that date (*Crimes Act 1958* s 603).
3. The situation was again altered by the passage of the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*, which introduced a new Part IC into the *Crimes Act 1958*. Part IC abolishes common law self-defence (s 322N) and sets out a single statutory self-defence provision for all offences (s 322K). It replaces the previous Subdivision (1AA) of Division 1 of Part I of the Act (ss 9AB–9AJ) '*Exceptions to homicide offences*'.
4. The provisions of the *Crimes Amendment (Abolition of Defensive Homicide)* Act 2014 commenced operation on 1 November 2014 and apply to all offences alleged to have been committed on or after that date (*Crimes Act 1958* s 623).
5. This topic outlines the statutory defence of self-defence introduced by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*. For information concerning the statutory provisions relevant to homicide offences alleged to have been committed on or after 23 November 2005 and before 1 November 2014, see 8.2 Statutory Self-defence (Pre-1/11/14) and Defensive Homicide.

Abolition of Common Law Self-defence

6. Statutory self-defence has replaced the common law defence for all offences (*Crimes Act 1958* s 322N). Consequently, common law self-defence is not available when:
    - The accused is charged with any offence alleged to have been committed on or after 1 November 2014.
7. However, common law self-defence will apply when:
    - The accused is charged with an offence other than a homicide offence and which is alleged to have been committed on or after 23 November 2005 and before 1 November 2014; or
    - The accused is charged with any offence alleged to have been committed before 23 November 2005.
8. See 8.3 Common Law Self-defence for information concerning the common law defence.

Repeal of Murder Self-defence, Defensive Homicide and Manslaughter Self-defence

9. The statutory defences for murder self-defence and manslaughter self-defence, as well as the offence of defensive homicide, were repealed by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*.

10. However, these defences (and the alternative offence of defensive homicide) remain relevant when:

    - The accused is charged with a homicide offence alleged to have been committed on or after 23 November 2005 and before 1 November 2014.

11. See 8.2 Statutory Self-defence (Pre-1/11/14) and Defensive Homicide for more information.

12. The new statutory self-defence provision, along with the abolition of common law self-defence and the repeal of the various homicide self-defence provisions, was implemented to simplify the law. The result is that for all offences alleged to have been committed on or after 1 November 2014 only one test for self-defence will apply, making it easier to explain self-defence to juries and assisting the jury in understanding and applying self-defence (Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, Explanatory Memorandum).

When to Charge the Jury about Self-defence

13. The judge must direct the jury about self-defence if the accused indicates that self-defence is in issue or if the judge considers that there are substantial and compelling reasons to direct the jury about self-defence despite the absence of a request (*Jury Directions Act 2015* ss 14–16). See Directions under Jury Directions Act 2015.

14. In criminal proceedings where self-defence in the context of family violence is in issue, Part 6 of the *Jury Directions Act 2015* specifies certain directions that may be given early in the trial. See "Family Violence and Self-defence: Jury Directions" below and Directions under Jury Directions Act 2015.

15. At common law, the judge was required to instruct the jury about self-defence if there was evidence on which a reasonable jury could decide the issue favourably to the accused (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Kear* [1997] 2 VR 555; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

16. The issue of self-defence could be held to arise if there was any evidence from which the jury might infer that the accused acted in self-defence (*R v Kear* [1997] 2 VR 555; *R v Imadonmwonyi* [2004] VSC 361).

17. To see if there was any such evidence, a judge could look not only to the direct evidence, but also to whether a circumstantial case could fairly be made out to support the defence (*R v Kear* [1997] 2 VR 555; *R v Imadonmwonyi* [2004] VSC 361).

18. At common law, if there was sufficient evidence to raise the possibility of self-defence, the trial judge was required to leave the issue to the jury even if the judge considered the defence to be "weak or tenuous" (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; R v Kear [1997] 2 VR 555; *R v Muratovic* [1967] Qd R 15; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

19. If there was sufficient evidence to raise the possibility of self-defence, the judge was required at common law to instruct the jury about it, whether or not the defence was raised by the accused (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Kear* [1997] 2 VR 555; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

20. Where there was sufficient evidence to raise the possibility of self-defence, the judge was required to instruct the jury about it even if the factual basis for the defence was inconsistent with the accused's version of events at trial (*R v Kear* [1997] 2 VR 555; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

21. These common law principles may be relevant to the operation of the residual obligation to give directions under *Jury Directions Act 2015* s 16, but must be read in light of the whole of Part 3 of the Act (or Part 6 of the Act, for self-defence in the context of family violence).

Onus of Proof

22. Once the question of self-defence is raised by the defence (that is, once the 'evidential onus' is satisfied), the legal onus is on the prosecution to prove beyond reasonable doubt that the accused did not act in self-defence (*Crimes Act 1958* s 322I).

23. This is consistent with general common law principles, and the application of the previous statutory self-defence provisions for homicide offences (*Babic v R* (2010) 28 VR 297; *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; Viro v R (1978) 141 CLR 88; *Dziduch v R* (1990) 47 A Crim R 378).

Elements of Statutory Self-defence

24. Sections 322K(1)–(2) of the *Crimes Act 1958* state:

> (1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.
>
> (2) A person carries out conduct in self-defence if-
>
> (a) the person believes that the conduct is necessary in self-defence; and
>
> (b) the conduct is a reasonable response in the circumstances as the person perceives them.

25. It is not for the accused to establish that he or she held the relevant belief and that his or her conduct was a reasonable response in the perceived circumstances. The onus is on the prosecution to disprove this defence (*Crimes Act 1958* s 322I).

26. This means that where self-defence arises on the evidence, the accused will be not guilty unless the prosecution proves either:

- That the accused did not believe that the conduct was necessary in self-defence; or
- That the conduct was not a reasonable response in the circumstances as the accused perceived them.

27. Incorporating the onus and standard of proof, this issue may be put to the jury as two questions:

(a) Is there a reasonable possibility that the accused believed that his/her conduct was necessary to defend him/herself?

(b) Is there a reasonable possibility that what the accused did was a reasonable response to the circumstances as s/he perceived them? (*R v Katarzynski* [2002] NSWSC 613).

28. The accused will be found not guilty unless the jury answer "no" to one of those two questions.

29. Some cases have suggested that there is a separate requirement that the accused carried out his conduct for the purpose of self-defence (see *Douglas v R* [2005] NSWCCA 419). In most cases, it is not necessary to address this separate requirement. It is suggested that this third requirement should only be raised where it would be open to the jury to find that the accused believed the conduct was necessary in self-defence, but that his/her conduct was not committed as a result of this belief.

30. Circumstances of "family violence" can affect both limbs of the test for self-defence. See "Family Violence" below for further information.

Belief in Necessity

31. The first limb of the test is based on the language used by Wilson, Dawson and Toohey JJ in *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645 and can be treated as equivalent to the first limb of common law self-defence.

32. The first limb is a subjective test. The test is whether the accused believed that the conduct was necessary in self-defence. It does not involve a consideration of what a reasonable or ordinary person would have believed in the circumstances (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *Viro v R* (1978) 141 CLR 88; *R v Conlon* (1993) 69 A Crim R 92 (SC NSW)).

33. For this element to be satisfied, it does not matter if the accused's belief was mistaken, as long as it was genuinely held (*R v McKay* [1957] VR 560; *R v Katarzynski* [2002] NSWSC 613; *R v Trevenna* [2004] NSWCCA 43).

34. If the accused was intoxicated (by alcohol, drugs or any other substances) at the time he or she committed the relevant acts, this can be taken into account when determining whether he or she believed his or her actions to be necessary *(R v Conlon* (1993) 69 A Crim R 92 (NSWSC); *R v Katarzynski* [2002] NSWSC 613. See "Intoxication" below for further information).

35. The determination of whether the accused believed that his or her actions were necessary in self-defence incorporates two questions: first, whether the accused believed it was necessary to defend himself or herself at all and, secondly, whether the accused believed it was necessary to respond as he or she did given the threat as s/he perceived it (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645).

36. In determining whether the accused believed that the force used was necessary, consideration should be given to the fact that a person who has reacted instantly to imminent danger cannot be expected to weigh precisely the exact measure of self-defensive action which is required (*R v Palmer* [1971] AC 814; *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Conlon* (1993) 69 A Crim R 92).

37. The proportionality of the accused's response to the harm threatened is just one factor to take into account in determining whether the accused believed that his or her actions were necessary (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259.

38. There is no rule requiring the accused to retreat from an actual or perceived attack rather than defend himself or herself. However, a failure to retreat is a factor to be taken into account in determining whether the accused believed his or her conduct was necessary (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Howe* (1958) 100 CLR 448) as well as in determining whether the response to the threat was reasonable – see below 'Reasonable Response'.

39. If the accused acted under the pretence of defending himself or herself to attack another or retaliate for a past attack, then this limb of the test for self-defence will not be met. Factors such as a failure to retreat when possible or a highly disproportionate response might indicate an intention to use the circumstances for aggression or retaliation rather than for self-defence.

40. A person is not entitled to rely on self-defence only if s/he acts while an attack is in progress or immediately threatened. The key issue is whether the accused's perception of danger led him or her to believe that the use of defensive force was necessary (*Osland v R* (1998) 197 CLR 316).

41. However, what is believed to be necessary in the circumstances may be affected by the lack of immediacy of the threat (*R v Portelli* (2004) 10 VR 259).

42. Where a person responds pre-emptively to what he or she perceives to be a threat from a violent partner, expert evidence of "battered woman syndrome" may be admitted. Such evidence can assist the jury to understand that an act committed even when there is no attack underway may be a self-defensive response to a genuinely apprehended threat of imminent danger, sufficient to warrant a pre-emptive strike (*Osland v R* (1998) 197 CLR 316).

43. More generally, evidence of "family violence" can affect the determination of the accused's belief in necessity in situations where:

- he or she is responding to a harm that is not immediate; and/or
- his or her response involved force in excess of the force involved in the perceived threat. See "Family Violence" below for further information.

44. Unlike common law self-defence, s 322K does not require the accused's belief in necessity to be based on reasonable grounds.

Statutory Self-defence: Murder

45. Section 322K(3) of the *Crimes Act 1958* provides that in the case of murder, a person will only be carrying out conduct in self-defence if he or she believes that the conduct is necessary to defend himself or herself or another person from the infliction of death or really serious injury.

46. The statutory defence will fail if the accused did not believe that his or her actions were necessary to defend him or herself or another person from the infliction of death or *really serious injury*. This provision is similar to the statutory defence of murder self-defence introduced in 2005 by the *Crimes (Homicide) Act 2005* (see 8.2 Statutory Self-defence (Pre-1/11/14) and Defensive Homicide).

47. However, it differs from common law self-defence, which does not specify the type of harm that must be threatened before a person can raise self-defence. At common law, even if a person defends himself or herself against less serious harm, or acts to protect property or prevent crime, s/he may successfully raise self-defence if the jury finds s/he believed upon reasonable grounds that his or her actions were necessary (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v McKay* [1957] VR 560. See also *Babic v R* (2010) 28 VR 297).

48. The *Crimes Act 1958* s 322H defines "really serious injury" as including serious sexual assault for the purposes of Part IC, but otherwise does not define the term.

49. Although it has not yet been determined, it seems likely that "really serious injury" can include psychological injuries as well as physical injuries. It will be for the jury to decide whether the accused was threatened with an "injury", as well as whether that threatened injury was "really serious".

Reasonable Response

50. The prosecution must prove that the conduct was not a reasonable response in the circumstances as the accused perceived them to be (*Crimes Act 1958* s 322K(2)(b)).

51. This part of the statutory test is based on laws in other Australian jurisdictions (e.g. s 418(2) of the *Crimes Act 1900* (NSW) and s 10.4(2) of the *Commonwealth Criminal Code*). These provisions have been interpreted by the courts as discussed below.

52. The question of whether the conduct was a 'reasonable response' is an objective test. Although it is an objective test, the reasonableness of the response must be considered in light of the circumstances as subjectively perceived by the accused. The relevant determination is whether there is a reasonable possibility that the accused's conduct was a reasonable response in the circumstances as he or she perceived them (*Presidential Security Services of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241; *R v Katarzynski* [2002] NSWSC 613; *R v Trevenna* [2004] NSWCCA 43; *Oblach v R* (2005) 65 NSWLR 75; *Crawford v R* [2008] NSWCCA 166).

53. This second limb is where the test for self-defence differs from the position at common law, because the accused is not required to have reasonable grounds for his or her belief that it was necessary to act in self-defence. Rather, it is sufficient that the accused genuinely held the belief and that, objectively, his or her response to that belief is reasonable (*R v Katarzynski* [2002] NSWSC 613; *Oblach v R* (2005) 65 NSWLR 75).

54. It is up to the jury to decide what to take into account in determining the reasonableness of the accused's response in the circumstances. The jury is assessing the response of the accused (not of a reasonable person), so personal attributes including, for example, the accused's age, gender and state of health as well as the surrounding physical circumstances will be relevant (*R v Katarzynski* [2002] NSWSC 613. See also *R v Forbes* [2005] NSWCCA 377; *Ward v R* [2006] NSWCCA 321).

55. The reasonableness of the response should also be assessed in terms of the objective proportionality of the conduct to the perceived situation (*Flanagan v R* [2013] NSWCCA 320; see also the report of the Criminal Law Officers' Committee of the Standing Committee of Attorneys-General entitled Model Criminal Code Ch 2: General principles of criminal responsibility: final report (Canberra, AGPS, 1993); *Oblach v R* (2005) 65 NSWLR 75).

56. Again, while objective proportionality is a consideration under the second limb of the statutory self-defence test, it must be determined, in light of the threat that the accused genuinely believed to exist; that is, against the circumstances as the accused perceived them.

57. More generally, evidence of "family violence" can affect the determination of whether the accused's conduct was a reasonable response in the perceived circumstances where:

    - he or she is responding to a harm that is not immediate; and/or
    - his or her response involved force in excess of the force involved in the perceived threat. See "Family Violence" below for further information.

Defence against Lawful Force

58. Unlike at common law, the statutory defence of self-defence does not apply if the accused is responding to lawful conduct, and knows at the time of his or her response that the conduct is lawful (*Crimes Act 1958 s 322L*). This provision replicates the previous s 9AF of the *Crimes Act 1958* (see 8.2 Statutory Self-defence (Pre-1/11/14) and Defensive Homicide).

59. In applying s 322L, the relevant question is whether a jury could find or consider that there was a reasonable possibility that the other party's conduct was unlawful. This may require the court to consider whether the other party was engaged in self-defence, which may include a pre-emptive strike (*DPP v McDowall* [2019] VSC 341, [9], [13]–[16]).

Accused as the Initial Aggressor

60. At common law, one of the factors to be taken into account in determining whether the accused was acting in self-defence was whether he or she had been the initial aggressor. However, there was no rule to prevent lawful self-defence when the accused originated the attack, as long as the original aggression had ceased to create a continuing situation of emergency that provoked a lawful counter attack on the accused. Initial aggression by the accused was part of the surrounding circumstances the jury was required to take into account in determining whether the accused was acting in self-defence (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645).

61. Where it is alleged that the accused was the initial aggressor, the jury must consider all the circumstances as perceived by the accused, including, for example, the extent to which the accused declined further conflict, stopped using force, was defeated, faced a disproportionately escalated level of force in response, or attempted to retreat (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259; *Ruben Anandan v R* [2011] VSCA 413; see also *R v Lawson and Forsythe* [1986] VR 515 (Ormiston J)).

Defence of Others and Protection of Property

62. Other than for the offence of murder (see "Statutory Self-defence: Murder" above), the statutory test does not set out specific categories of circumstances in which self-defence may be raised. Section 322K includes notes to the effect that a person may be acting in self-defence in the following circumstances:

- The defence of himself/herself or another person;
- The prevention or termination of the unlawful deprivation of the liberty of the person or another person; or
- The protection of property.

63. At common law, 'self-defence' was a general description that could include conduct to defend another person from harm, to prevent the unlawful deprivation of liberty or to protect property (*R v Portelli* (2004) 10 VR 259, *R v McKay* [1957] VR 560).

64. At common law, the defence may also have been available in cases of apprehending a fleeing suspect or to prevent crime (*R v McKay* [1957] VR 560; *R v Turner* [1962] VR 30). It remains to be seen whether or how this aspect of self-defence might fit within the statutory test for self-defence in s 322K.

Intoxication

65. At common law, it was possible to take into account the accused's state of intoxication in determining both aspects of the test for common law self-defence (*R v Conlon* (1993) 69 A Crim R 92 (NSWSC); *R v Katarzynski* [2002] NSWSC 613).

66. However, s 322T(2) of the *Crimes Act 1958* states that:

> If any part of a defence to an offence relies on reasonable response, in determining whether that response was reasonable, regard must be had to the standard of a reasonable person who is not intoxicated.

67. This provision prevents intoxication being taken into account when determining whether the accused's conduct was a reasonable response to the circumstances as he or she perceived them. However, it does not prevent intoxication being taken into account in determining whether the accused believed his or her actions were necessary in self-defence.

68. Section 322T(4) provides an exception for cases in which the intoxication is not self-induced. In such cases regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned. See ss 322T(5)–(6) for the definition of "self-induced intoxication".

69. The effect of s 322T is similar to that of the now repealed s 9AJ of the *Crimes Act 1958* (see 8.5 Statutory Intoxication (From 1/11/14)).

Family Violence

70. The *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* included in the *Crimes Act 1958* provisions concerning "family violence". These provisions substantially replicate those introduced into the *Crimes Act 1958* by the *Crimes (Homicide) Act 2005*, but are applicable to all offences rather than limited to homicide offences.

71. Section 322J(2) defines family violence "in relation to a person" as "violence against that person by a family member".

72. A person's "family member" is defined broadly in s 322J(2) and includes:

- a person who is or has been married to the person;
- a person who has or has had an intimate personal relationship with the person;
- a person who is or has been the father, mother, step-father or step-mother of the person;
- a child who normally or regularly resides with the person;
- a guardian of the person; and
- another person who is or has been ordinarily a member of the household of the person.

73. "Violence" is also defined broadly in s 322J(2) to mean:

    - physical abuse;
    - sexual abuse;
    - psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to:
        - intimidation;
        - harassment;
        - damage to property;
        - threats of physical abuse, sexual abuse or psychological abuse;
        - in relation to a child:
            - causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
            - putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

74. A single act may amount to "abuse" for the purpose of the definition of violence (s 322J(3)). A number of acts that form part of a pattern of behaviour may also amount to "abuse" for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial (s 322J(3)).

75. Section 322M(1) provides that, for the purposes of an offence in circumstances where self-defence in the context of family violence is alleged, a person may believe that their conduct is necessary, and their conduct may be a reasonable response in the circumstances, even if:

    - They are responding to a harm that is not immediate; or
    - Their response involves the use of force in excess of the force involved in the harm or threatened harm.

76. The provisions in s 322M(1) replicate the now repealed s 9AH(1), which clarified existing law in relation to self-defence. As noted above (see "Belief in Necessity"), a person is not required to wait until an attack is in progress or immediately threatened before using defensive force. S/he is entitled to take steps to forestall a threatened attack before it has begun (*Osland v R* (1998) 197 CLR 316). Similarly, the force used is not required to be precisely proportionate, as long as the accused believed it was necessary (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645) and the conduct was a reasonable response in the circumstances.

77. Sections 322J and 322M(2) state that, in cases involving allegations of family violence, then the following evidence may be relevant in determining whether the accused believed his or her conduct was necessary, or whether the conduct was a reasonable response in the circumstances:

(a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;

(b) the cumulative effect, including psychological effect, on the person or a family member of that violence;

(c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;

(d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;

(e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;

(f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

78. See 'Chapter 4: Evidence of Relationship and Family Violence' in the Victorian Law Reform Commission's Defences to Homicide: Final Report for a more detailed discussion of the relationship between self-defence and family violence, and the use which can be made of the evidence outlined above.

Family Violence and Self-defence: Jury Directions

79. The *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* introduced a new Part 7 into the *Jury Directions Act 2013*. On 29 June 2015, these provisions were revised and relocated to Part 6 of the *Jury Directions Act 2015*.

80. Part 3 of the *Jury Directions Act 2015* does not apply to Part 6 of the Act.

81. Part 6 of the *Jury Directions Act 2015* applies to any trial commencing on or after 29 June 2015, regardless of the date of any alleged offence.

82. For the purposes of Part 6, "family violence" has the same meaning as in s 322J(2) of the *Crimes Act 1958* (see "Family Violence" above).

83. The trial judge must give the jury preliminary directions on family violence, in accordance with s 59 of the *Jury Directions Act 2015*, if the defence counsel or the accused requests such directions, unless there are good reasons for not doing so (*Jury Directions Act 2015* s 58). The judge may give the statutory directions if the accused is unrepresented and the judge considers it in the interests of justice to do so (*Jury Directions Act 2015* s 58(3)).

84. The judge must give the statutory directions on family violence as soon as practicable after the request is made and the judge may give the direction before any evidence is adduced in the trial. The directions may be repeated at any time during the trial (*Jury Directions Act 2015* s 58(4)–(5)).

85. The directions must include all of the following (*Jury Directions Act 2015* s 59):

(a) self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial; and

(b) as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires); and

(c) [...] evidence in the trial is likely to include evidence of family violence committed by the victim against the accused or another person whom the accused was defending [...].

86. The following directions under s 60 may also be sought and, if sought, must be given unless there are good reasons for not doing so:

(a) that family violence–

(i) is not limited to physical abuse and may include sexual abuse and psychological abuse;

(ii) may involve intimidation, harassment and threats of abuse;

(iii) may consist of a single act;

(iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;

(b) if relevant, that experience shows that–

(i) people may react differently to family violence and there is no typical, proper or normal response to family violence;

(ii) it is not uncommon for a person who has been subjected to family violence–

(A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;

(B) not to report family violence to police or seek assistance to stop family violence;

(iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by-

(A) family violence itself;

(B) cultural, social, economic and personal factors;

(c) that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence [...] in relation to the offence charged.

Content of the Charge

87. When directing the jury about self-defence there is no set formula to be used (*Collingburn v R* (1985) 18 A Crim R 294; *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259).

88. The burden of proof should be made very clear to the jury. They should be told that the accused should only be convicted if the prosecution has proved that he or she did not act in self-defence (*Crimes Act 1958* s 322I).

89. One way the judge can do this is by explaining to the jury that they must acquit the accused if the prosecution has not proved that there is:

(a) No reasonable possibility that the accused believed that his/her conduct was necessary to defend him/herself; or

(b) No reasonable possibility that what the accused did was a reasonable response to the circumstances as s/he perceived them (*R v Katarzynski* [2002] NSWSC 613).

90. The question of self-defence should be placed in its factual setting, and considerations which may assist the jury to reach its conclusion should be identified (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Dziduch* (1990) 47 A Crim R 378; *R v Portelli* (2004) 10 VR 259).

91. The jury should be told to consider all of the circumstances of the case, and that any one factor should be considered within that broader context. This helps ensure that matters of evidence, such as the proportionality of the conduct, are not elevated to rules of law (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Alpagut* 27/7/1989 NSWCCA; *R v Portelli* (2004) 10 VR 259).

92. The judge should offer such assistance by way of comment as is appropriate to the particular case. It will often be desirable to tell the jury to approach the task in a practical manner, giving proper weight to the predicament of the accused, which may have afforded little, if any, opportunity for calm deliberation or detached reflection (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Dziduch* (1990) 47 A Crim R 378; *R v Portelli* (2004) 10 VR 259).

93. The issue of self-defence should be listed with all of the other issues which the prosecution must establish, rather than being dealt with separately (*R v Alpagut* 27/7/1989 NSWCCA).

Last updated: 27 October 2022

8.1.1 Preliminary Directions: Self-Defence in the Context of Family Violence (Jury Directions Act 2015 ss 59, 60)

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This charge should be given, unless there are good reasons for not doing so, when:

i) the trial commences *on or after 29 June 2015, irrespective of the date of any alleged offence,* and self-defence in the context of family violence is in issue; and

ii) defence counsel (or the accused, if unrepresented) has requested that the jury be directed on family violence in accordance with s 58 of the Jury Directions Act 2015.

If the accused is unrepresented and does not request a direction on family violence, this charge can be given if it in the interests of justice to do so.

This charge must be given as soon as practicable after a request has been made in terms of s 58 of the *Jury Directions Act 2015* and may be given before any evidence is adduced in the trial.

Introduction

In this case, self-defence in the context of family violence [is/is likely to be] in issue. I therefore need to give you some directions about "self-defence" and "family violence".

The law recognises the right of a person to defend himself or herself from attacks or threatened attacks. The law says that a person may act in self-defence if that person:

- believes that their conduct is necessary in self-defence, and
- the conduct is a reasonable response in the circumstances as the person perceives them.

The law recognises that evidence of "family violence" may be relevant in deciding whether the accused acted in self-defence. "Family violence" includes all kinds of physical, sexual and psychological abuse by one family member towards another.

Examples of evidence of family violence include:

- The *history of the relationship* between family members, including violence by one family member towards any other family member.
- The *overall effect* of that violence, including any *psychological effect*, on the person who has been affected by family violence or the other family members.
- *Social, cultural or economic factors* that impact on the person who has been affected by family violence or the other family members.
- The general *nature and dynamics* of relationships affected by family violence, including the *possible consequences of separation* from the abuser.

Evidence in this case is likely to include evidence of family violence committed by the victim against [the accused/another person whom the accused was defending].

Considerations

[*All or specified parts of the following shaded section must be included:*]

Family violence is not limited to physical abuse and can include sexual abuse and psychological abuse.

Family violence can involve intimidation, harassment and threats of abuse.

Family violence can consist of a single act.

Family violence can also consist of separate acts that form part of a pattern of behaviour. Those separate acts can, when looked at together, amount to abuse even though some or all of those acts may, when looked at separately, appear to be minor or trivial.

Experience shows that people may react differently to family violence and there is no typical, proper or normal response to family violence.

Experience also shows that it is not uncommon for a person who has been subjected to family violence to stay with an abusive partner after the family violence starts, or to leave and then return to the partner, or not to report family violence to police or seek assistance to stop family violence.

Experience also shows that family violence itself and cultural, social, economic and personal factors can influence decisions made by a person who is subjected to family violence about how to address the family violence or how to respond to or avoid it.

The law recognises that if the accused assaulted the victim on a previous occasion that does not mean that the accused could not have been acting in self-defence when he/she [*insert relevant conduct*].

Last updated: 29 June 2015

8.1.2 Charge: Statutory Self-Defence

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This charge should be given if there is evidence from which a jury might infer that the accused was acting in self-defence when s/he committed any offence *on or after 1 November 2014*.

This charge should be given as part of the instruction that the jury must exclude any lawful justification or excuse.

This charge is drafted for use in cases in which the *defence* has alleged *self-defence*. It will need to be modified if used in cases where the possibility of self-defence arises on the evidence, but is *not alleged by the defence*. It will also need to be modified if there is evidence that the accused was acting in *defence of another*, in *defence of property*, or to *prevent or terminate the unlawful deprivation of liberty.*

Introduction

In this case the defence has alleged that NOA was acting in self-defence when s/he [*insert relevant act*]. I therefore need to give you some directions about "self-defence".

The law recognises the right of a person to defend himself or herself from attacks or threatened attacks. The law says that a person may act in self-defence if the person:

- believes that his or her conduct is necessary in self-defence, and
- the conduct is a reasonable response in the circumstances as the person perceives them.

As long as it is a reasonable response in the circumstances as the person perceives them, a person may do whatever they believe is necessary to defend themselves even if this involves committing what would otherwise be a criminal act.

So, in this case, even if you are satisfied that the prosecution has proven all of the other elements of an offence beyond reasonable doubt, NOA will not be guilty of that offence if s/he acted in self-defence.

The prosecution must therefore prove, beyond reasonable doubt, that NAO was not acting in self-defence. It is not for NOA to prove that s/he did act in self-defence.

Elements of Self-defence

There are two possible ways for the prosecution to prove that the accused was not acting in self-defence. I will explain them to you, and then examine some factors you should take into account in making your decision.

No Belief in Necessity

The first way in which the prosecution can prove that NOA was not acting in self-defence is to prove, beyond reasonable doubt, that when s/he [*insert relevant act*], s/he did not believe that it was necessary to do what s/he did to defend him/herself.

This involves assessing the accused's state of mind at the time s/he [*insert relevant act*]. What threat did s/he believe s/he faced? Did s/he believe it was necessary to react to the threat with force, and to do what s/he did in order to defend him/herself – or was s/he acting for some other purpose, such as [*insert relevant example from the evidence and/or arguments, e.g.* "to attack another" *or* "in retaliation for a past attack"]?

In making this assessment, you must consider the circumstances as NOA perceived them to be at the time s/he committed the acts. It does not matter if you think s/he was mistaken about the danger s/he faced, or you believe that s/he overreacted to the threat. The question here is whether the prosecution has proved that NOA did not believe it was necessary to act in the way s/he did, to defend him/herself against the danger s/he thought s/he faced at the time.

In deciding whether NOA believed that his/her conduct was necessary to defend him/herself, you can consider whether it would have been reasonable for him/her to hold that belief in all the circumstances. This is not because the law requires that the belief be reasonable. It does not. The reasonableness of the accused's alleged belief is only a guide to help you decide whether or not the accused really believed that it was necessary to do what s/he did to defend him/herself.

[*If it is alleged that the accused committed murder and the harm the accused allegedly believed s/he faced did not amount to death or really serious injury, add the following shaded section.*]

According to the law, a person may only commit what would otherwise be considered murder if s/he believes s/he is responding to a threat of death or really serious injury. If s/he intentionally kills someone in response to what s/he believes is a less serious threat, s/he will be guilty of murder. You must therefore determine whether NOA believed s/he was responding to a threat of death or really serious injury when s/he killed NOV. If the prosecution can prove, beyond reasonable doubt, that s/he

did not believe this, then NOA will not be acting in self-defence.

Not a Reasonable Response in the Circumstances

The second way in which the prosecution can prove that NOA was not acting in self-defence is by proving, beyond reasonable doubt, that his/her conduct was not a reasonable response in the circumstances as NOA perceived them to be at the time s/he [*insert relevant act*].

Again, it does not matter if NOA was mistaken in his/her perception of the circumstances. The prosecution will only succeed if it satisfies you beyond reasonable doubt that NOA's conduct was not a reasonable response in the circumstances, as s/he perceived them to be at the time of the conduct in question.

If the prosecution fails to prove to you either that NOA did not believe it was necessary to act in the way s/he did to defend him/herself, or that that conduct was not a reasonable response, in the circumstances as perceived by NOA, then you must find him/her not guilty of [*insert offence*].

Considerations

In determining whether NOA acted in self-defence, you must take into account all of the circumstances in which the act occurred. This includes [*insert any relevant factors, such as the* nature of the perceived threat*, any previous* relationship *between the parties, any* prior conduct *of the victim, or any personal* characteristics of the accused *that may have affected his or her behaviour, and relate to the facts in issue*].

You should also consider the defence's claim that NOA was reacting to a threat. In such circumstances, a person cannot be expected to weigh precisely the exact amount of self-defensive action required. You should not look at the situation with the benefit of hindsight, but instead take into account the fact that calm reflection cannot always be expected in such a situation.

[*If it is alleged that the force used was disproportionate to the threat, add the following shaded section. However, if there is evidence of self-defence in the context of family violence, see the shaded section on family violence instead.*]

It is for this reason that the law does not require that the force used in self-defence be exactly proportionate to the harm threatened.

However, if you consider that NOA's actions were out of all proportion to the harm threatened, that is one of the factors you can take into account in determining whether s/he believed his/her actions to be necessary in the circumstances. You can also consider this factor in deciding whether the accused's response was reasonable in the circumstances as s/he perceived them.

In this case, the prosecution alleged that NOA's acts were plainly disproportionate to the threat s/he perceived. [*Insert evidence and/or arguments.*] The defence responded [*insert evidence and/or arguments*].

[*If it is alleged that the accused failed to retreat, add the following shaded section.*]

In this case, you have heard evidence that NOA had the opportunity to retreat from the [*insert relevant act*], but failed to do so.

Although the law does not require a person to retreat from an attack before defending himself or herself, you can take into account a failure to do so when determining whether NOA believed that what s/he was doing was necessary in self-defence.

A failure to retreat is also one of the factors that you can take into account in deciding whether the accused's response was reasonable in the circumstances as s/he perceived them.

[*If it is alleged that the accused engaged in a pre-emptive strike, add the following shaded section. However, if there is evidence of self-defence in the context of family violence, see the shaded section on family violence instead.*]

In this case, the defence claimed that NOA was acting in self-defence, even though s/he was not being physically attacked at the time s/he [*insert relevant act*]. The defence claimed that his/her actions were necessary despite the lack of an immediate threat, to defend against [*insert relevant evidence*].

The law says that a person is not required to wait until an attack is actually in progress before defending himself or herself. S/he is entitled to use whatever force s/he believes is necessary to defend himself or herself against threatened harm, as long as the use of that force was a reasonable response in the circumstances as s/he perceived them.

However, the lack of immediacy of a threat is one of the factors you can take into account in determining what the accused believed to be necessary in the circumstances. You can also consider this factor in deciding whether the accused's response was reasonable in the circumstances as s/he perceived them.

[*If it is alleged that the accused was the original aggressor, add the following shaded section.*]

In this case, you have heard evidence that it was NOA who started the confrontation with NOV, by [*insert relevant evidence*]. This may be a significant matter in deciding whether NOA acted in self-defence. A person cannot start an attack, and simply claim that s/he was then defending him/herself from the victim's response to his/her original aggression.

However, when deciding whether NOA believed that his/her actions were necessary, and whether those actions were a reasonable response, you should take into account matters such as [*insert relevant factors, such as the extent to which the accused declined further conflict, stopped using force, faced a disproportionately escalated level of force in response, was defeated by the victim, was subjected to a new attack or attempted to retreat*].

[*If it is alleged that the accused was intoxicated, add the following shaded section.*]

In this case you have heard evidence that NOA was intoxicated at the time that s/he [*insert relevant act*]. If you find that s/he was intoxicated, you may take this into account when assessing whether s/he believed it was necessary to act in the way s/he did and in assessing the circumstances as NOA perceived them. This is because these issues include an assessment of NOA's state of mind, including his/her state of intoxication.

However, if you find that s/he was intoxicated, you must not take this into account when assessing whether his/her conduct was a reasonable response in the circumstances as NOA perceived them. The law requires you to consider what the reasonable response of a person who was not intoxicated would have been, in the circumstances as perceived by the accused.[1139]

[*If there is evidence of family violence involving the accused and the victim, add the following shaded section. If the existence or extent of family violence is in issue, this direction will need to be modified to account for the prosecution's onus of disproving the reasonable possibility that the accused had been subject to family violence*.[1140]]

In this case you have heard evidence of what is called "family violence" between NOA and NOV. [*Insert*

[1139] This direction will need to be modified if the intoxication is not self–induced. Model charges are available from 8.5.1 Charge: Statutory Intoxication (Self–induced) or 8.5.2 Charge: Statutory Intoxication (self–induced contested), as relevant.

[1140] For criminal proceedings where self-defence in the context of family violence is in issue, s 59 of the Jury Directions Act 2015 applies and certain preliminary directions may need to be given to the jury. See 8.1.1 Preliminary Directions: Self-defence in the Context of Family Violence (Jury Directions Act 2015 ss 59, 60).

evidence and/or arguments.]

The law says that where the accused has [*insert relevant act*] in circumstances where family violence is alleged, the accused may believe that his/her conduct was necessary to defend him/herself, and the conduct may be a reasonable response in the circumstances, even if:

- [*If relevant*] s/he is responding to a harm that is not immediate;
- [*If relevant*] his/her response involves the use of force in excess of the force involved in the harm or threatened harm.

This does not mean that a person who has suffered family violence may use any level of force in any circumstances. A person who has suffered family violence will still be guilty of [*insert the offence charged*] if s/he did not believe that it was necessary to act in the way s/he did, or if the conduct was not a reasonable response in the circumstances as s/he perceived them to be.

However, the law recognises that in determining whether a person was defending him/herself from "family violence", it is not a simple matter of determining whether [an attack was in progress at the time the accused acted/the accused's response was proportionate to the threatened harm]. Such cases are complicated, and require you to consider all of the evidence, including evidence of:

[*Where there is evidence of one or more of the following matters (listed in* Crimes Act 1958 *s 322J(1), the judge should identify the evidence and relate it to the facts in issue*:

(a) The *history of the relationship* between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;

(b) The *cumulative effect,* including psychological effect, on the person or a family member of that violence;

(c) *Social, cultural or economic factors* that impact on the person or a family member who has been affected by family violence*;*

(d) The general *nature and dynamics* of relationships affected by family violence, including the possible consequences of separation from the abuser;

(e) The *psychological effect of violence* on people who are or have been in a relationship affected by family violence;

(f) *Social or economic factors* that impact on people who are or have been in a relationship affected by family violence.]

In this case, the defence has submitted that NOA was acting defensively when s/he [*insert relevant act and arguments*]. The prosecution denied this was the case, alleging [*insert relevant evidence and/or arguments*].

Summary

To summarise this element, the prosecution must prove, beyond reasonable doubt, that NOA either:

- Did not believe that it was necessary to do what s/he did to defend him/herself; or
- The conduct was not a reasonable response in the circumstances as perceived by NOA.

Last updated: 1 November 2014

8.1.3 Checklist: Statutory Self-Defence

Click here to obtain a Word version of this document for adaptation

This checklist can be used if there is evidence from which a jury might infer that the accused was acting in self-defence when s/he committed any offence on or after 1 November 2014.

The checklist is designed for use where it is alleged that the accused believed it was necessary to do what s/he did to *defend him/herself*. It will need to be modified if it is alleged that the accused was acting in *defence of another*, in *defence of property*, or to *prevent or terminate the unlawful deprivation of liberty.*

It is designed to be used together with a checklist outlining the elements of the relevant offence. Details of that offence will need to be inserted in the appropriate places.

In addition to proving all of the elements of [*insert offence*], the prosecution must also prove that the accused did not act in self-defence. This requires the prosecution to prove, beyond reasonable doubt, that when the acts said to constitute the offence were committed, either:

1. The accused did not believe that it was necessary to do what s/he did to defend him/herself; or
2. The accused's conduct was not a reasonable response in the circumstances as s/he perceived them.

Belief in Necessity

1. Has the prosecution proven, beyond reasonable doubt, that the accused did not believe that it was necessary to do what s/he did to defend him/herself, at the time s/he committed the relevant acts?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of [*insert offence*] (as long as you are satisfied that the prosecution has also proven all of the elements of that offence beyond reasonable doubt)

If No, then go to Question 2

Reasonable Response in the Circumstances

2. Has the prosecution proven, beyond reasonable doubt, that the accused's conduct was not a reasonable response in the circumstances as NOA perceived them?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of [*insert offence*] (as long as you are satisfied that the prosecution has also proven all of the elements of that offence beyond reasonable doubt)

If No, then the accused acted in self-defence and is not guilty of [*insert offence*] (as long as you also answered No to Question 1)

Last updated: 1 November 2014

8.2 Statutory Self-Defence (Pre-1/11/14) and Defensive Homicide

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Commencement and Repeal Information

1. Prior to 2005, self-defence in Victoria was governed solely by the common law. This situation was altered by the passage of the *Crimes (Homicide) Act 2005*, which introduced two statutory self-defence provisions into the *Crimes Act 1958*: one for use in murder cases (s 9AC) and the other for use in manslaughter cases (s 9AE). The Act also introduced a new offence of "Defensive Homicide" (s 9AD).
2. The provisions of the *Crimes (Homicide) Act 2005* commenced operation on 23 November 2005, and apply to offences committed on or after that date (*Crimes Act 1958* s 603).
3. If the date of the victim's death differs from the date on which the *actus reus* was committed, the relevant date for determining whether the provisions of the *Crimes (Homicide) Act 2005* apply is the date of death (*R v Gould* (2007) 17 VR 393; [2007] VSC 420).
4. Subdivision (1AA) of Division 1 of Part I of the *Crimes Act 1958* (which includes ss 9AC, 9AD and 9AE) was repealed by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* on 1 November 2014.
5. This topic therefore applies only to offences committed between 23 November 2005 and 1 November 2014. For self-defence cases in which the offence is alleged to have been committed on or after 1 November 2014, see 8.1 Statutory Self-defence (From 1/11/14).

Application of Statutory Provisions

6. Although *Crimes Act 1958* s 9AB states that the statutory self-defence provisions only apply to the "relevant offences" of murder, manslaughter or defensive homicide, it has been held that they also apply to attempted murder (*R v Pepper* (2007) 16 VR 637; [2007] VSC 234; *DPP v McAllister* [2007] VSC 315).

Replacement of Common Law Self-defence

7. Where it applies, this statutory defence has replaced the common law defence (*Babic v R* (2010) 28 VR 297; [2010] VSCA 198). Consequently, common law self-defence is not available when:
    - The accused is charged with murder, manslaughter, defensive homicide, attempted murder or attempted defensive homicide; and
    - It is alleged that the death occurred on or after 23 November 2005.
8. However, common law self-defence may be raised when:
    - The accused is charged with an offence other than the homicide offences listed above, and such offence was alleged to have been committed before 1 November 2014; or
    - The accused is charged with one of those homicide offences listed above, and such offence, was alleged to have been committed before 23 November 2005.
9. See 8.3 Common Law Self-defence for information concerning the common law defence.

When to Charge the Jury about Self-defence

10. The judge must direct the jury about self-defence if the accused indicates that self-defence is in issue or if the judge considers that there are substantial and compelling reasons to direct the jury about self-defence in the absence of a request (*Jury Directions Act 2015* ss 14–16). See Directions under Jury Directions Act 2015.
11. At common law, the judge was required to instruct the jury about self-defence if there was evidence on which a reasonable jury could decide the issue favourably to the accused (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Kear* [1997] 2 VR 555; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

12. The issue of self-defence could be held to arise if there was any evidence from which the jury might infer that the accused acted in self-defence (*R v Kear* [1997] 2 VR 555; *R v Imadonmwonyi* [2004] VSC 361).

13. To see if there was any such evidence, a judge could look not only to the direct evidence, but also to whether a circumstantial case could fairly be made out to support the defence (*R v Kear* [1997] 2 VR 555; *R v Imadonmwonyi* [2004] VSC 361).

14. At common law, if there was sufficient evidence to raise the possibility of self-defence, the trial judge was required to leave the issue to the jury even if the judge considered the defence to be "weak or tenuous" (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Kear* [1997] 2 VR 555; *R v Muratovic* [1967] Qd R 15; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

15. If there was sufficient evidence to raise the possibility of self-defence, the judge was required at common law to instruct the jury about it, whether or not the defence is raised by the accused (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Kear* [1997] 2 VR 555; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

16. Where there was sufficient evidence to raise the possibility of self-defence, the judge was required to instruct the jury about it even if the factual basis for the defence was inconsistent with the accused's version of events at trial (*R v Kear* [1997] 2 VR 555; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

17. These common law principles may be relevant to the operation of the residual obligation to give directions under *Jury Directions Act 2015* s 16, but must be read in light of the whole of Part 3 of the Act.

Onus of Proof

18. Once the question of self-defence is put in issue, the onus is on the prosecution to prove that the accused did not act in self-defence (*Babic v R* (2010) 28 VR 297; [2010] VSCA 198; *Zecevicv Director of Public Prosecutions* (1987) 162 CLR 645; *Virov R* (1978) 141 CLR 88; *Dziduch v R* (1990) 47 A Crim R 378).

Murder Self-defence

19. Section 9AC provides that a person is not guilty of murder if he or she carries out conduct that would otherwise constitute murder "while believing the conduct to be necessary to defend himself or herself or another person from the infliction of death or really serious injury."

20. Although this provision appears to suggest that it is for the accused to establish that he or she held the relevant belief, this is not the case. The onus is on the prosecution to prove that the accused did not hold such a belief (*Babic v R* (2010) 28 VR 297; [2010] VSCA 198).

21. The accused will therefore not be guilty of murder if the jury:

    - Finds that the accused believed that it was necessary to do what he or she did to defend him or herself or another person from death or really serious injury; or
    - Is not satisfied that the prosecution has proven beyond reasonable doubt that the accused did not have such a belief (*Babic v R* (2010) 28 VR 297; [2010] VSCA 198).

22. Unlike common law self-defence (see 8.3 Common Law Self-defence), section 9AC does not require the accused's belief to have been based on reasonable grounds. It is a purely subjective test that focuses on the belief of the accused (*Babic v R* (2010) 28 VR 297; [2010] VSCA 198; *R v Carrington* (2007) 16 VR 694; [2007] VSC 422).

23. This means that even if the prosecution can prove that the accused's belief in the necessity of his or her action was unreasonable in the circumstances, if the accused genuinely held that belief he or she must not be convicted of murder. However, he or she may be convicted of defensive homicide (see "Defensive Homicide" below).

24. The statutory defence will fail if the accused did not believe that his or her actions were necessary to defend him or herself or another person from the infliction of *death or really serious injury*. This also differs from common law self-defence, which does not specify the type of harm that must be threatened before a person can raise self-defence. At common law, even if people defend themselves against less serious harm, or act to protect property or prevent crime, they may successfully raise self-defence if the jury finds they believed upon reasonable grounds that their actions were necessary (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v McKay* [1957] VR 560. See also *Babic v R* (2010) 28 VR 297; [2010] VSCA 198).

25. The *Crimes Act* does not define "really serious injury" for the purposes of s 9AC. Although it has not been determined, it seems likely that it can include psychological injuries as well as physical injuries. It will be for the jury to decide whether what the accused was threatened with was an "injury", as well as whether that threatened injury was "really serious".

26. As s 9AC involves a purely subjective test, the jury should not consider what a reasonable or ordinary person would have believed in the circumstances, but what the *accused* believed (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *Virov R* (1978) 141 CLR 88; *R v Conlon* (1993) 69 A Crim R 92 (SC NSW)).

27. It does not matter if the accused's belief was mistaken, as long as it was genuinely held (*R v McKay* [1957] VR 560).

28. If the accused was intoxicated at the time he or she committed the relevant acts, this can be taken into account when determining whether he or she believed his or her actions to be necessary (*R v Conlon* (1993) 69 A Crim R 92 (NSWSC); *R v Katarzynski* [2002] NSWSC 613. See "Intoxication" below for further information).

29. The determination of whether the accused believed that his or her actions were necessary incorporates two questions: first, whether the accused believed it was necessary to defend himself or herself at all and, secondly, whether the accused believed it was necessary to respond as he or she did given the threat as s/he perceived it (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645).

30. In determining whether the accused believed that the force used was necessary, consideration should be given to the fact that a person who has reacted instantly to imminent danger cannot be expected to weigh precisely the exact measure of self-defensive action which is required (*R v Palmer* [1971] AC 814; *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Conlon* (1993) 69 A Crim R 92).

31. The proportionality of the accused's response to the harm threatened is just one factor to take into account in determining whether the accused believed that his or her actions were necessary (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259; [2004] VSCA 178; *R v Carrington* (2007) 16 VR 694; [2007] VSC 422).

32. There is no rule requiring the accused to retreat from an attack rather than defend himself or herself. However, a failure to retreat is a factor to be taken into account in determining whether the accused believed that what was done was necessary (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Howe* (1958) 100 CLR 448).

33. If the accused acted under the pretence of defending himself or herself to attack another or retaliate for a past attack, then the test for self-defence will not be met. Factors such as a failure to retreat when possible or a highly disproportionate response might indicate an intention to use the circumstances for aggression or retaliation rather than for self-defence.

34. Circumstances of "family violence" can affect the accused's determination of what is necessary (s 9AH). See "Family Violence" below for further information.

Defensive Homicide

Warning: The offence of defensive homicide is only available for conduct that occurred between 20 November 2005 and 1 November 2014. The offence of defensive homicide is not available outside that period.

35. As noted above, the "reasonableness" of the accused's belief in the necessity of his or her actions is not taken into account when determining whether he or she acted in self-defence. The focus is solely on whether the accused believed his or her actions were necessary (s 9AC).

36. However, *Crimes Act 1958* s 9AD states that a person who kills in circumstances that, but for s 9AC, would constitute murder will be guilty of the indictable offence of "defensive homicide" if he or she did not have reasonable grounds for his or her belief.

37. Sections 9AC and 9AD therefore create a scheme whereby people who kill in circumstances that would ordinarily constitute murder will not be convicted of murder if they genuinely, but unreasonably, believed their actions were necessary (or if the prosecution cannot disprove such a belief). However, they remain criminally responsible (though to a lesser extent) if the jury finds that the accused's belief was not based on reasonable grounds.

38. Although s 9AD refers to the accused's "belief" in the necessity of his or her actions, that section does not only apply to cases where the jury positively finds that the accused believed that his or her actions were necessary. It also applies to cases where the prosecution fails to persuade the jury beyond reasonable doubt that the accused did not have such a belief (*Babic v R* (2010) 28 VR 297; [2010] VSCA 198).

39. In such cases, the jury must focus on the accused's asserted belief. To convict the accused of defensive homicide, they must find that, *if* the accused believed his or her actions were necessary to defend himself or herself or another person from the infliction of death or really serious injury, that belief was not held on reasonable grounds (*Babic v R* (2010) 28 VR 297; [2010] VSCA 198).

40. This element does not require the jury to determine whether the accused *acted unreasonably* in the circumstances. It requires the jury to determine whether there were no *reasonable grounds* for the accused's belief that it was necessary to do what he or she did (*R v Hendy* [2008] VSCA 231).

41. This is not a test about what the hypothetical "reasonable person" might have believed in the circumstances, but about whether the *accused* had no reasonable grounds for his or her belief, in the circumstances as he or she perceived them to be (*R v Portelli* (2004) 10 VR 259; [2004] VSCA 178; *Virov R* (1978) 141 CLR 88).

42. The accused's belief will not have been based on reasonable grounds if it was not a belief which the accused might reasonably have held in all the circumstances (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Wills* [1983] 2 VR 201).

43. In determining whether the accused's belief was not based on reasonable grounds, the jury may take into account the following matters:

    - The surrounding circumstances (*R v Wills* [1983] 2 VR 201);
    - All of the facts within the accused's knowledge (*R v Wills* [1983] 2 VR 201);
    - The relationship between the parties involved (*R v Hector* [1953] VLR 543);
    - The prior conduct of the victim (*R v Besim* [2004] VSC 169);
    - Circumstances of family violence (s 9AH – see "Family Violence" below);
    - The personal characteristics of the accused, such as:

- Any deluded beliefs he or she held (*Grosser v R* (1999) 73 SASR 584; *R v Walsh* (1991) 60 A Crim R 419 (Tas SC));
- Any excitement, affront or distress he or she was experiencing (*R v Wills* [1983] 2 VR 201);

- The proportionality of the accused's response (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259; [2004] VSCA 178);
- The accused's failure to retreat (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Howe* (1958) 100 CLR 448).

44. The accused's intoxication should not be taken into account in determining whether his or her belief was based on reasonable grounds, unless it was not self-induced (s 9AJ. See "Intoxication" below for further information).

Manslaughter Self-defence

45. Section 9AE provides that a person is not guilty of manslaughter if:

> he or she carries out the conduct that would otherwise constitute manslaughter while believing the conduct to be necessary –
>
> (a) to defend himself or herself or another person; or
>
> (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person –
>
> and he or she had reasonable grounds for that belief.

46. This provision substantially replicates the common law of self-defence, in that it involves both a subjective element (a belief by the accused that what he or she was doing was necessary) and an objective element (that the belief was based on reasonable grounds). See "Murder Self-defence" above for a discussion of the subjective element, and "Defensive Homicide" above for a discussion of the objective element.

47. However, unlike at common law, s 9AE restricts self-defence in the case of manslaughter to situations where people act to defend themselves or other people, or to prevent or terminate the unlawful deprivation of their liberty or the liberty of other people. It does not allow defensive force to be used for the protection of property or the prevention of other crimes (cf. *R v McKay* [1957] VR 560).

48. As the test for manslaughter self-defence differs from the test for murder self-defence, in murder cases that raise the possibility of a manslaughter verdict, it will be necessary to charge the jury separately about the requirements of each. See "Procedure for Charging the Jury about Statutory Self-defence" below.

Attempts

49. Where the offence of attempted murder is alleged to have been committed on or after 23 November 2005 and before 1 November 2014, the statutory self-defence provisions in Subdivision (1AA) of Division 1 of Part I apply (*R v Pepper* (2007) 16 VR 637; [2007] VSC 234; *DPP v McAllister* [2007] VSC 315; *R v Carrington* (2007) 16 VR 694; [2007] VSC 422).

50. Where the charge is attempted murder, and the issue of self-defence arises, the alternative verdict of attempted defensive homicide can be left to the jury (*R v Pepper* (2007) 16 VR 637; [2007] VSC 234; *DPP v McAllister* [2007] VSC 315; *R v Carrington* (2007) 16 VR 694; [2007] VSC 422; but compare *DPP v Ayyad* (2014) 44 VR 346; [2014] VSC 629).

51. If the accused is charged with another offence, such as intentionally causing serious injury, in addition to attempted murder or attempted defensive homicide, it will be necessary to give multiple directions about self-defence. The jury will need to be charged about statutory self-defence in relation to the attempted murder or attempted defensive homicide charges, and common law self-defence in relation to any other charges (*R v Pepper* (2007) 16 VR 637; [2007] VSC 234; *DPP v McAllister* [2007] VSC 315).

52. In such cases, a judge should consider how to accommodate the fact that the jury will be required to consider the less serious charge of attempted defensive homicide (maximum penalty level 4 imprisonment) before the more serious charge of intentionally causing serious injury (maximum penalty level 3 imprisonment) (*R v Pepper* (2007) 16 VR 637; [2007] VSC 234. See *R v Carrington* (2007) 16 VR 694; [2007] VSC 422 for an example of how the jury may be directed).

Defence against Lawful Force

53. Unlike at common law, the statutory defences of murder self-defence (s 9AC) and manslaughter self-defence (s 9AE) do not apply if the accused is responding to lawful conduct, and knows at the time of his or her response that the conduct is lawful (s 9AF).

54. In applying s 9AF, the relevant question is whether a jury could find or consider that there was a reasonable possibility that the other party's conduct was unlawful. This may require the court to consider whether the other party was engaged in self-defence, which may include a pre-emptive strike (*DPP v McDowall* [2019] VSC 341, [9], [13]–[16]).

Accused as the Initial Aggressor

55. At common law, one of the factors to be taken into account in determining whether the accused was acting in self-defence was whether he or she had been the initial aggressor. However, there was no rule to prevent lawful self-defence when the accused originated the attack, as long as the original aggression had ceased to create a continuing situation of emergency that provoked a lawful counter attack on the accused. Initial aggression by the accused was part of the surrounding circumstances the jury was required to take into account in determining whether the accused believed it was necessary to act in self-defence or whether there were reasonable grounds for that belief (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645).

56. Where it is alleged that the accused was the initial aggressor, the jury must consider all the circumstances as perceived by the accused, including, for example, the extent to which the accused declined further conflict, stopped using force, was defeated, faced a disproportionately escalated level of force in response, or attempted to retreat (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259; [2004] VSCA 178; *Ruben Anandan v R* [2011] VSCA 413; see also *R v Lawson and Forsythe* [1986] VR 515 (Ormiston J))

Intoxication

57. At common law, it is possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds (*R v Conlon* (1993) 69 A Crim R 92 (NSWSC); *R v Katarzynski* [2002] NSWSC 613).

58. However, s 9AJ(2) of the *Crimes Act 1958* states that:

> If any part of an element of a relevant offence, or of a defence to a relevant offence, relies on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard must be had to the standard of a reasonable person who is not intoxicated.

59. A "relevant offence" for the purpose of this provision is defined as murder, manslaughter or defensive homicide (s 9AB).

60. The effect of this provision is to prevent intoxication being taken into account in homicide cases when determining whether the accused had reasonable grounds for believing in the necessity of his or her actions. It does not, however, prevent intoxication being taken into account in determining whether the accused believed his or her actions were necessary in self-defence.

61. Section 9AJ(4) provides an exception for cases in which the intoxication is not self-induced. In such cases regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned. See ss 9AJ(5) and (6) for the definition of "self-induced intoxication".

62. For more information, see 8.5 Statutory Intoxication (From 1/11/14) (23/11/05–31/10/14).

Use of Pre-emptive Force

63. People are not only entitled to rely on self-defence if they act whilst an attack is in progress or immediately threatened. They are entitled to take steps to forestall a threatened attack before it has begun (*Osland v R* (1998) 197 CLR 316; *Virov R* (1978) 141 CLR 88; *R v Lane* [1983] 2 VR 449; *R v Conlon* (1993) 69 A Crim R 92).

64. The key issue is not whether an attack was imminent or immediately threatened, but whether the accused's perception of danger led him or her to believe that the use of defensive force was necessary, and (in the case of manslaughter or defensive homicide) whether there were reasonable grounds for such a belief (*Osland v R* (1998) 197 CLR 316).

65. However, what is believed to be necessary in the circumstances, and whether there were reasonable grounds for such a belief, may be affected by the lack of immediacy of the threat, although this will not necessarily be the case (*R v Portelli* (2004) 10 VR 259; [2004] VSCA 178).

66. Where a person responds pre-emptively to what he or she perceives to be a threat from a violent partner, expert evidence of "battered woman syndrome" may be admitted. Such evidence can assist the jury to understand that an act committed when there is no actual attack underway may be a self-defensive response to a genuinely apprehended threat of imminent danger, sufficient to warrant a pre-emptive strike (*Osland v R* (1998) 197 CLR 316. See also "Family Violence" below).

Family Violence

67. *The Crimes (Homicide) Act 2005* introduced into the *Crimes Act 1958* a new provision concerning homicide cases involving allegations of "family violence" (s 9AH). This is defined in s 9AH(4) to mean "violence" against a person by a "family member".

68. "Family member" is defined broadly in s 9AH(4), and includes:

- a person who is or has been married to the person;
- a person who has or has had an intimate personal relationship with the person;
- a person who is or has been the father, mother, step-father or step-mother of the person;
- a child who normally or regularly resides with the person;
- a guardian of the person; and
- another person who is or has been ordinarily a member of the household of the person.

69. "Violence" is also defined broadly in s 9AH(4) to mean:

- physical abuse;
- sexual abuse;
- psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to:

- intimidation;
- harassment;
- damage to property;
- threats of physical abuse, sexual abuse or psychological abuse;
- in relation to a child:
    - causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
    - putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

70. A single act may amount to "abuse" for the purpose of the definition of violence (s 9AH(5)(a)). A number of acts that form part of a pattern of behaviour may also amount to "abuse", even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial (s 9AH(5)(b)).

71. Section 9AH(1) provides that, for cases of murder, defensive homicide or manslaughter committed in circumstances where family violence is alleged, people may believe, and may have reasonable grounds for believing, that their conduct is necessary, even if:
    - They are responding to a harm that is not immediate; or
    - Their response involves the use of force in excess of the force involved in the harm or threatened harm.

72. The provisions in s 9AH(1) clarify what is already the law in relation to self-defence. As noted above (see "Use of Pre-emptive Force"), people are not required to wait until an attack is in progress or immediately threatened before using defensive force. They are entitled to take steps to forestall a threatened attack before it has begun (*Osland v R* (1998) 197 CLR 316). Similarly, disproportionate force may be used, as long as the accused believed it was necessary, and (in the case of defensive homicide or manslaughter) there were reasonable grounds for such a belief (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645).

73. Sections 9AH(2) and (3) state that, in cases involving allegations of family violence, the following evidence may be relevant in determining whether the accused believed his or her conduct to be necessary, or had reasonable grounds for believing his or her conduct to be necessary:

    (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;

    (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;

    (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;

    (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;

    (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;

    (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

74. If such evidence is given, the judge will need to explain to the jury its relevance to the facts in issue. This will differ, depending on the area under consideration:

- In cases of murder self-defence (s 9AC), the judge will need to explain the way in which family violence may affect the accused's belief about what actions were necessary to defend himself or herself.
- In cases of defensive homicide (s 9AD), the judge will need to explain the way in which family violence may affect the reasonableness of the accused's belief.
- In cases of manslaughter self-defence (s 9AE), the judge will need to explain the way in which family violence may affect the accused's belief about what actions were necessary to defend himself or herself, as well as the way in which it may affect the reasonableness of the grounds for that belief.

75. See 'Chapter 4: Evidence of Relationship and Family Violence' in the Victorian Law Reform Commission's Defences to Homicide: Final Report for a more detailed discussion of the relationship between self-defence and family violence, and the use which can be made of the evidence outlined above.

Family Violence and Self-defence

76. The *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* introduced a new Part 7 into the *Jury Directions Act 2013*. On 29 June 2015, these provisions were revised and relocated to Part 6 of the *Jury Directions Act 2015*.

77. Part 3 of the *Jury Directions Act 2015* does not apply to Part 6 of the Act.

78. Part 6 of the *Jury Directions Act 2015* applies to any trial commencing on or after 29 June 2015, regardless of the date of any alleged offence.

79. For the purposes of Part 6, "family violence" has the same meaning as in s 322J(2) of the *Crimes Act 1958* (which replicates the previous definition in s 9AH, see "Family Violence" above).

80. The trial judge must give the jury preliminary directions on family violence, in accordance with s 59 of the *Jury Directions Act 2015*, if the defence counsel or the accused requests such directions, unless there are good reasons for not doing so (*Jury Directions Act 2015* s 58). And the judge may give them if the accused is unrepresented and the judge considers it in the interests of justice to do so (*Jury Directions Act 2015* s 58(3)).

81. The judge must give the statutory directions on family violence as soon as practicable after the request is made and the judge may give the direction before any evidence is adduced in the trial. The directions may be repeated at any time during the trial (*Jury Directions Act 2015* s 58(4)–(5)).

82. The directions must include all of the following (*Jury Directions Act 2015* s 59):

> (a) self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial; and
>
> (b) as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires); and
>
> (c) [...] evidence in the trial is likely to include evidence of family violence committed by the victim against the accused or another person whom the accused was defending [...].

83. The following directions under s 60 may also be sought and, if sought, must be given unless there are good reasons for not doing so:

(a) that family violence–

(i) is not limited to physical abuse and may include sexual abuse and psychological abuse;

(ii) may involve intimidation, harassment and threats of abuse;

(iii) may consist of a single act;

(iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;

(b) if relevant, that experience shows that–

(i) people may react differently to family violence and there is no typical, proper or normal response to family violence;

(ii) it is not uncommon for a person who has been subjected to family violence–

(A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;

(B) not to report family violence to police or seek assistance to stop family violence;

(iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by-

(A) family violence itself;

(B) cultural, social, economic and personal factors;

(c) that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence [...] in relation to the offence charged.

Content of the Charge

84. When directing the jury about self-defence there is no set formula to be used (*Collingburn v R* (1985) 18 A Crim R 294; *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259; [2004] VSCA 178).

85. The burden of proof should be made very clear to the jury. They should be told that the accused should only be convicted of murder if the prosecution has proved that he or she did not act in self-defence (*R v Alpagut* 27/7/1989 NSWCCA; *R v Dziduch* (1990) 47 A Crim R 378; *R v Portelli* (2004) 10 VR 259; [2004] VSCA 178; *Babic v R* (2010) 28 VR 297; [2010] VSCA 198).

86. One way the judge can do this is by explaining to the jury that they must acquit the accused of murder (and go on to consider whether he or she is guilty of defensive homicide), if they find *either*:

(a) That the accused believed it was necessary to do what he or she did to defend him or herself or another person from death or really serious injury; or

(b) That the prosecution has not proven beyond reasonable doubt that the accused did not have such a belief (*Babic v R* (2010) 28 VR 297; [2010] VSCA 198).

87. The judge may explain to the jury that even if they are not sure that the accused held the requisite belief, they may still convict him or her of defensive homicide. In such a case they must assume that the accused held the belief that he or she said that he or she held. They may only convict him or her of defensive homicide if they are satisfied that the accused had no reasonable grounds for that asserted belief (*Babic v R* (2010) 28 VR 297; [2010] VSCA 198).

88. When addressing defensive homicide, judges should be careful not to direct the jury that the accused's *conduct* must have been unreasonable. The focus of the charge must be on the grounds for the accused's *belief* (see, e.g. *R v Hendy* [2008] VSCA 231).

89. The question of self-defence should be placed in its factual setting, and considerations which may assist the jury to reach its conclusion should be identified (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Dziduch* (1990) 47 A Crim R 378; *R v Portelli* (2004) 10 VR 259; [2004] VSCA 178).

90. The jury should be told to consider all of the circumstances of the case, and that any one factor should be considered within that broader context. This helps ensure that matters of evidence, such as the proportionality of the force, are not elevated to rules of law (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Alpagut* 27/7/1989 NSWCCA; *R v Portelli* (2004) 10 VR 259; [2004] VSCA 178).

91. The judge should offer such assistance by way of comment as is appropriate to the particular case. It will often be desirable to tell the jury to approach the task in a practical manner, giving proper weight to the predicament of the accused, which may have afforded little, if any, opportunity for calm deliberation or detached reflection (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Dziduch* (1990) 47 A Crim R 378; *R v Portelli* (2004) 10 VR 259; [2004] VSCA 178).

92. The issue of self defence should be listed with all of the other issues which the prosecution must establish, rather than being dealt with separately (*R v Alpagut* 27/7/1989 NSWCCA).

Procedure for Charging the Jury about Statutory Self-defence

93. In most murder cases alleged to be committed on or after 23 November 2005 and before 1 November 2014 in which there is evidence that the accused acted in self-defence, it will be necessary to charge the jury about each of the following matters:

    - The other elements of murder;
    - Murder self-defence (s 9AC);
    - Defensive homicide (s 9AD);
    - The elements of manslaughter; and
    - Manslaughter self-defence (s 9AE).

94. To assist the jury to understand the way in which these offences and defences interact, and the fact that there are different tests for self-defence in relation to murder and manslaughter, it is recommended that these matters be addressed in the order outlined above.

Last updated: 27 October 2022

8.2.1 Charge: Murder Self-Defence

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This charge should be given if it is alleged that the accused committed *murder* on or after 23 November 2005 and before 1 November 2014, and there is evidence from which a jury might infer that he or she was acting in self-defence. It should be inserted where indicated in the murder charge.

Murder Self-defence

In this case the defence has alleged that NOA was acting to defend him/herself when s/he killed NOV.[1141] I therefore need to give you some directions about "self-defence".

The law recognises the right of people to defend themselves from attacks or threatened attacks. The law says that people may even commit acts that would otherwise be classified as "murder" if they believe those acts are necessary to defend themselves from being killed or really seriously injured. So in this case, even if you are satisfied that the prosecution has proven all of the other elements of murder beyond reasonable doubt, NOA will not be guilty of that offence if s/he acted in self-defence.

Because the prosecution must prove the accused's guilt, it is for the prosecution to prove, beyond reasonable doubt, that NOA was not acting in self-defence when s/he killed NOV.It is not for NOA to prove that s/he did act in self-defence.

To prove that the accused was not acting in self-defence, the prosecution must satisfy you, beyond reasonable doubt, that when s/he killed NOV, s/he did not believe that it was necessary to do what s/he did to defend him/herself from the infliction of death or really serious injury.

This involves assessing the accused's state of mind at the time s/he [*insert relevant act*]. What threat did s/he believe s/he faced? Did s/he believe s/he was defending him/herself from the infliction of death or really serious injury? If so, did s/he believe it was necessary to react to that threat with force, and to react with the level of force used in order to defend him/herself from that harm – or was s/he acting for some other purpose, such as [*insert relevant example from the evidence and/or arguments, e.g.* "in retaliation for a past attack"]?

[*If the harm the accused allegedly believed s/he faced may not amount to death or really serious injury, add the following shaded section.*]

According to the law, a person may only commit what would otherwise be considered murder if s/he believes s/he is responding to a threat of death or really serious injury. If s/he intentionally kills someone in response to what s/he believes is a less serious threat, s/he will be guilty of murder. You must therefore determine whether NOA believed s/he was responding to a threat of death or really serious injury when s/he killed NOV. If the prosecution can prove, beyond reasonable doubt, that s/he did not, then this element will be met.

In making this assessment, you must consider the circumstances as NOA perceived them to be at the time s/he killed NOV. It does not matter if you think s/he was mistaken about the danger s/he faced, or if you believe that s/he overreacted to the threat or acted unreasonably. The question here is what NOA believed was necessary in the circumstances. You must determine whether the prosecution has proven that NOA did not believe it was necessary to act in the way s/he did, to defend him/herself against the threat of death or really serious injury that s/he thought s/he faced at the time.

[1141] This charge is drafted for use in cases in which the defence does not deny that the accused killed the victim, but contends that it was done in self-defence. It will need to be modified if used in the following circumstances:

– If self-defence arises on the evidence, but is not alleged by the defence;

– If the defence denies that the accused killed the victim; or

– If there is evidence that the accused was acting in defence of another.

It is only if you are satisfied that NOA did not believe s/he was threatened with death or really serious injury, or did not act in the belief that what s/he did was necessary to defend him/herself from that threat, that this element will be satisfied.

Considerations

You must take into account all of the circumstances in which the killing occurred when determining whether NOA believed that it was necessary to do what s/he did to defend him/herself from the infliction of death or really serious injury. This includes [*insert any relevant factors, such as the* nature of the perceived threat*, any previous* relationship *between the parties, any* prior conduct *of the victim, or any personal* characteristics of the accused *that may have affected his or her behaviour, and relate to the facts in issue*].

You should also consider the defence's claim that NOA was reacting to an imminent threat. In such circumstances, a person cannot be expected to weigh precisely the exact amount of defensive action required. You should not look at the situation with the benefit of hindsight, but instead take into account the fact that calm reflection cannot always be expected in such a situation.

[*If it is alleged that the force used was disproportionate to the threat, add the following shaded section. However, if there is evidence of self-defence in the context of family violence, see the shaded section on family violence instead.*]

It is for this reason the law does not require that any defensive force used be exactly proportionate to the harm threatened.

However, if you consider that the accused's actions were out of all proportion to the harm threatened, that is one of the factors you can take into account in determining whether s/he believed his/her actions to be necessary in the circumstances.

In this case, the prosecution alleged that NOA's acts were plainly disproportionate to the threat s/he believed s/he faced. [*Insert evidence and/or arguments.*] The defence responded [*insert evidence and/or arguments*].

[*If it is alleged that the accused failed to retreat, add the following shaded section.*]

In this case, you have heard evidence that NOA had the opportunity to retreat from the [*insert relevant act*], but failed to do so.

Although the law does not require people to retreat from an attack before defending themselves, you can take into account a failure to do so when determining whether NOA believed that what s/he was doing was necessary in self-defence.

[*If it is alleged that the accused engaged in a pre-emptive strike, add the following shaded section. However, if there is evidence of family violence between the accused and the victim, see the shaded section on family violence instead.*]

In this case, the defence claimed that NOA was acting in self defence, even though s/he was not being physically attacked at the time s/he [*insert relevant act*]. The defence claimed that his/her actions were necessary despite the lack of an immediate threat, to defend against [*insert relevant evidence*].

The law says that people are not required to wait until an attack is actually in progress before defending themselves. They are entitled to use whatever force they believe is necessary to defend themselves from being killed or really seriously injured.

However, the lack of immediacy of a threat is one of the factors you can take into account in determining what the accused believed to be necessary in the circumstances.

[*If it is alleged that the accused was intoxicated, add the following shaded section.*]

In this case you have heard evidence that NOA was intoxicated at the time that s/he [*insert relevant act*]. If you find that s/he was intoxicated, you should take this into account when assessing whether s/he believed it was necessary to act in the way s/he did. This is because the issue to be decided is what the

accused believed was necessary in all of the circumstances, including his/her state of intoxication.

[*If there is evidence of family violence involving the accused and the victim, add the following shaded section if relevant*.[1142]]

In this case you have heard evidence of what is called "family violence" between NOA and NOV. [*Insert evidence and/or arguments.*]

The law says that where a person is killed in circumstances where family violence is alleged, the accused may believe that his/her conduct was necessary to defend him/herself even if:

- [*If relevant*] s/he is responding to a harm that is not immediate;
- [*If relevant*] his/her response involves the use of force in excess of the force involved in the harm or threatened harm.

This does not mean that a person who has suffered family violence may use any level of force in any circumstances. A person who has suffered family violence will still be guilty of murder if s/he did not believe that it was necessary to act in the way s/he did.

However, the law recognises that in determining whether a person was defending him/herself from "family violence", it is not a simple matter of determining whether [an attack was in progress at the time the accused acted/the accused's response was proportionate to the threatened harm]. Such cases are complicated, and require you to consider all of the evidence, including evidence of:

[*Where there is evidence of one or more of the following matters (listed in* Crimes Act 1958 *s 9AH(3)), the judge should identify the evidence and relate it to the facts in issue:*

(a) The *history of the relationship* between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;

(b) The *cumulative effect*, including psychological effect, on the person or a family member of that violence;

(c) *Social, cultural or economic factors* that impact on the person or a family member who has been affected by family violence;

(d) The general *nature and dynamics* of relationships affected by family violence, including the possible consequences of separation from the abuser;

(e) The *psychological effect of violence* on people who are or have been in a relationship affected by family violence;

(f) *Social or economic factors* that impact on people who are or have been in a relationship affected by family violence.]

In this case, the defence has submitted that NOA was acting defensively when s/he [*insert relevant act and arguments*]. The prosecution denied this was the case, alleging [*insert relevant evidence and/or*

[1142] If the trial commenced after 1 November 2014, irrespective of the date of the alleged offence, certain preliminary directions may need to be given to the jury. See 8.1.1 Preliminary Directions: Self-defence in the Context of Family Violence (Jury Directions Act 2015 ss 59, 60).

arguments].

If, in light of all of the circumstances, you are satisfied that NOA did not believe that it was necessary to do what s/he did to defend him/herself from the infliction of death or really serious injury, then this fourth element will be met.

Summary

[*This section should replace point four onwards in the summary to the* murder charge.]

- Four – that NOA did not believe that it was necessary to do what s/he did to defend him/herself from the infliction of death or really serious injury.

If you find that these matters have not been proven, then you must find NOA not guilty of murder.

However, a finding that NOA is not guilty of murder is not the end of the matter. If you decide that NOA is not guilty of murder because s/he was acting in self-defence, you must then consider whether s/he is guilty of "defensive homicide". I will now explain that offence to you.

[*Insert* defensive homicide charge.]

Last updated: 29 June 2015

8.2.2 Charge: Defensive Homicide

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This charge should be given if it is alleged that the accused committed *murder* on or after 23 November 2005 and before 1 November 2014, and there is evidence from which a jury might infer that he or she was acting in self-defence. It should be given after the charge on murder self-defence.

The charge may be modified for use in cases where the accused has been *charged* with the offence of defensive homicide.

Introduction

According to the law, people who kill in the belief that what they are doing is necessary to defend themselves from death or really serious injury do not commit murder, even if their belief is unreasonable. However, if they do not have reasonable grounds for believing that what they are doing is necessary in self-defence, they will be guilty of the offence of defensive homicide.

To find the accused guilty of this offence, you must be satisfied that:

- The prosecution have proven the first three elements of murder beyond reasonable doubt, but have failed to prove the fourth. That is, they have failed to prove that NOA did not act in self defence; and
- The prosecution have proven, beyond reasonable doubt, that NOA did not have reasonable grounds for believing that what s/he did was necessary in self-defence.

Reasonable Grounds

In determining whether NOA is guilty of this offence, you must focus on the belief that NOA said s/he had.[1143] That is, you must ask whether or not s/he had reasonable grounds for believing it was necessary to act in the way s/he did, to defend him/herself from death or really serious injury.

In making your determination, you must consider the circumstances as NOA perceived them to be at the time s/he killed NOV. You must determine whether the prosecution has proven that, in those circumstances, there was no reasonable basis for the accused to have believed that it was necessary to act in the way s/he did, in response to the perceived threat.

It does not matter if NOA was mistaken about that threat. The question is whether or not there were reasonable grounds for NOA to believe in the need to respond to the threat in the way s/he did, in the circumstances as s/he perceived them to be.

Considerations

When determining whether the prosecution has proven that NOA had no reasonable grounds for believing his/her actions were necessary, you must again take into account all of the circumstances in which the killing occurred. This includes [*insert any relevant factors, such as the* nature of the perceived threat*, any previous* relationship *between the parties, any* prior conduct *of the victim, or any personal* characteristics of the accused *that may have affected his or her behaviour, and relate to the facts in issue*].

As was the case in relation to self-defence, you must consider the defence's claim that NOA was reacting to an imminent threat, and could not be expected to weigh precisely the exact amount of defensive action required.

[*If it is alleged that the force used was disproportionate to the threat, add the following shaded section. However, if there is evidence of self-defence in the context of family violence, see the shaded section on family violence instead.*]

Once again, the law does not require that any defensive force used be exactly proportionate to the harm threatened.

However, if you consider that the accused's actions were out of all proportion to the harm threatened, that is one of the factors you can take into account in determining whether s/he had reasonable grounds for believing his/her actions were necessary to defend him/herself from the threat of death or really serious injury.

In this case, the prosecution alleged that NOA's acts were plainly disproportionate to the threat s/he perceived. [*Insert evidence and/or arguments.*] The defence responded [*insert evidence and/or arguments*].

[*If it is alleged that the accused failed to retreat, add the following shaded section.*]

The evidence that NOA had the opportunity to retreat from the [*insert relevant act*], but failed to do so, is also relevant to this issue. Although the law does not require people to retreat from an attack before defending themselves, a failure to retreat is one of the factors that you can take into account in deciding whether NOA had reasonable grounds for believing that his/her actions were necessary.

[*If it is alleged that the accused engaged in a pre-emptive strike, add the following shaded section. However, if there is evidence of family violence between the accused and the victim, see the shaded section on family violence instead.*]

[1143] This charge has been drafted for use in cases where the accused has personally asserted that s/he acted in self-defence. If the issue of self-defence has arisen in another way, it will need to be modified accordingly.

In this case, the defence claimed that NOA was acting in self defence, even though s/he was not being physically attacked at the time s/he [*insert relevant act*]. The defence said [*insert evidence and/or arguments*].

As I told you in relation to self defence for murder, people are not required to wait until an attack is actually in progress before defending themselves. They are entitled to use whatever force they believe is necessary to defend themselves from being killed or really seriously injured.

However, the lack of immediacy of a threat is one of the factors you can take into account in determining whether NOA had reasonable grounds for believing that his/her actions were necessary.

[*If it is alleged that the accused was intoxicated, add the following shaded section.*]

While evidence that NOA was intoxicated at the time that s/he [*insert relevant act*] was relevant to your determination of whether s/he believed it was necessary to act in the way s/he did, you must not take any intoxication into account in determining whether the accused had reasonable grounds for believing in the necessity of his/her actions.[1144] The law requires you to consider whether a person who was not intoxicated would have had reasonable grounds for believing those actions were necessary, in the circumstances as perceived by the accused.

[*If there is evidence of family violence involving the accused and the victim, add the following shaded section if relevant.*[1145]]

The evidence of "family violence" between NOA and NOV that I mentioned earlier is also relevant in this context. The law says that where a person is killed in circumstances where family violence is alleged, the accused may have reasonable grounds for believing, that his/her conduct was necessary to defend him/herself even if:

- [*If relevant*] s/he is responding to a harm that is not immediate;
- [*If relevant*] his/her response involves the use of force in excess of the force involved in the harm or threatened harm.

I note again that this does not mean that a person who has suffered family violence may use any level of force in any circumstances. A person who has suffered family violence will be guilty of defensive homicide if s/he did not have reasonable grounds for believing that it was necessary to act in the way s/he did.

However, as I mentioned earlier, the law recognises that in determining whether a person was defending him/herself from "family violence", it is not a simple matter of determining whether [an attack was in progress at the time the accused acted/the accused's response was proportionate to the threatened harm]. Such cases are complicated, and require you to consider all of the evidence, including evidence of:

[*Where there is evidence of one or more of the following matters (listed in* Crimes Act 1958 *s 9AH(3)), the judge should identify the evidence and relate it to the facts in issue:*

[1144] If it is alleged that the intoxication was not self–induced, this section will need to be modified (see s 9AJ(4)). See *Crimes Act 1958* ss 9AJ(5) and (6) for the definition of "self–induced" intoxication. Model charges are available from 8.6.1 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self–induced) or 8.6.2 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self–induced contested), as relevant.

[1145] If the trial commenced after 1 November 2014, irrespective of the date of the alleged offence, certain preliminary directions may need to be given to the jury. See 8.1.1 Preliminary Directions: Self-defence in the Context of Family Violence (Jury Directions Act 2015 ss 59, 60).

(a) The *history of the relationship* between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;

(b) The *cumulative effect*, including psychological effect, on the person or a family member of that violence;

(c) *Social, cultural or economic factors* that impact on the person or a family member who has been affected by family violence;

(d) The general *nature and dynamics* of relationships affected by family violence, including the possible consequences of separation from the abuser;

(e) The *psychological effect of violence* on people who are or have been in a relationship affected by family violence;

(f) *Social or economic factors* that impact on people who are or have been in a relationship affected by family violence.]

In this case, the defence has submitted that NOA was acting defensively when s/he [*insert relevant act and arguments*]. The prosecution denied this was the case, alleging [*insert relevant evidence and/or arguments*].

Summary

To summarise, to find NOA guilty of defensive homicide:

One – you must be satisfied that the prosecution have proven the first three elements of murder beyond reasonable doubt; and

Two – you must find that the prosecution have failed to prove the fourth element of murder. That is, you must conclude that NOA is not guilty of murder because s/he was acting in self-defence; and

Three – you must be satisfied that the prosecution have proven, beyond reasonable doubt, that NOA did not have reasonable grounds for believing that what s/he did was necessary in self-defence.

If you are not satisfied that this is the case, then you must find NOA not guilty of defensive homicide.

Last updated: 29 June 2015

8.2.3 Checklist: Murder Self-Defence with Manslaughter

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This checklist can be used if it is alleged that the accused committed *murder* on or after *23 November 2005* and before *1 November 2014*, there is evidence from which a jury might infer that he or she was acting in *self-defence*, and *both criminal negligence and unlawful and dangerous act manslaughter* are available as alternative verdicts.[1146]

[1146] This checklist will need to be adapted if reckless murder has been left to the jury – see 7.2.1.2 Checklist: International and Reckless Murder (without Self-defence).

The checklist is designed for use where it is alleged that the accused believed it was necessary to do what s/he did to *defend him/herself*. It will need to be modified if it is alleged that the accused acted to *defend another person* or to *terminate the unlawful deprivation of liberty.*

Before you can convict the accused of murder, there are four elements that the prosecution must prove beyond reasonable doubt:

1. The accused caused the victim's death; and
2. The accused's acts were conscious, voluntary and deliberate; and
3. The accused intended to kill or cause really serious injury; and
4. The accused did not believe that it was necessary to do what s/he did to defend him/herself from being killed or really seriously injured.

Cause of Death

1. Has the prosecution proved that the accused caused the victim's death?

Consider – ***Were the accused's actions a substantial or significant cause of the victim's death?***

If Yes then go to 2

If No, then the accused is not guilty of Murder

Conscious, Voluntary and Deliberate Acts

2. Has the prosecution proved that the accused's actions which caused the death were conscious, voluntary and deliberate?

If Yes then go to 3

If No, then the accused is not guilty of Murder

Intention

3. Has the prosecution proved that at the time the accused did the acts that caused the victim's death, s/he intended to kill or to cause really serious injury?

If Yes then go to 4

If No, then the accused is not guilty of Murder (but may be guilty of Manslaughter – Go to 6)

Self-defence

4. Has the prosecution proved that the accused did not believe that it was necessary to do what s/he did to defend him/herself from being killed or really seriously injured?

Consider – What were the circumstances as perceived by the accused?

If Yes then the accused is guilty of Murder (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of Murder (but may be guilty of Defensive Homicide – Go to 5)

Defensive Homicide

The offence of defensive homicide should only be considered if you answered "Yes" to Questions 1, 2 and 3 above, and "No" to Question 4.

Before you can convict the accused of defensive homicide, the prosecution must prove, beyond reasonable doubt, that:

5. There were no reasonable grounds for the accused to believe that what s/he did was necessary to defend him/herself from being killed or really seriously injured.

Defensive Homicide

5. Has the prosecution proved that there were no reasonable grounds for the accused to believe that what s/he did was necessary to defend him/herself from being killed or really seriously injured?

Consider – What were the circumstances as perceived by the accused?

If Yes then the accused is guilty of Defensive Homicide (as long as you also answered Yes to Questions 1, 2 and 3 and No to Question 4)

If No, then the accused is not guilty of Defensive Homicide

Manslaughter

The offence of manslaughter should only be considered if you answered "Yes" to Questions 1 and 2 above, and "No" to Question 3.

Before you can convict the accused of manslaughter, the prosecution must prove, beyond reasonable doubt, either that:

6. The accused committed a criminally negligent act; or

7. The accused committed an unlawful and dangerous act.

The prosecution must also prove, beyond reasonable doubt, that:

8. The accused's act was not committed in self-defence.

Criminal Negligence

6. Has the prosecution proved that the act which caused the victim's death was committed in circumstances which involved such a great falling short of the standard of care that a reasonable person would have exercised, and involved such a high risk of causing death or really serious injury, that it deserves to be criminally punished?

If Yes, then go to 8a

If No, then go 7a

Unlawful and Dangerous Act

7a. Has the prosecution proved that the accused intended to commit the act that caused the victim's death?

If Yes, then go to 7b

If No, then the accused is not guilty of Manslaughter

7b. Has the prosecution proved that the accused's act that caused the victim's death was unlawful?

If Yes, then go to 7c

If No, then the accused is not guilty of Manslaughter

7c. Has the prosecution proved that the accused's act that caused the victim's death was dangerous?

Consider – Would a reasonable person consider that an act of that kind would expose another person or other people to an appreciable risk of serious injury?

If Yes, then go to 8a

If No, then the accused is not guilty of Manslaughter

Self-defence

8a. Has the prosecution proved that the accused did not believe that it was necessary to do what s/he did to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to Questions 1, 2 and either 6 or 7(a, b and c))

If No, then go to 8b

8b. Has the prosecution proved that there were no reasonable grounds for the accused to believe that what s/he did was necessary to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to Questions 1, 2 and either 6 or 7(a, b and c))

If No, then the accused is not guilty of Manslaughter

Last updated: 1 November 2014

8.2.4 Checklist: Murder Self-Defence with Criminal Negligence Manslaughter

Click here to obtain a Word version of this document for adaptation

This checklist can be used if it is alleged that the accused committed *murder* on or after *23 November 2005* and before *1 November 2014*, there is evidence from which a jury might infer that he or she was acting in *self-defence*, and *criminal negligence manslaughter* is available as an alternative verdict.[1147]

The checklist is designed for use where it is alleged that the accused believed it was necessary to do what s/he did to *defend him/herself*. It will need to be modified if it is alleged that the accused acted to *defend another person* or to *terminate the unlawful deprivation of liberty.*

Before you can convict the accused of murder, there are four elements that the prosecution must prove beyond reasonable doubt:

1. The accused caused the victim's death; and
2. The accused's acts were conscious, voluntary and deliberate; and
3. The accused intended to kill or cause really serious injury; and
4. The accused did not believe that it was necessary to do what s/he did to defend him/herself from being killed or really seriously injured.

Cause of Death

1. Has the prosecution proved that the accused caused the victim's death?

Consider – ***Were the accused's actions a substantial or significant cause of the victim's death?***

If Yes then go to 2

If No, then the accused is not guilty of Murder

Conscious, Voluntary and Deliberate Acts

2. Has the prosecution proved that the accused's actions which caused the death were conscious, voluntary and deliberate?

If Yes then go to 3

If No, then the accused is not guilty of Murder

Intention

3. Has the prosecution proved that at the time the accused did the acts that caused the victim's death, s/he intended to kill or to cause really serious injury?

If Yes then go to 4

If No, then the accused is not guilty of Murder (but may be guilty of Manslaughter – Go to 6)

Self-defence

[1147] This checklist will need to be adapted if reckless murder has been left to the jury – see 7.2.1.2 Checklist: Intentional and Reckless Murder (without Self-defence).

4. Has the prosecution proved that the accused did not believe that it was necessary to do what s/he did to defend him/herself from being killed or really seriously injured?

Consider – What were the circumstances as perceived by the accused?

If Yes then the accused is guilty of Murder (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of Murder (but may be guilty of Defensive Homicide – Go to 5)

Defensive Homicide

The offence of defensive homicide should only be considered if you answered "Yes" to Questions 1, 2 and 3 above, and "No" to Question 4.

Before you can convict the accused of defensive homicide, the prosecution must prove, beyond reasonable doubt, that:

5. There were no reasonable grounds for the accused to believe that what s/he did was necessary to defend him/herself from being killed or really seriously injured.

Defensive Homicide

5. Has the prosecution proved that there were no reasonable grounds for the accused to believe that what s/he did was necessary to defend him/herself from being killed or really seriously injured?

Consider – What were the circumstances as perceived by the accused?

If Yes then the accused is guilty of Defensive Homicide (as long as you also answered Yes to Questions 1, 2 and 3 and No to Question 4)

If No, then the accused is not guilty of Defensive Homicide

Manslaughter

The offence of manslaughter should only be considered if you answered "Yes" to Questions 1 and 2 above, and "No" to Question 3.

Before you can convict the accused of manslaughter, the prosecution must prove, beyond reasonable doubt, that:

6. The accused committed a criminally negligent act; and

7. The accused's act was not committed in self-defence.

Criminal Negligence

6. Has the prosecution proved that the act which caused the victim's death was committed in circumstances which involved such a great falling short of the standard of care that a reasonable person would have exercised, and involved such a high risk of causing death or really serious injury, that it deserves to be criminally punished?

If Yes, then go to 7a

If No, then the accused is not guilty of Manslaughter

Self-defence

7a. Has the prosecution proved that the accused did not believe that it was necessary to do what s/he did to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to Questions 1, 2 and 6)

If No, then go to 7b

7b. Has the prosecution proved that there were no reasonable grounds for the accused to believe that what s/he did was necessary to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to Questions 1, 2 and 6)

If No, then the accused is not guilty of Manslaughter

Last updated: 1 November 2014

8.2.5 Checklist: Murder Self-Defence with Unlawful and Dangerous Act Manslaughter

Click here to obtain a Word version of this document for adaptation

This checklist can be used if it is alleged that the accused committed *murder* on or after *23 November 2005* and before *1 November 2014*, there is evidence from which a jury might infer that he or she was acting in *self-defence*, and *unlawful and dangerous act manslaughter* is available as an alternative verdict.[1148]

The checklist is designed for use where it is alleged that the accused believed it was necessary to do what s/he did to *defend him/herself*. It will need to be modified if it is alleged that the accused acted to *defend another person* or to *terminate the unlawful deprivation of liberty.*

Before you can convict the accused of murder, there are four elements that the prosecution must prove beyond reasonable doubt:

1. The accused caused the victim's death; and
2. The accused's acts were conscious, voluntary and deliberate; and
3. The accused intended to kill or cause really serious injury; and
4. The accused did not believe that it was necessary to do what s/he did to defend him/herself from being killed or really seriously injured.

Cause of Death

[1148] This checklist will need to be adapted if reckless murder has been left to the jury – see 7.2.1.2 Checklist: International and Reckless Murder (without Self-defence).

1. Has the prosecution proved that the accused caused the victim's death?

*Consider – **Were the accused's actions a substantial or significant cause of the victim's death?***

If Yes then go to 2

If No, then the accused is not guilty of Murder

Conscious, Voluntary and Deliberate Acts

2. Has the prosecution proved that the accused's actions which caused the death were conscious, voluntary and deliberate?

If Yes then go to 3

If No, then the accused is not guilty of Murder

Intention

3. Has the prosecution proved that at the time the accused did the acts that caused the victim's death, s/he intended to kill or to cause really serious injury?

If Yes then go to 4

If No, then the accused is not guilty of Murder (but may be guilty of Manslaughter – Go to 6)

Self-defence

4. Has the prosecution proved that the accused did not believe that it was necessary to do what s/he did to defend him/herself from being killed or really seriously injured?

Consider – What were the circumstances as perceived by the accused?

If Yes then the accused is guilty of Murder (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of Murder (but may be guilty of Defensive Homicide – Go to 5)

Defensive Homicide

The offence of defensive homicide should only be considered if you answered "Yes" to Questions 1, 2 and 3 above, and "No" to Question 4.

Before you can convict the accused of defensive homicide, the prosecution must prove, beyond reasonable doubt, that:

5. There were no reasonable grounds for the accused to believe that what s/he did was necessary to defend him/herself from being killed or really seriously injured.

Defensive Homicide

5. Has the prosecution proved that there were no reasonable grounds for the accused to believe that what s/he did was necessary to defend him/herself from being killed or really seriously injured?

Consider – What were the circumstances as perceived by the accused?

If Yes then the accused is guilty of Defensive Homicide (as long as you also answered Yes to Questions 1, 2 and 3 and No to Question 4)

If No, then the accused is not guilty of Defensive Homicide

Manslaughter

The offence of manslaughter should only be considered if you answered "Yes" to Questions 1 and 2 above, and "No" to Question 3.

Before you can convict the accused of manslaughter, the prosecution must prove, beyond reasonable doubt, that:

6. The accused intended to commit the act that caused the victim's death; and

7. The accused's act was unlawful; and

8. The accused's act was dangerous; and

9. The accused's act was not committed in self-defence.

Intention

6. Has the prosecution proved that the accused intended to commit the act that caused the victim's death?

If Yes, then go to 7

If No, then the accused is not guilty of Manslaughter

Unlawful Act

7. Has the prosecution proved that the accused's act that caused the victim's death was unlawful?

If Yes, then go to 8

If No, then the accused is not guilty of Manslaughter

Dangerous Act

8. Has the prosecution proved that the accused's act that caused the victim's death was dangerous?

Consider – Would a reasonable person consider that an act of that kind would expose another person or other people to an appreciable risk of serious injury?

If Yes, then go to 9a

If No, then the accused is not guilty of Manslaughter

Self-defence

9a. Has the prosecution proved that the accused did not believe that it was necessary to do what s/he did to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to Questions 1, 2, 6, 7 and 8)

If No, then go to 9b

9b. Has the prosecution proved that there were no reasonable grounds for the accused to believe that what s/he did was necessary to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to Questions 1, 2, 6, 7 and 8)

If No, then the accused is not guilty of Manslaughter

Last updated: 1 November 2014

8.2.6 Checklist: Murder Self-Defence with No Manslaughter

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This checklist can be used if it is alleged that the accused committed *murder* on or after *23 November 2005* and before *1 November 2014*, there is evidence from which a jury might infer that he or she was acting in *self-defence*, and *manslaughter is not available* as an alternative verdict.[1149]

Before you can convict the accused of murder, there are four elements that the prosecution must prove beyond reasonable doubt:

1. The accused caused the victim's death; and
2. The accused's acts were conscious, voluntary and deliberate; and
3. The accused intended to kill or cause really serious injury; and
4. The accused did not believe that it was necessary to do what s/he did to defend him/herself from being killed or really seriously injured.

Cause of Death

1. Has the prosecution proved that the accused caused the victim's death?

Consider – ***Were the accused's actions a substantial cause of the victim's death?***

If Yes then go to 2

If No, then the accused is not guilty of Murder

Conscious, Voluntary and Deliberate Acts

2. Has the prosecution proved that the accused's actions which caused the death were conscious,

[1149] This checklist will need to be adapted if reckless murder has been left to the jury – see 7.2.1.2 Checklist: International and Reckless Murder (without Self-defence).

voluntary and deliberate?

If Yes then go to 3

If No, then the accused is not guilty of Murder

Intention

3. Has the prosecution proved that at the time the accused did the acts that caused the victim's death, s/he intended to kill or to cause really serious injury?

If Yes then go to 4

If No, then the accused is not guilty of Murder

Self-defence

4. Has the prosecution proved that the accused did not believe that it was necessary to do what s/he did to defend him/herself from being killed or really seriously injured?

Consider – What were the circumstances as perceived by the accused?

If Yes then the accused is guilty of Murder (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of Murder (but may be guilty of Defensive Homicide – Go to 5)

Defensive Homicide

The offence of defensive homicide should only be considered if you answered "Yes" to Questions 1, 2 and 3 above, and "No" to Question 4.

Before you can convict the accused of defensive homicide, the prosecution must prove, beyond reasonable doubt, that:

5. There were no reasonable grounds for the accused to believe that what s/he did was necessary to defend him/herself from being killed or really seriously injured.

Defensive Homicide

5. Has the prosecution proved that there were no reasonable grounds for the accused to believe that what s/he did was necessary to defend him/herself from being killed or really seriously injured?

Consider – What were the circumstances as perceived by the accused?

If Yes then the accused is guilty of Defensive Homicide (as long as you also answered Yes to Questions 1, 2 and 3 and No to Question 4)

If No, then the accused is not guilty of Defensive Homicide

Last updated: 1 November 2014

8.2.7 Charge: Manslaughter Self-Defence

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Warning: This charge relates to the defence of "manslaughter – self-defence" (Crimes Act 1958 s 9AE). As this defence has so far been the subject of only limited judicial interpretation, the charge should be treated with caution.

This charge should be given if *manslaughter* is available as a verdict in relation to a homicide committed on or after 23 November 2005 and before 1 November 2014, and there is evidence from which a jury might infer that the accused was acting in self-defence. It is recommended that the charge be given immediately after directing the jury about the elements of manslaughter.

Introduction

As I have already mentioned, in this case the defence has alleged that NOA was acting defensively when s/he killed NOV.[1150] I have already explained the law of self-defence in relation to murder, as well as directing you about the offence of defensive homicide. I now need to tell you about the law of self-defence in relation to manslaughter.

The law says that people may commit acts that would otherwise be classified as "manslaughter" if they believe, on reasonable grounds, that it is necessary to commit those act to defend themselves. So even if you are satisfied that the prosecution has proven all of the elements of manslaughter beyond reasonable doubt, NOA will not be guilty of that offence if s/he acted in self-defence.

As is the case for self-defence in relation to murder, it is for the prosecution to prove, beyond reasonable doubt, that NOA was not acting in self-defence when s/he committed the acts that would otherwise be considered "manslaughter".[1151] It is not for NOA to prove that s/he did act in self-defence.

So before you can find the accused guilty of manslaughter, you must be satisfied that the prosecution has proven, beyond reasonable doubt:

[1150] This charge is drafted for use in cases in which the principal charge is murder, manslaughter is raised as an alternative verdict, and the defence does not deny that the accused killed the victim, but contends that it was done in self-defence. It assumes that the jury has already been charged in relation to murder self-defence and defensive homicide (see Charge: Murder Self-defence and Charge: Defensive Homicide).

The charge will need to be modified if used in the following circumstances:

– If manslaughter is the principal charge;

– If the jury has not been instructed about murder self-defence;

– If self-defence arises on the evidence, but is not alleged by the defence;

– If the defence denies that the accused killed the victim; or

– If there is evidence that the accused was acting in defence of another or to prevent or terminate the unlawful deprivation of liberty.

[1151] This charge assumes that the defence does not deny that the accused killed the victim, but contends it was done in self-defence. If the defence does deny that the accused killed the victim, parts of the charge will need to be modified.

- All of the elements of the offence, and
- That NOA did not act in self-defence.

Elements of Manslaughter Self-defence

In relation to manslaughter, there are two possible ways for the prosecution to prove that the accused was not acting in self-defence.

First, the prosecution can prove that when NOA killed NOV, s/he did not believe that it was necessary to do what s/he did to defend him/herself.

As with self-defence in relation to murder, this involves assessing the accused's state of mind at the time s/he killed NOV. What threat did s/he believe s/he faced? Did s/he believe it was necessary to react to the threat with force, and to do what s/he did in order to defend him/herself – or was s/he acting for some other purpose, such as [*insert relevant example from the evidence and/or arguments, e.g.* "to attack another" *or* "in retaliation for a past attack"]?

Secondly, the prosecution can prove that even if NOA believed his/her acts were necessary, that belief was not based on reasonable grounds.

This again requires you to consider the circumstances as NOA perceived them to be at the time s/he killed NOV, as is the case in relation to defensive homicide. You must determine whether the prosecution has proven that there was no reasonable basis for the accused to have believed that it was necessary to act in the way s/he did, in response to the threat s/he believed s/he faced.

If the prosecution fails to prove to you beyond reasonable doubt either that NOA did not believe it was necessary to act in the way s/he did to defend him/herself, or that that belief was not based on reasonable grounds, then you must find him/her not guilty of manslaughter. It is only if you are satisfied that the prosecution has proven one or other of these matters that you may convict him/her of manslaughter – as long as you are also satisfied that all of the elements of the offence have been proven.

Considerations

In making your determination, you must again take into account all of the circumstances in which the killing took place, including the fact that a person cannot be expected to weigh precisely the exact amount of self-defensive action required to respond to an imminent threat.

You should also take into account the same factors that I mentioned in relation to murder self-defence and defensive homicide, such as [*insert relevant factors from the following list*:

- The nature of the threat;
- Any previous relationship between the parties;
- Any prior conduct of the victim;
- Any personal characteristics of the accused that may have affected his or her behaviour;
- The proportionality of the of the accused's response to the harm threatened;
- Any failure to take obvious evasive action;
- The lack of immediacy of the threatened harm;
- Any circumstances of family violence.]

[*If it is alleged that the accused was intoxicated, add the following shaded section.*]

As is the case in relation to murder self-defence and defensive homicide, you can also take into account the accused's intoxication when assessing whether s/he believed it was necessary to act in the way s/he did. However, you must not take any intoxication into account in determining whether the

accused's belief in the necessity of his/her actions was based on reasonable grounds.[1152] The law requires you to consider whether a person who was not intoxicated would have had reasonable grounds for believing those actions were necessary, in the circumstances as perceived by the accused.

Summary

To summarise, even if you decide that all of the elements of manslaughter have been proven beyond reasonable doubt, you may find that NOA was not guilty of that offence because s/he was acting in self-defence.

Before you can find NOA guilty of manslaughter, you must therefore be satisfied not only that all of the elements of the offence have been met, but also that the prosecution has proven, beyond reasonable doubt, that NOA either:

- Did not believe that it was necessary to do what s/he did to defend him/herself; or
- Did not have reasonable grounds for holding that belief.

If the prosecution cannot prove one or other of these matters beyond reasonable doubt, then you must find NOA not guilty of manslaughter.

Last updated: 1 November 2014

8.2.8 Checklist: Manslaughter Self-Defence

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This checklist can be used instead of the Manslaughter Checklist if it is alleged that the accused committed *either criminal negligence manslaughter or unlawful and dangerous act manslaughter* on or after *23 November 2005* and before *1 November 2014* and there is evidence from which a jury might infer that he or she was acting in *self-defence*.

The checklist is designed for use where it is alleged that the accused believed it was necessary to do what s/he did to *defend him/herself*. It will need to be modified if it is alleged that the accused acted to *defend another person* or to *terminate the unlawful deprivation of liberty.*

Before you can convict the accused of manslaughter, the prosecution must prove, beyond reasonable doubt, either that:

1. The accused committed a criminally negligent act; or
2. The accused committed an unlawful and dangerous act.

The prosecution must also prove, beyond reasonable doubt, that:

3. The accused's act was not committed in self-defence.

Criminal Negligence

1. Has the prosecution proved that the act which caused the victim's death was committed in circumstances which involved such a great falling short of the standard of care that a reasonable person would have exercised, and involved such a high risk of causing death or really serious injury, that it deserves to be criminally punished?

[1152] If it is alleged that the intoxication was not self–induced, this section will need to be modified (see s 9AJ(4)). See *Crimes Act 1958* ss 9AJ(5) and (6) for the definition of "self–induced" intoxication. Model charges are available from 8.6.1 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self–induced) or 8.6.2 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self–induced contested), as relevant.

If Yes, then go to 3a

If No, then go 2a

Unlawful and Dangerous Act

2a. Has the prosecution proved that the accused intended to commit the act that caused the victim's death?

If Yes, then go to 2b

If No, then the accused is not guilty of Manslaughter

2b. Has the prosecution proved that the accused's act that caused the victim's death was unlawful?

If Yes, then go to 2c

If No, then the accused is not guilty of Manslaughter

2c. Has the prosecution proved that the accused's act that caused the victim's death was dangerous?

Consider – Would a reasonable person consider that an act of that kind would expose another person or other people to an appreciable risk of serious injury?

If Yes, then go to 3a

If No, then the accused is not guilty of Manslaughter

Self-defence

3a. Has the prosecution proved that the accused did not believe that it was necessary to do what s/he did to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to either Question 1 or 2(a, b and c))

If No, then go to 3b

3b. Has the prosecution proved that the accused did not have reasonable grounds for his/her belief that what s/he did was necessary to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to either Question 1 or 2(a, b and c))

If No, then the accused is not guilty of Manslaughter

Last updated: 1 November 2014

8.2.9 Checklist: Unlawful and Dangerous Act Manslaughter

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This checklist can be used instead of 7.2.2.3 Checklist: Manslaughter by Unlawful and Dangerous Act if it is alleged that the accused committed *unlawful and dangerous act manslaughter* on or after *23 November 2005* and before *1 November 2014*, and there is evidence from which a jury might infer that he or she was acting in *self-defence*.

The checklist is designed for use where it is alleged that the accused believed it was necessary to do what s/he did to *defend him/herself*. It will need to be modified if it is alleged that the accused acted to *defend another person* or to *terminate the unlawful deprivation of liberty.*

Before you can convict the accused of manslaughter, the prosecution must prove, beyond reasonable doubt, that:

1. The accused intended to commit the act that caused the victim's death; and
2. The accused's act was unlawful; and
3. The accused's act was dangerous; and
4. The accused's act was not committed in self-defence.

Intention

1. Has the prosecution proved that the accused intended to commit the act that caused the victim's death?

If Yes, then go to 2

If No, then the accused is not guilty of Manslaughter

Unlawful Act

2. Has the prosecution proved that the accused's act that caused the victim's death was unlawful?

If Yes, then go to 3

If No, then the accused is not guilty of Manslaughter

Dangerous Act

3. Has the prosecution proved that the accused's act that caused the victim's death was dangerous?

Consider – Would a reasonable person consider that an act of that kind would expose another person or other people to an appreciable risk of serious injury?

If Yes, then go to 4a

If No, then the accused is not guilty of Manslaughter

Self-defence

4a. Has the prosecution proved that the accused did not believe that it was necessary to do what s/he did to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then go to 4b

4b. Has the prosecution proved that the accused did not have reasonable grounds for his/her belief that what s/he did was necessary to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of Manslaughter

Last updated: 1 November 2014

8.2.10 Checklist: Criminal Negligence Manslaughter

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This checklist can be used instead of 7.2.3.2 Checklist: Negligent Manslaughter if it is alleged that the accused committed *criminal negligence manslaughter* on or after *23 November 2005* and before *1 November 2014* and there is evidence from which a jury might infer that he or she was acting in *self-defence*.

The checklist is designed for use where it is alleged that the accused believed it was necessary to do what s/he did to *defend him/herself*. It will need to be modified if it is alleged that the accused acted to *defend another person* or to *terminate the unlawful deprivation of liberty.*

Before you can convict the accused of manslaughter, the prosecution must prove, beyond reasonable doubt, that:

1. The accused committed a criminally negligent act; and
2. The accused's act was not committed in self-defence.

Criminal Negligence

1. Has the prosecution proved that the act which caused the victim's death was committed in circumstances which involved such a great falling short of the standard of care that a reasonable person would have exercised, and involved such a high risk of causing death or really serious injury, that it deserves to be criminally punished?

If Yes, then go to 2a

If No, then the accused is not guilty of Manslaughter

Self-defence

2a. Has the prosecution proved that the accused did not believe that it was necessary to do what s/he did to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to Question 1)

If No, then go to 2b

2b. Has the prosecution proved that the accused did not have reasonable grounds for his/her belief that what s/he did was necessary to defend him/herself?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of Manslaughter (as long as you also answered Yes to Question 1)

If No, then the accused is not guilty of Manslaughter

Last updated: 1 November 2014

8.3 Common Law Self-Defence

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Introduction

1. Prior to 2005, self-defence in Victoria was governed solely by the common law. This situation was first altered by the passage of the *Crimes (Homicide) Act 2005*, which introduced two statutory self-defence provisions into the *Crimes Act 1958*: one for use in murder cases (s 9AC) and the other for use in manslaughter cases (s 9AE).
2. The provisions of the *Crimes (Homicide) Act 2005* commenced operation on 23 November 2005, and applied to offences committed on or after that date (*Crimes Act 1958* s 603).
3. The provisions replaced the common law in the relevant areas (*Babic v R* (2010) 28 VR 297), so that common law self-defence is not available for charges of murder, manslaughter, defensive homicide, attempted murder or attempted defensive homicide where such are alleged to have been committed on or after 23 November 2005:
4. The situation was again altered by the passage of the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*, which introduced provisions into the *Crimes Act 1958* abolishing common law self-defence (s 322N) and setting out a single statutory self-defence for all offences (s 322K).
5. The provisions of the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* commenced operation on 1 November 2014 and apply to offences alleged to have been committed on or after that date (*Crimes Act 1958* s 623).
6. As a result of these legislative changes, common law self-defence may be raised only when:
    - The accused is charged with an offence other than the homicide offences listed above, and such offence was alleged to have been committed before 1 November 2014; or
    - The accused is charged with one of those homicide offences listed above, and such offence was alleged to have been committed before 23 November 2005.
7. This topic outlines the common law defence of self-defence. For information concerning the statutory provisions, see 8.1 Statutory Self-defence (From 1/11/14) and 8.2 Statutory Self-defence (Pre-1/11/14) and Defensive Homicide.

When to Charge the Jury about Self-defence

8. The judge must direct the jury about self-defence if the accused indicates that self-defence is in issue or if there are substantial and compelling reasons to direct on self-defence in the absence of any request (*Jury Directions Act 2015* ss 14–16). See Directions under Jury Directions Act 2015.

9. At common law, the judge was required to instruct the jury about self-defence if there was evidence on which a reasonable jury could decide the issue favourably to the accused (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Kear* [1997] 2 VR 555; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

10. The issue of self-defence could be held to arise if there was any evidence from which the jury might infer that the accused acted in self-defence (*R v Kear* [1997] 2 VR 555; *R v Imadonmwonyi* [2004] VSC 361).

11. To see if there was any such evidence, a judge could look not only to the direct evidence, but also to whether a circumstantial case could fairly be made out to support the claimed defence (*R v Kear* [1997] 2 VR 555; *R v Imadonmwonyi* [2004] VSC 361).

12. At common law, if there was evidence on which self-defence could be found, the trial judge was required to leave the issue to the jury even if the judge considered the plea to be "weak or tenuous" (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Kear* [1997] 2 VR 555; *R v Muratovic* [1967] Qd R 15; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

13. If there was sufficient evidence to raise the possibility of self-defence, the judge was required at common law to instruct the jury about it, whether or not the plea was raised by the accused (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Kear* [1997] 2 VR 555; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

14. Where there was sufficient evidence to raise the possibility of self-defence, the judge was required to instruct the jury about it even if the factual basis for the defence was inconsistent with the accused's version of events at trial (*R v Kear* [1997] 2 VR 555; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

15. These common law principles may be relevant to the operation of the residual obligation to give directions under *Jury Directions Act 2015* s 16, but must be read in light of the whole of Part 3 of the Act.

Elements of Common Law Self-defence

16. The High Court has defined the test for self-defence, for both homicide and non-homicide cases, as follows:

> The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he [or she] did (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645 at 661 (Wilson, Dawson and Toohey JJ)).

17. There are two elements to this test:

    i) The accused must have believed at the time that s/he committed the relevant act that what s/he was doing was necessary (known as the "subjective element"); and

    ii) That belief must have been based on reasonable grounds (known as the "objective element").

18. Once the question of self-defence is put in issue, the onus is on the prosecution to disprove at least one of these elements beyond reasonable doubt. If the prosecution fail to disprove at least one of these elements the accused will be entitled to an acquittal (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *Viro v R* (1978) 141 CLR 88; *Dziduch v R* (1990) 47 A Crim R 378; *R v Alpagut* 27 July 1989 (NSWCCA)).

Belief in Necessity (The Subjective Element)

19. At the time the accused committed the relevant act, s/he must have believed that what s/he was doing was necessary (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Wills* [1983] 2 VR 201).

20. This is a subjective test. It does not involve a consideration of what a reasonable or ordinary person would have believed in the circumstances, but rather what the *accused* believed (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *Viro v R* (1978) 141 CLR 88; *R v Conlon* (1993) 69 A Crim R 92 (SC NSW)).

21. For this element to be satisfied, it does not matter if the accused's belief was mistaken, as long as it was genuinely held (*R v McKay* [1957] VR 560).

22. If the accused was intoxicated at the time he or she committed the relevant acts, this can be taken into account when determining whether he or she believed his or her actions to be necessary (*R v Conlon* (1993) 69 A Crim R 92 (NSWSC); *R v Katarzynski* [2002] NSWSC 613. See "Intoxication" below for further information).

23. The determination of whether the accused believed that his or her actions were necessary incorporates two questions: first, whether the accused believed it was necessary to defend himself or herself at all and, secondly, whether the accused believed it was necessary to respond as he or she did given the threat as s/he perceived it (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645).

24. In determining whether the accused believed that the force used was necessary, consideration should be given to the fact that a person who has reacted instantly to imminent danger cannot be expected to weigh precisely the exact measure of self-defensive action which is required (*R v Palmer* [1971] AC 814; *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Conlon* (1993) 69 A Crim R 92).

25. The proportionality of the accused's response to the harm threatened is just one factor to take into account in determining whether the accused believed that his or her actions were necessary (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259. See "Proportionality" below).

26. There is no rule requiring the accused to retreat from an attack rather than defend himself or herself. However, a failure to retreat is a factor to be taken into account in determining whether the accused believed that what was done was necessary (as well as in determining whether that belief was based on reasonable grounds – see below) (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Howe* (1958) 100 CLR 448).

27. If the accused acted under the pretence of defending himself or herself to attack another or retaliate for a past attack, then this element will not be met. Factors such as a failure to retreat when possible or a highly disproportionate response might indicate an intention to use the circumstances for aggression or retaliation rather than for self-defence.

Belief on Reasonable Grounds (The Objective Element)

28. The accused's belief that what he or she was doing was necessary must have been based on reasonable grounds. That is, it must have been a belief which the accused might reasonably have held in all the circumstances (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Wills* [1983] 2 VR 201).

29. This element does not require the jury to determine whether the accused *acted reasonably* in the circumstances. It requires the jury to determine whether there were *reasonable grounds* for the accused's belief that it was necessary to do what he or she did (*R v Hendy* [2008] VSCA 231).

30. This is not a test about what the hypothetical "reasonable person" might have believed in the circumstances, but about whether the *accused* had reasonable grounds for his or her belief, in the circumstances as he or she perceived them to be (*R v Portelli* (2004) 10 VR 259; *Virov R* (1978) 141 CLR 88).

31. In determining whether the accused's belief was based on reasonable grounds, the jury may take into account the following matters:

    - The surrounding circumstances (*R v Wills* [1983] 2 VR 201);
    - All of the facts within the accused's knowledge (*R v Wills* [1983] 2 VR 201);

- The relationship between the parties involved (*R v Hector* [1953] VLR 543);
- The prior conduct of the victim (*R v Besim* (2004) 148 A Crim R 28);
- The personal characteristics of the accused, such as:
    - Any deluded beliefs he or she held (*Grosser v R* (1999) 73 SASR 584; *R v Walsh* (1991) 60 A Crim R 419 (Tas SC));
    - Any excitement, affront or distress he or she was experiencing (*R v Wills* [1983] 2 VR 201);
- The proportionality of the accused's response (*Zecevicv Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259. See "Proportionality" below);
- The accused's failure to retreat (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Howe* (1958) 100 CLR 448).

Other Relevant Considerations

Intoxication

32. Evidence of intoxication may be relevant to the subjective element of self-defence (belief in necessity). If the accused was intoxicated at the time he or she committed the relevant acts, the jury can take this into account when determining whether he or she believed:
    - That an occasion for the use of force had arisen; or
    - That the use of force was necessary (*R v Conlon* (1993) 69 A Crim R 92 (NSWSC); *Bedi v R* (1993) 61 SASR 269; *Ninness v Walker* (1998) 143 FLR 239; *R v Katarzynski* [2002] NSWSC 613).
33. It is unclear whether evidence of intoxication is also relevant to the objective element (in the absence of any statutory modifications).[1153] This issue has not yet been addressed in Victoria, and courts in other jurisdictions have divided on the issue of whether the jury, in determining whether the accused's belief was based on "reasonable grounds", must take into account any personal characteristics of the accused (including his or her state of intoxication) which might have affected:
    - His or her appreciation of the gravity of the threat faced; and
    - The reasonableness of his or her response to that threat (compare *R v Conlon* (1993) 69 A Crim R 92; *R v Katarzynski* [2002] NSWSC 613 with *Ninness v Walker* (1998) 143 FLR 239; *R v McCullough* [1982] Tas R 43).

Where the Accused Initiated the Aggression

34. A person who originates an attack cannot then claim that s/he acted to defend himself or herself against a counter attack, unless his or her original aggression had ceased at the time of the counter attack so as to have enabled the accused to form a belief that his or her actions were necessary in self-defence. (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518).

[1153] *Crimes Act 1958* ss 9AJ and 322T both modify the common law position and, where either provision applies, requires the jury to ignore evidence of self–induced intoxication when determining whether the accused's belief was based on reasonable grounds. See 8.5 Statutory Intoxication (From 1/11/14) and 8.6 Statutory Intoxication (23/11/05–31/10/14).

35. However, there is no rule to prevent self-defence being raised when the accused originated the attack, as long as the original aggression had ceased to create a continuing situation of emergency that provoked a lawful attack on the accused. Any initial aggression by the accused will form part of the whole of the surrounding circumstances to be taken into account in determining whether accused had a belief, on reasonable grounds, in the necessity of his or her actions. (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645).

36. Where it is alleged that the accused was the initial aggressor, the jury will need to consider all the circumstances as perceived by the accused, including, for example, the extent to which the accused declined further conflict, stopped using force, was defeated, faced a disproportionately escalated level of force in response, or attempted to retreat (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259; *Ruben Anandan v R* [2011] VSCA 413; see also *R v Lawson and Forsythe* [1986] VR 515 (Ormiston J)).

Defence Against Lawful Force

37. Common law self-defence is not limited to defending against unlawful attacks (cf. statutory self-defence). It is possible to raise the defence even if the accused was responding to the lawful use of force (such as a lawful arrest) (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645).

38. However, it will only be in an unusual situation that a lawful attack will provide reasonable grounds for acting in self-defence. This is because where an accused creates a situation in which force might lawfully be applied to apprehend him or her (e.g. where s/he is engaged in criminal behaviour of a violent kind), then the only reasonable view of his or her resistance to that force will usually be that s/he was acting as an aggressor in pursuit of his or her original design, rather than in self-defence (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *Fry v Queen* (1992) 58 SASR 424).

Proportionality

39. Although in the past there was a separate requirement that the accused's actions be proportionate to the harm threatened, this is no longer the case. The proportionality of the accused's response to the harm threatened is simply one factor to take into account in determining whether the accused believed that his or her actions were necessary, and whether that belief was based on reasonable grounds (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259; *R v Hendy* [2008] VSCA 231; *R v Said* [2009] VSCA 244).

Use of Pre-emptive Force

40. A person is not only entitled to rely on self-defence only if s/he acts whilst an attack is in progress or immediately threatened. S/he is entitled to take steps to forestall a threatened attack before it has begun (*Osland v R* (1998) 197 CLR 316; *Virov R* (1978) 141 CLR 88; *R v Lane* [1983] 2 VR 449; *R v Conlon* (1993) 69 A Crim R 92).

41. The key issue is not whether an attack was imminent or immediately threatened, but whether the accused's perception of danger led him or her to believe that the use of defensive force was necessary, and that that belief was based on reasonable grounds (*Osland v R* (1998) 197 CLR 316).

42. However, what is believed to be necessary in the circumstances, and the reasonableness of the grounds for that belief, may be affected by the lack of immediacy of the threat, although this will not necessarily be the case (*R v Portelli* (2004) 10 VR 259).

43. Where a person responds pre-emptively to what he or she perceives to be a threat from a violent partner, expert evidence of "battered woman syndrome" may be admitted. Such evidence can assist the jury to understand that an act committed when there is no actual attack underway may be a self-defensive response to a genuinely apprehended threat of imminent danger, sufficient to warrant a pre-emptive strike (*Osland v R* (1998) 197 CLR 316).

Defence of Others and Protection of Property

44. Although the principles in *Zecevic* were stated to apply to cases of *self-defence*, it has been held that they apply equally to cases in which a person acts in defence of another (*R v Portelli* (2004) 10 VR 259).

45. There is no longer a requirement for there to be a particular relationship between the accused and the person they were defending. An accused will have a defence if s/he was protecting any other person, as long as s/he believed on reasonable grounds that it was necessary to act in that way given all of the circumstances (*R v Portelli* (2004) 10 VR 259).

46. Although there is little Victorian case law on the issue, the same principles may also apply if force is used to protect personal property, or to prevent crime (see, e.g. *R v McKay* [1957] VR 560).

Content of the Charge

47. When directing the jury about self-defence there is no set formula to be used (*Collingburn v R* (1985) 18 A Crim R 294; *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Portelli* (2004) 10 VR 259).

48. The burden of proof should be made very clear to the jury. They should be told that the offence is proved only if the prosecution has established *either* that the accused had no belief that it was necessary to act in the way he or she did, *or* that there were no reasonable grounds for such a belief (*R v Alpagut* 27/7/1989 NSWCCA; *R v Dziduch* (1990) 47 A Crim R 378; *R v Portelli* (2004) 10 VR 259).

49. Judges should be careful not to direct the jury that the accused's *conduct* must have been reasonable. The focus of the second element must be on the grounds for the accused's *belief* (*R v Hendy* [2008] VSCA 231).

50. The question of self-defence should be placed in its factual setting, and considerations which may assist the jury to reach its conclusion should be identified (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Dziduch* (1990) 47 A Crim R 378; *R v Portelli* (2004) 10 VR 259).

51. The jury should be told to consider all of the circumstances of the case, and that any one factor should be considered within that broader context. This helps ensure that matters of evidence, such as the proportionality of the force, are not elevated to rules of law (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Alpagut* 27/7/1989 NSWCCA; *R v Portelli* (2004) 10 VR 259; *R v Said* [2009] VSCA 244).

52. The judge should offer such assistance by way of comment as is appropriate to the particular case. It will often be desirable to tell the jury to approach the task in a practical manner, giving proper weight to the predicament of the accused, which may have afforded little, if any, opportunity for calm deliberation or detached reflection (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645; *R v Dziduch* (1990) 47 A Crim R 378; *R v Portelli* (2004) 10 VR 259).

53. The judge must not give the jury the impression that proportionality is a necessary part of the legal conception of self-defence, or give proportionality undue prominence as a factual consideration (*R v Said* [2009] VSCA 244).

54. If an issue arises as to whether the force used by the accused was proportionate to the threat offered, the jury should be directed that the prosecution must establish that the force used by the accused was "out of all proportion" or "plainly disproportionate" to any attack which the accused could reasonably have believed was threatened by the victim. This will make it clear that the accused does not have to have acted in a precisely proportionate way, and makes allowance for any difficulty an accused may have found him or herself in in weighing the precise action which should have been taken to avoid the threat (*R v Dziduch* (1990) 47 A Crim R 378; *R v Portelli* (2004) 10 VR 259; *R v Said* [2009] VSCA 244).

55. The issue of self defence should be listed with all of the other issues which the prosecution must establish, rather than being dealt with separately (*R v Alpagut* 27/7/1989 NSWCCA).

Last updated: 29 June 2015

8.3.1 Charge: Common Law Self-Defence

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This charge should be given if there is evidence from which a jury might infer that the accused was acting in self-defence when s/he:

i) committed an offence *other than murder, manslaughter, defensive homicide, attempted murder or attempted defensive homicide prior to 1 November 2014*; or

ii) committed one of the offences listed above *prior to 23 November 2005*.

Introduction

In this case the defence has alleged that NOA was acting in self-defence when s/he [*insert relevant act*].[1154] I therefore need to give you some directions about "self-defence".

The law recognises the right of people to defend themselves from attacks or threatened attacks. The law says that they may act to defend themselves if they believe, on reasonable grounds, that it is necessary to do what they did in self-defence.

They may do whatever they believe is necessary to defend themselves, even if this involves committing what would otherwise be a criminal act. So in this case, the prosecution must prove that NOA did not act in self-defence. Because the prosecution must prove the accused's guilt, it is not for NOA to prove that s/he did act in self-defence.

Elements of Self-defence

There are two possible ways for the prosecution to prove that the accused was not acting in self-defence. I will explain them to you, and then examine some factors you should take into account in making your decision.

No Belief in Necessity

The first way in which the prosecution can prove that NOA was not acting in self-defence is to prove, beyond reasonable doubt, that when s/he [*insert relevant act*], s/he did not believe that it was necessary to do what s/he did to defend him/herself.

This involves assessing the accused's state of mind at the time s/he [*insert relevant act*]. What threat did s/he believe s/he faced? Did s/he believe it was necessary to react to the threat with force, and to do what s/he did in order to defend him/herself – or was s/he acting for some other purpose, such as [*insert relevant example from the evidence and/or arguments, e.g.* "to attack another or in retaliation for a past attack"]?

In making this assessment, you must consider the circumstances as NOA perceived them to be at the time s/he committed the acts. It does not matter if you think s/he was mistaken about the danger s/he faced, or you believe that s/he overreacted to the threat. The question here is whether the prosecution can prove that NOA did not believe it was necessary to act in the way s/he did, to defend him/herself against the danger s/he thought s/he faced at the time.

[1154] This charge is drafted for use in cases in which the defence has alleged self-defence. It will need to be modified if used in cases where the possibility of self-defence arises on the evidence, but is not alleged by the defence. It will also need to be modified if there is evidence that the accused was acting in defence of another, in defence of property, or to prevent a crime.

Not Based on Reasonable Grounds

The second way in which the prosecution can prove that NOA was not acting in self-defence is by proving that even if s/he believed his/her acts were necessary, that belief was not based on reasonable grounds.

In determining whether this belief was based on reasonable grounds, you must again consider the circumstances as NOA perceived them to be at the time s/he [*insert relevant act*]. You must determine whether the prosecution has proven that the accused had no reasonable basis to believe it was necessary to act in the way s/he did, in response to the threat s/he believed s/he faced. It does not matter if NOA was mistaken about that threat, so long as his/her response to the threat, in all of the circumstances as s/he perceived them to be, was based on reasonable grounds.

If the prosecution fails to prove to you beyond reasonable doubt either that NOA did not believe it was necessary to act in the way s/he did to defend him/herself, or that that belief was not based on reasonable grounds, then you must find him/her not guilty of [*insert offence*].

Considerations

In determining whether NOA acted in self-defence, you must take into account all of the circumstances in which the act occurred. This includes [*insert any relevant factors, such as the* nature of the perceived threat*, any previous* relationship *between the parties, any* prior conduct *of the victim, or any personal* characteristics of the accused *that may have affected his or her behaviour, and relate to the facts in issue*].

You should also consider the defence's claim that NOA was reacting to an imminent threat. In such circumstances, a person cannot be expected to weigh precisely the exact amount of self-defensive action required. You should not look at the situation with the benefit of hindsight, but instead take into account the fact that calm reflection cannot always be expected in such a situation.

[*If it is alleged that the force used was disproportionate to the threat, add the following shaded section*.]

It is for this reason that the law does not require that the force used in self-defence be exactly proportionate to the harm threatened. However, if you consider that the accused's actions were out of all proportion to the harm threatened, that is one of the factors you can take into account in determining whether s/he believed his/her actions to be necessary in the circumstances. You can also take it into account in deciding whether the accused's belief was based on reasonable grounds.

In this case, the prosecution alleged that NOA's acts were plainly disproportionate to the threat s/he faced. [*Insert evidence and/or arguments*.] The defence responded [*insert evidence and/or arguments*].

[*If it is alleged that the accused failed to retreat, add the following shaded section*.]

In this case, you have heard evidence that NOA had the opportunity to retreat from the [*insert relevant act*], but failed to do so.

Although the law does not require a person to retreat from an attack before defending himself or herself, you can take into account a failure to do so when determining whether NOA believed that what s/he was doing was necessary in self-defence.

A failure to retreat is also one of the factors that you can take into account in deciding whether the accused's belief in the necessity of his/her actions was based on reasonable grounds.

[*If it is alleged that the accused engaged in a pre-emptive strike, add the following shaded section*.]

In this case, the defence claimed that NOA was acting in self defence, even though s/he was not being physically attacked at the time s/he [*insert relevant act*]. The defence claimed that his/her actions were necessary despite the lack of an immediate threat, to defend against [*insert relevant evidence*].

The law says that people are not required to wait until an attack is actually in progress before defending themselves. They are entitled to use whatever force they believe is necessary to defend themselves against threatened harm, as long as that belief is based on reasonable grounds.

However, the lack of immediacy of a threat may affect your determination of what the accused believed to be necessary in the circumstances. It may also affect your decision about whether that belief was based on reasonable grounds. It is, however, just one factor to be considered in deciding whether the prosecution has proved that NOA did not believe, on reasonable grounds, that what s/he was doing was necessary in self-defence.

[*If it is alleged that the accused was the original aggressor, add the following shaded section.*]

In this case, you have heard evidence that it was NOA who started the confrontation with NOV, by [*insert relevant evidence*]. This may be a significant matter in deciding whether NOA acted in self-defence. A person cannot start an attack, and simply claim that s/he was then defending him/herself from the victim's response to his/her original aggression.

However, when deciding whether NOA believed that his/her actions were necessary, and in deciding whether there were reasonable grounds for that belief, you should take into account matters such as [*insert any relevant factors, such as the extent to which the accused declined further conflict, stopped using force, faced a disproportionately escalated level of force in response, was defeated by the victim, was subjected to a new attack, or attempted to retreat*].

[*If it is alleged that the accused was intoxicated, add the following shaded section.*]

Warning: As noted in 8.3 Common Law Self-defence, Victorian courts have not yet addressed the question of whether intoxication is relevant to the objective element of self-defence. This part of the charge is based on the assumption that intoxication is relevant to that element, as was held by the NSW Supreme Court in *R v Conlon* (1993) 69 A Crim R 92 and *R v Katarzynski* [2002] NSWSC 613. However, as it is possible that Victorian courts will adopt the approach taken in *R v McCullough* [1982] Tas R 43 and *Ninness v Walker* (1998) 143 FLR 239, holding that intoxication is not relevant to the objective element, judges should give consideration to this issue before charging the jury.

In this case you have heard evidence that NOA was intoxicated at the time that s/he [*insert relevant act*]. If you find that s/he was intoxicated, you should take this into account when assessing whether s/he believed it was necessary to act in the way s/he did. This is because the issue to be decided is what the accused believed was necessary in all of the circumstances, including his/her state of intoxication.

You should also take any intoxication into account in determining whether the accused's belief was based on reasonable grounds.

Summary

To summarise this element, the prosecution must prove, beyond reasonable doubt, that NOA either:

- Did not believe that it was necessary to do what s/he did to defend him/herself; or
- Did not have reasonable grounds for holding that belief.

Last updated: 1 November 2014

8.3.2 Checklist: Common Law Self-Defence

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This checklist can be used if there is evidence from which a jury might infer that the accused was acting in self-defence when s/he:

Committed an offence *other than murder, manslaughter, defensive homicide, attempted murder or attempted defensive homicide prior to 1 November 2014*; or

Committed one of the offences listed above *prior to 23 November 2005*.

It is designed to be used together with a checklist outlining the elements of the relevant offence. Details of that offence will need to be inserted in the appropriate places.

In addition to proving all of the elements of [*insert offence*], the prosecution must also prove that the accused did not act in self-defence. This requires the prosecution to prove, beyond reasonable doubt, that when the acts said to constitute the offence were committed, either:

1. The accused did not believe that it was necessary to do what s/he did to defend him/herself; or
2. The accused's belief that it was necessary to do what s/he did to defend him/herself was not based on reasonable grounds.

Belief in Necessity

1. Has the prosecution proven, beyond reasonable doubt, that the accused did not believe that it was necessary to do what s/he did to defend him/herself, at the time s/he committed the relevant acts?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of [*insert offence*] (as long as you are satisfied that the prosecution has also proven all of the elements of that offence beyond reasonable doubt)

If No, then go to Question 2

Reasonable grounds

2. Has the prosecution proven, beyond reasonable doubt, that the accused's belief that it was necessary to do what s/he did to defend him/herself was not based on reasonable grounds?

Consider – What were the circumstances as perceived by the accused?

If Yes, then the accused is guilty of [*insert offence*] (as long as you are satisfied that the prosecution has also proven all of the elements of that offence beyond reasonable doubt)

If No, then the accused acted in self-defence and is not guilty of [*insert offence*] (as long as you also answered No to Question 1)

Last updated: 1 November 2014

8.4 Mental Impairment

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Commencement Information

1. The defence of mental impairment was created by s 20 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (the Act).
2. Section 20 commenced operation on 18 April 1998, and applies to any offences that it is alleged were committed on or after that date.

3. The common law defence of insanity was abrogated by s 25 of the Act, but continues to apply to any offences it is alleged were committed before 18 April 1998 (Schedule 3 clause 7(1)). However, a verdict of not guilty on account of insanity is to be taken for all purposes to be a finding of not guilty by reason of mental impairment under Part 4 of the Act (Schedule 3 clause 7(2)).

When can the Defence of Mental Impairment be Raised?

4. The question of mental impairment may be raised at any time during the trial by the defence or the prosecution (s 22(1). See, e.g. *R v Hassan* [2004] VSC 85).

5. If the prosecution wishes to raise the issue of mental impairment, they require the leave of the trial judge (s 22(1)). As long as there is admissible evidence on the issue, the trial judge has a very broad discretion to grant leave (*R v Alford* (No.2) [2005] VSC 405).

Pre-empanelment Consent Hearings

6. Depending on the circumstances, it may be possible to deal with the issue of mental impairment without empanelling or charging a jury (s 21(4). See, e.g. *R v Whelan* [2006] VSC 319).

7. According to s 21(4), if prior to the jury's empanelment the prosecution and the defence agree that the proposed evidence demonstrates that the accused committed the conduct constituting the offence,[1155] and will also establish the defence of mental impairment, the trial judge may hear the evidence and:

    - If satisfied that the evidence establishes the defence of mental impairment, may direct that a verdict of not guilty because of mental impairment be recorded without empanelling a jury; or
    - If not satisfied that the evidence establishes the defence of mental impairment, direct that the matter be heard by a jury.

8. The judge must be satisfied that the evidence establishes the defence of mental impairment on the balance of probabilities (*R v Whelan* [2006] VSC 319).

Establishing Mental Impairment

9. A person is presumed not to be suffering from a mental impairment until the contrary is proved (s 21(1)). This provision reflects the common law presumption of sanity (*Sodeman v R* (1936) 55 CLR 192; *R v Porter* (1933) 55 CLR 182).

10. The onus of rebutting the presumption of sanity rests on the party raising the question of mental impairment (s 21(3)). In most cases it will be the defence that raise the issue, and who will be required to prove that the accused was mentally impaired. However, the burden will rest on the prosecution if they raise the issue under s 22 (with the judge's leave).

11. The defence of mental impairment must be proved on the balance of probabilities (s 21(2)(b)). This reflects the standard of proof that existed under the common law (*Sodeman v R* (1936) 55 CLR 192; *R v Porter* (1933) 55 CLR 182).

12. Apart from some limited circumstances in which a judge may determine the issue (see "Consent Hearings" above), determining whether or not an accused suffered from a mental impairment is a question of fact for the jury (s 21(2)(a)).

[1155] It is unclear whether the defence and prosecution simply need to agree that the accused committed the relevant acts, or whether they also need to agree that the accused had the requisite mental state: see "Mental Impairment and Proof of Elements" below.

13. When mental impairment is in issue, if a jury finds the accused not guilty they must specify in their verdict whether they have done so on the basis of mental impairment (s 22(2)(b)).[1156]

What is the Defence of Mental Impairment?

14. People will have a defence to what would otherwise be a criminal act if, at the time they committed the act, they were suffering from a mental impairment that had the effect that they either:

    (a) did not know the nature and quality of what they were doing; or

    (b) did not know that their conduct was wrong (s 20(1)).

15. If the defence of mental impairment is established, the appropriate verdict is "not guilty because of mental impairment" (s 20(2)). The effects of such a verdict are specified in s 23 of the Act.

16. Unlike most other Australian jurisdictions (i.e. Queensland, Western Australia, Tasmania, South Australia and the Northern Territory), the Victorian defence does not include a mental impairment which has the effect of removing a person's capacity to control his or her actions.

17. The defence applies to people who were suffering from a mental impairment at the time they *committed the criminal act*. Part 2 of the Act establishes processes to be used if the accused suffers from a mental impairment *at the time of the trial*, and is unable to understand the charge, the trial or the evidence, or is unable to enter a plea or give instructions to his or her lawyer (see 10.1 Investigations into Unfitness to Stand Trial).

"Mental Impairment"

18. The Act does not define the term "mental impairment". It has been held to have the same meaning as "disease of the mind", which formed the basis of the common law insanity defence (*R v Sebalj* [2003] 2003 VSC 181; *R v Gemmill* (2004) 8 VR 242; *DPP v Taleski* [2007] VSC 183; *R v Martin* [2005] VSC 518).

19. "Disease of the mind" has been held to be synonymous with "mental illness". It connotes an unhealthy or "infirm" mind, as opposed to a healthy mind affected by a transient, non-recurrent mental malfunction caused by external forces (*R v Falconer* [1990] 171 CLR 30; *R v Radford* (1985) 42 SASR 266).

20. See "What is a 'disease of the mind'?" in 8.8 Automatism for further information concerning the meaning of this phrase, and examples of conditions which have been held to be "diseases of the mind".

Nature and Quality of the Act

21. People will have a defence to what would otherwise be a criminal act if, at the time they committed the act, they were suffering from a mental impairment that had the effect that that they did not know the nature and quality of their conduct (s 20(1)(a)).

22. This provision restates one of the limbs of the common law defence of insanity. In that context, the phrase "nature and quality" has been held to refer to the physical character and significance of a person's actions, and the consequences of those acts. It does not refer to the moral quality of his or her conduct (*Sodeman v R* (1936) 55 CLR 192).

[1156] It is unclear whether the jury must return this verdict in relation to the offence charged, or whether they may return a qualified acquittal to a lesser included offence. See "Lesser Included Offences" below for further information.

23. To satisfy this limb of the defence, the accused must have been unable to appreciate the physical nature of what he or she was doing, and the consequences of his or her behaviour. In the case of murder, for example, the accused must have had so little capacity for understanding the nature of life and the destruction of life, that to him or her it was like breaking a twig or destroying an inanimate object (*R v Porter* (1933) 55 CLR 182).

Knowledge of wrongfulness

24. People will have a defence to what would otherwise be a criminal act if, at the time they committed the act, they were suffering from a mental impairment that had the effect that they did not know that their conduct was wrong (s 20(1)(b)).

25. Section 20(1)(b) defines this to mean that the person "could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong".

26. This provision, including the definition of "wrong" as meaning contrary to the ordinary principles of reasonable people, rather than contrary to the law or morality, also restates one of the limbs of the common law defence of insanity (*R v White and Piggin* (2003) 7 VR 442; *R v Porter* (1933) 55 CLR 182; *Sodeman v R* (1936) 55 CLR 192; *Stapleton v R* (1952) 86 CLR 358).

Mental Impairment and Proof of Elements

27. The defence of mental impairment is not established simply by proving that the accused suffered from a mental impairment that had one of the requisite effects. The jury must also be satisfied that the accused engaged in the "conduct constituting the offence" (s 20(1)).

28. Section 3(1) states that "*conduct* includes doing an act and making an omission". It is clear from this definition that the prosecution must at least prove, beyond reasonable doubt, that the accused committed the *act or omission* which constitutes the offence charged.

29. It is unclear whether the prosecution must also prove any of the other elements of the charged offence, such as the requisite *mens rea*. While the use of the term "conduct constituting the offence" may indicate that the prosecution is *not* required to prove that the accused had a specific mental state, this issue has not yet been addressed in Victoria.[1157]

30. A number of different approaches have been taken to the issue of which elements the prosecution is required to prove, as outlined below. As the law in this area is unclear, judges who are required to charge a jury in a case that raises the defence of mental impairment will need to consider which of these approaches (if any) to apply.

The Original High Court Approach

31. Originally, it appears to have been assumed (without discussion) by the High Court that the prosecution was required to prove all of the elements of the offence charged (see, e.g. *R v Porter* (1933) 55 CLR 182; *R v Sodeman* (1936) 55 CLR 192; *R v Stapleton* (1952) 86 CLR 358).

32. This approach does not address the difficulties that arise if the presence of a mental illness prevents the prosecution from proving that the accused had the requisite mental state. It is possible that the accused would be entitled to a complete acquittal in such circumstances.

[1157] Where a similar phrase was interpreted in the United Kingdom, the courts originally held that the prosecution had to prove all of the elements of the charged offence (*R v Egan* [1998] 1 Cr App R 121). This approach was later overruled, with the courts holding that the prosecution only had to prove the *actus reus* of the charged offence (*Attorney-General's Reference (No. 3 of 1998)* [2000] QB 401; *R v Antoine* [2001] 1 AC 340).

33. This approach appears to have been adopted in the trial of Donna Fitchett. In *R v Fitchett* (2009) 23 VR 91, Nettle JA is reported as having told the jury that they needed to find all of the elements of murder proven (at para 26). However, the issue did not form a ground of appeal, and appears not to have been directly addressed.

The *Stiles* Approach

34. In the only Victorian case to directly address this issue, the Court of Appeal also held that the prosecution had to prove all of the elements. However, they stated that when deciding whether the prosecution has proved its case, the jury must assume that the accused was of sound mind (*R v Stiles* (1990) 50 A Crim R 13. See also *R v Perkins* [1983] WAR 184).

35. Under this approach the jury should not consider any evidence of mental illness when determining whether the elements of the offence have been proven. Consequently, if evidence of mental illness provides the only reason for doubting that the accused had the requisite mental state, he or she should either be convicted or found not guilty because of mental impairment, depending on whether the requirements of the defence are established on the balance of probabilities.

36. This approach has been used in a number of recent NSW single judge decisions (see, e.g. *R v Grant* [2009] NSWSC 833; *R v Tarantello* [2011] NSWSC 383).

The *Hawkins* Approach

37. In *Hawkins v R* (1994) 179 CLR 500, the High Court held, in the context of the Tasmanian *Criminal Code*, that the prosecution only needs to prove that the accused voluntarily committed the 'incriminated act'. They do *not* need to be satisfied that the accused acted with the requisite specific intention.

38. Under this approach, where the accused is charged with an offence that requires proof of a specific intention:

    - The jury must first determine whether the prosecution has proven, beyond reasonable doubt, that the accused voluntarily committed the relevant act. Evidence of mental illness should not be taken into account when making this determination;
    - If the jury is satisfied that the accused committed the relevant act, they must next determine whether the requirements of the mental impairment defence have been proven on the balance of probabilities. If so, they should return a qualified acquittal.
    - If the jury is *not* satisfied that the mental impairment defence has been established, the jury must next determine whether the prosecution has proven, beyond reasonable doubt, that the accused had the necessary specific intention. Evidence of mental illness *may* be taken into account when making this determination (*Hawkins v R* (1994) 179 CLR 500).

39. This approach has been followed in a number of cases in other jurisdictions (see, e.g. *R v Toki* [2003] NSWCCA 125; *R v Minani* (2005) 63 NSWLR 490; *Garrett v R* [1999] WASCA 169; *Ward v R* (2000) 118 A Crim R 78 (Kennedy, Wallwork and Scott JJ)).

40. However, other judgments have highlighted a number of difficulties with the *Hawkins* approach, and have sought to limit its application (see, e.g. *Ward v R* (2000) 118 A Crim R 78 (Wheeler J); *R v Nolan* WA CCA 22/5/97; *Stanton v R* (2001) 24 WAR 233; [2001] WASCA 189).

Other Approaches

41. A number of other approaches have been taken to this issue, both in Australia and in other common law jurisdictions. These include:

- Requiring the prosecution to prove all of the elements of the charged offence, but directing the jury to return a qualified acquittal if the accused's illness provided the reason for them failing to be satisfied about those elements (*R v Pantelic* (1973) 1 ACTR 1; *Taylor v R* (1978) 22 ALR 599 (Smithers J));
- Requiring the prosecution to only prove the *actus reus* of the charged offence (*Attorney-General's Reference (No. 3 of 1998)* [2000] QB 401; *R v Antoine* [2001] 1 AC 340);
- Requiring the prosecution to prove the *actus reus* and, if there is objective evidence raising the issue, any specific knowledge or intention necessary to constitute the offence (*R v Ardler* (2004) 144 A Crim R 552; *R v King* (2005) 155 ACTR 55; *R v Clements* [2006] ACTSC 44);

Other Matters for Consideration

42. When determining which approach to take to this issue, judges may wish to consider the following matters:
    - At what point should other defences, such as self-defence or consent, be considered by the jury;
    - If the prosecution is not required to prove *mens rea*, what verdict should the jury return where the same conduct forms the *actus reus* of a number of different offences (e.g. murder and manslaughter);
    - What is the prosecution required to prove in cases involving negligence, complicity or inchoate offence.

When to Give a Charge on Mental Impairment

43. Once a jury has been empanelled, if there is admissible evidence that raises the question of mental impairment, the judge must direct the jury to consider the question (s 22(2)). This reflects the position at common law (*R v McMahon* (2004) 8 VR 101; *R v Shields* [1967] VR 706; *R v Meddings* [1966] VR 306; *Bratty v Attorney-General for Northern Ireland* [1963] AC 386).
44. A charge concerning mental impairment will therefore always need to be given if there is admissible evidence that raises the issue (unless the prosecution and the defence agree, prior to empanelment, that the proposed evidence will establish the defence, and the trial judge is satisfied that that is the case. See "Consent Hearings" above).
45. It may therefore be necessary to charge the jury about mental impairment even if neither the prosecution nor the defence seek to raise the question, or actively oppose it being left to the jury, if there is admissible evidence on the issue (see, e.g. *Hawkins v R* (1994) 179 CLR 500).
46. The time at which the charge should be given will depend on the resolution of the issues outlined in "Mental Impairment and Proof of Elements" above. For example:
    - If the *Stiles* approach is adopted, the charge should be given after directing the jury about all of the elements of the offence.
    - If the *Hawkins* approach is adopted, the judge may wish to give the charge before directing the jury about the prosecution's need to prove specific intention.

Content of the Charge

47. The term "mental impairment" is a legal term, not a medical term. It is therefore for the trial judge to determine what is meant by the term and to explain its meaning to the jury (*R v Falconer* [1990] 171 CLR 30; *R v Tonkin* [1975] Qd R 1; *R v Kemp* [1957] 1 QB 399).
48. The judge should clearly explain what the prosecution must prove before the jury considers the defence of mental impairment. This will depend on the resolution of the issues outlined in "Mental Impairment and Proof of Elements" above.

49. The judge must explain to the jury the *findings* which may be made in a case where mental impairment is in issue (i.e. guilty, not guilty or not guilty because of mental impairment (s 22(2)).

50. The judge must also explain to the jury the *legal consequences* of those findings (s 22(2); *R v Fitchett* (2009) 23 VR 91).[1158]

51. This requirement was introduced to address the concern that, in the absence of any information about the processes that would follow a finding of not guilty because of mental impairment, some jury members might be reluctant to hand down an exculpatory verdict, due to the perception that it could result in the immediate release of a disturbed and dangerous person. In most cases, that would almost certainly not be the case (*R v Fitchett* (2009) 23 VR 91. See also *R v Weise* [1969] VR 953).

52. This part of the charge must therefore:

    - Inform the jury about the nature of the decisions that will have to be made following a finding of not guilty because of mental impairment; and
    - Explain to the jury that there is a process to be followed which will focus upon the question of the appropriate disposition of the person in the particular circumstances of the case (*R v Fitchett* (2009) 23 VR 91).

53. The judge is not empowered to prognosticate upon or pre-empt the decisions to be made with respect to the accused's disposition (*R v Fitchett* (2009) 23 VR 91).

54. The judge must not convey any impression concerning the desirability, punitive features or public safety aspects of arriving at a particular verdict (*R v Fitchett* (2009) 23 VR 91).

55. While there is no set formulation for what must be said, the Court of Appeal in *R v Fitchett* (2009) 23 VR 91 approved the following charge given by Osborn J in *R v Gemmill* (12/11/03 Vic SC):

> If you find the accused guilty, then there will be a further hearing before me and I will have to determine how he should be sentenced. If you find him not guilty, that is completely not guilty, he will be discharged and be free to walk away from the court. If you find him not guilty because of mental impairment, then there are two options open to me. The first is to declare that he is liable to a supervision order under the Crimes (Mental Impairment and Unfitness to be Tried) Act (1997) and the second is to order that he be released unconditionally. I would have to form a view on evidence as to what was the appropriate course to be followed.
> A Supervision order, which is the first option that would be open to me, may commit the person to custody, or release the person on conditions decided by the court and specified in the Order. So you can see that those are the different legal consequences that follow from the different verdicts available to you. And you can see, as I have told you, that a verdict of not guilty because of mental impairment, has quite different consequences from a verdict of not guilty, ...

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8.4.1 Charge: Mental Impairment

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Warning! The law is currently unclear on when this direction should be given within a charge. See 8.4 Mental Impairment for guidance on that issue.

[1158] This differs from the law in most other areas, where it is generally considered undesirable to direct a jury about the consequences of their verdict (see, e.g. *Lucas v R* (1970) 120 CLR 171).

Introduction

In this case, defence counsel[1159] has raised what is called the "defence of mental impairment", submitting that NOA should be found not guilty of [*insert name of offence*] because s/he was mentally impaired when s/he [*insert relevant acts*]. I therefore need to give you some directions about this defence.

Onus and Standard of Proof

According to the law, people should not be held criminally responsible for acts they do while suffering particular effects of a mental impairment. So even if the prosecution can prove, beyond reasonable doubt, that NOA [*identify matters the prosecution must prove*],[1160] s/he will not be guilty of [*identify offence*] if s/he committed those acts while suffering certain mental conditions.

However, in the absence of any evidence to the contrary, the law presumes that people are not mentally impaired. So if you are to find that NOA was not guilty because of a mental impairment, it is the defence who must prove that s/he was mentally impaired at the time s/he [did the acts/made the omissions] said to constitute the crime.

You can see that this is one of those rare situations in which a matter must be proved by the defence. The prosecution must still prove [*identify matters the prosecution must prove*] before you need to consider the issue of mental impairment. However, if you are satisfied that those matters have all been proven, it is defence counsel who must prove the requirements of this defence if you are to find the accused not guilty because of mental impairment.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – the defence only needs to prove these requirements on what is called the "balance of probabilities". This is a much lower standard than that required of the prosecution when proving an offence. It only requires the defence to prove that it is more probable than not that NOA was mentally impaired to the necessary degree.

Overview of Requirements

There are two requirements that the defence must prove, on the balance of probabilities, if you are to find the accused not guilty because of mental impairment. I will list them for you, and then explain each one in more detail.

First, the defence must prove that the accused was suffering from a mental impairment at the time that s/he did the acts said to constitute the relevant crime.

Second, the defence must prove that the mental impairment affected the accused in one of two ways. It must have affected the accused in such a way that s/he either did not know the nature and quality of what s/he was doing, or s/he did not know that what s/he was doing was wrong.

If you find that the prosecution has proven, beyond reasonable doubt, that [*identify matters the prosecution must prove*], and you are also satisfied that both of these requirements have been proven by the defence on the balance of probabilities, then this defence will be successful and you must find NOA not guilty of that offence because of mental impairment.

[1159] This charge is based on the assumption that the defence has raised the issue of mental impairment. If it is the prosecution that has raised the issue, the charge will need to be modified accordingly.

[1160] It is unclear precisely which matters the prosecution must prove (see "Mental Impairment and Proof of Elements" in 8.4 Mental Impairment). The content of this part of the charge, as well as similar sections below, will depend on how the judge resolves these issues.

However, if the defence cannot prove, on the balance of probabilities, both that NOA had a mental impairment at the relevant time, and that the mental impairment affected him/her in one of the two ways I have just mentioned, then this defence will fail. If you are also satisfied that all of the elements of the offence have been proven by the prosecution, beyond reasonable doubt, you should find NOA guilty of [*insert offence*].

I will now explain each of these requirements in more detail.

Mental Impairment

The first requirement that the defence must prove is that the accused was suffering from a mental impairment at the time that s/he did the acts said to constitute the crime of [*insert offence*].

The law does not define what "mental impairment" means. It is not a psychiatric term with a specific medical definition. It is a term which simply means a disease or illness of the mind. This includes [*insert relevant mental impairments*].

[*If there is evidence that the accused may have been suffering from a temporary state of mind rather than a mental impairment, add the following shaded section.*]

To satisfy this requirement, the accused must have been suffering from some kind of mental illness or disorder, and not just from a temporary state of mind such as impulsiveness or passion. This is not to suggest that the mental impairment needs to be permanent – but it must be something more than just a passing mental malfunction.

[*If there is evidence that the accused's mental impairment was caused by an external factor, add the following shaded section.*]

To satisfy this requirement, the mental impairment must have been caused by something "internal" to the accused, as distinct from being the result of an external physical factor, such as [*insert relevant example*].

In this case, the defence alleged that NOA was suffering from a mental impairment when s/he [*insert relevant acts and summary of evidence and/or arguments*]. The prosecution denied this, submitting [*insert summary of relevant evidence and/or arguments*].

It is for you to decide, based on all of the evidence, if NOA was suffering from a mental impairment at the relevant time. It is only if the defence has proved that this was more likely than not that this first requirement will be met.

Effect of the Mental Impairment

The second requirement that the defence must prove relates to the effect of the mental impairment on the accused. The defence must prove that the mental impairment affected him/her to such an extent that when s/he committed the acts said to constitute the crime s/he either:

- Did not know the nature and quality of what s/he was doing; or
- Did not know that what s/he was doing was wrong.

The defence only needs to prove one of these effects, although in some cases there may be evidence of both. I will look at each of them in turn.

Nature and Quality of the Act

The first way in which the defence can satisfy this requirement is by proving, on the balance of probabilities, that the accused's mental impairment affected him/her to such an extent that s/he did not know the nature and quality of what s/he was doing.

This means that because of his/her mental impairment, the accused was unable to appreciate the physical nature and significance of what s/he was doing when s/he committed the acts said to constitute the crime. The accused was affected by his/her mental impairment in a way which led him/her to believe s/he was doing one thing, when in reality s/he was doing something completely different.

An example of this would be where a person thinks she is entering her own house, when she is in fact breaking into Parliament House. Another example would be a person who thinks that he is killing a rabbit, when in reality he is killing one of his friends.

[*If this limb is in issue, add the following shaded section.*]

In this case the defence argued that NOA did not know the nature and quality of what s/he was doing when [*insert relevant acts and summary of relevant evidence and/or arguments*]. The prosecution responded [*insert relevant evidence and/or arguments*].

[*If this limb is not in issue, add the following shaded section.*]

The defence has not sought to rely on this part of the second requirement, instead alleging that NOA did not know that his/her actions were wrong.

Knowledge that NOA's actions were wrong

The second way in which the defence can satisfy this requirement is by proving, on the balance of probabilities, that when the accused committed the acts said to constitute the crime, the mental impairment affected him/her to such an extent that s/he did not know that what s/he was doing was wrong.

The law defines this to mean that the accused could not reason with a moderate degree of sense and composure about whether his/her conduct, as perceived by reasonable people, was wrong.

You can see from this definition that the test is not whether the accused's acts were in fact wrong, or that accused knew that his/her actions were wrong according to the law or morality. It is that the accused was not able to reason in such a way that s/he would have known that reasonable people would consider his/her conduct to be wrong. That is, there was something so wrong with the accused's mind due to his/her mental impairment that s/he was incapable of realising that reasonable people would think his/her behaviour was wrong.

[*If this limb is in issue, add the following shaded section.*]

In this case the defence argued that NOA did not know that what s/he was doing was wrong when [*insert relevant acts and summary of relevant evidence and/or arguments*]. The prosecution responded [*insert relevant evidence and/or arguments*].

[*If this limb is not in issue, add the following shaded section.*]

The defence has not sought to rely on this part of the second requirement, instead alleging that NOA did not know the nature and quality of what s/he was doing.

Summary, Possible Verdicts and Consequences

To summarise, you must first determine whether the prosecution has proven, beyond reasonable doubt, [*identify matters the prosecution must prove*]. If you are not satisfied that the prosecution has proven all of these matters, then you must find NOA not guilty of that offence, regardless of your views about his/her possible mental impairment. As s/he will not have been convicted of that offence, that will be the end of the legal process. S/he will be discharged and free to walk away from the court.

If you decide that the prosecution has proven all of those matters beyond reasonable doubt, you must then look at the defence of mental impairment. You must determine whether the defence has proven, on the balance of probabilities, that:

- One – NOA had a mental impairment at the time s/he did the acts said to constitute that offence; and
- Two – that the mental impairment affected NOA in such a way that when s/he committed the acts said to constitute the offence, s/he did not know the nature and quality of what s/he was doing or s/he did not know that what s/he was doing was wrong.

It is only if the accused has established both of these requirements on the balance of probabilities that you may return a verdict of "not guilty because of mental impairment".

If that is your verdict, then there will be two options open to me. The first is to declare that the accused is liable to a Supervision Order, and the second is to order that s/he be released unconditionally. I would have to form a view, based on the evidence, as to what was the appropriate course to be followed.

A Supervision Order, which is the first option that would be open to me, may commit the person to custody, or release the person on conditions decided by the court and specified in the Order.

So you can see that there are different legal consequences that follow from the different verdicts available to you. And you can see, as I have told you, that a verdict of not guilty because of mental impairment has quite different consequences from a verdict of not guilty.

Because of these different consequences, it is necessary for you to tell me, if you reach a verdict of not guilty, whether you have reached that verdict because of mental impairment or not.

Although I have just explained to you the possible consequences of the different verdicts available in this case, it is important that you do not take these consequences into account in making your determination. As I told you earlier, you have an obligation to make your decision based on the evidence in the case, not on irrelevant factors such as the consequences of your decision.

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8.4.2 Checklist: Mental Impairment

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This checklist can be used where mental impairment has been raised by the defence. It is designed to be used along with a checklist outlining the elements of the offence in issue. Details of the specific offence will need to be inserted in the appropriate places.

Where mental impairment has been raised following a finding that the accused is not fit to be tried, references to finding the accused "guilty of [*insert offence*]" must be changed to "committed the offence of [*insert offence*]"

Two matters the defence must prove on the balance of probabilities:

1. That the accused was suffering from a mental impairment at the time s/he did the acts said to constitute the offence; and

2. That when the accused did those acts, the mental impairment affected him/her to such an extent that s/he either:

i) Did not know the nature and quality of what s/he was doing; or

ii) Did not know that what s/he was doing was wrong.

Mental Impairment

1. Has the defence proven, on the balance of probabilities, that the accused was suffering from a mental impairment at the time s/he did the acts said to constitute the offence of [*insert offence*]?

If Yes, then go to 2.1

If No, then the Accused is guilty of [*insert offence*] (as long as you are satisfied that the prosecution has proved all of the elements of that offence beyond reasonable doubt)

Effect of Mental Impairment

2.1 When the accused did the acts said to constitute the offence, did the mental impairment affect him/her to such an extent that s/he did not know the nature and quality of what s/he was doing?

If Yes, then the Accused is not guilty of [*insert offence*] because of mental impairment (as long as you also answered yes to question 1, and are satisfied that the prosecution has proved all of the elements of that offence beyond reasonable doubt)

If No, then go to 2.2

2.2 When the accused did the acts said to constitute the offence, did the mental impairment affect him/her to such an extent that s/he did not know that what s/he was doing was wrong?

Consider: Could the accused not reason, with a moderate degree of sense and composure, about whether his/her conduct, as perceived by reasonable people, was wrong?

If Yes, then the Accused is not guilty of [*insert offence*] because of mental impairment (as long as you also answered yes to question 1, and are satisfied that the prosecution has proved all of the elements of that offence beyond reasonable doubt)

If No, then the Accused is guilty of [*insert offence*] (as long as you also answered No to question 2.1, and are satisfied that the prosecution has proved all of the elements of that offence beyond reasonable doubt.)

Last updated: 11 December 2012

8.5 Statutory Intoxication (From 1/11/14)

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Introduction

1. Prior to 2005, the issue of intoxication in Victoria was governed solely by the common law. This situation has been altered by the *Crimes (Homicide) Act 2005* and the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*, which introduced s 9AJ (now repealed) and s 322T respectively into the *Crimes Act 1958*.
2. This topic covers the issue of intoxication under s 322T of the *Crimes Act 1958* and applies to all offences committed on or after 1 November 2014.
3. Section 322T applies to defences, which is defined to include self-defence, duress and sudden or extraordinary emergency.
4. Section 9AJ of the *Crimes Act 1958* applies to homicide offences committed on or after 23 November 2005 and before 1 November 2014 and the defences to those offences. See 8.5 Statutory Intoxication (From 1/11/14) (23/11/05–31/10/14).
5. The common law on intoxication remains relevant in respect of non-homicide offences committed before 1 November 2014 and the defences to those offences, and to all offences committed before 23 November 2005 and the defences to those offences. See 8.7 Common Law Intoxication.

6. As s 322T of the *Crimes Act 1958* applies only to defences, the common law in relation to intoxication also continues to apply to all offences, committed on or after 1 November 2014, for the purposes of negating an element of the offence (e.g. voluntariness or intention), or to prove that the accused committed the offence (e.g. by explaining the accused's behaviour). See 8.7 Common Law Intoxication.

Relevant Defences

7. The intoxication provision in s 322T defines defences to include self-defence (s 322K), duress (s 322O) and sudden and extraordinary emergency (s 322R).
8. In particular, it applies to the elements of those defences that refer to either a 'reasonable belief' or a 'reasonable response' of the accused (*Crimes Act 1958* ss 322T(2)–(4)).
9. Courts have not yet identified whether s 322T applies to any common law defences, or to statutory defences which contain elements of reasonable belief or reasonable response. One defence which s 322T might apply to is the belief in consent defence in *Crimes Act 1958* s 45(4) (as in force before 1 July 2016), under which the accused must first prove that he or she had reasonable grounds for believing that the complainant was aged 16 or older at the time of the alleged offence. As a matter of prudence, for the purpose of this Charge Book, we have assumed that s 322T does not apply to this defence.

Onus of Proof

10. The onus of proof regarding whether the accused's intoxication was self-induced is not clear on the wording of s 322T, and Victorian courts have not considered the issue.
11. On one hand, s 322T(5) states that intoxication 'is self-induced unless' one of a number of circumstances set out in s 322T(5)(a)–(d) exists. This may indicate a presumption that the intoxication is self-induced unless the accused proves that at least one of those circumstances exists.
12. On the other hand, it seems unlikely that s 322T would be interpreted as requiring the accused to prove an aspect of his/her defence, inconsistently with the presumption of innocence, without clear language to that effect (see, e.g. *Slaveski v Smith* (2012) 34 VR 206 [24], [45]; *WBM v Chief Commissioner of Police* (2012) 43 VR 446 [97] (Warren CJ); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 [73]; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 [192] (Tate JA); *Carolan v The Queen* (2015) 48 VR 87 [46]).
13. Section 322I of the *Crimes Act 1958* states that an accused has only an evidential onus to raise the defence of self-defence, duress or sudden and extraordinary emergency, while the prosecution has the legal onus of negating the defence raised beyond reasonable doubt. Section 322I falls within Part IC of the *Crimes Act*, which includes the statutory defences of self-defence, duress and sudden and extraordinary emergency as well as s 322T on intoxication in the context of those defences.
14. Even though the fact that the accused's intoxication was not self-induced does not, on its own, constitute one of these defences, it is an aspect of each of them. Therefore s 322I provides additional support for the view that the prosecution has the onus of proof in respect of whether the intoxication was self-induced.
15. As a matter of prudence, this charge book adopts the approach that the accused is required only to introduce evidence to the effect that his/her intoxication was not self-induced and that, once such evidence is raised by the defence, the onus is on the prosecution to prove beyond reasonable doubt that the accused's intoxication was not self-induced.

Meaning of intoxication

16. Intoxication for the purposes of s 322T is not defined, but expressly includes 'intoxication because of the influence of alcohol, a drug or any other substance' (*Crimes Act 1958* s 322T(1)). Other substances causing intoxication might include, for example, glue or petrol.

Self-Induced Intoxication

17. The intoxication provision in s 322T operates differently depending on whether the accused's intoxication was self-induced. If there is evidence that the accused's intoxication was not self-induced, it will be important for the jury to determine this question.

18. Intoxication will not be self-induced if it came about involuntarily or because of 'fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force' (*Crimes Act 1958* ss 322T(5)(a)–(b)).

19. Intoxication will also not be self-induced if it came about from using a prescription drug in accordance with the directions of the person who prescribed it, from using a non-prescription drug for a purpose and at the dosage level recommended by the manufacturer or from using a medicinal cannabis product in accordance with a patient medicinal cannabis access authorisation. However, if a person using the prescription or non-prescription drug knew or had reason to believe, when taking the drug, that it would significantly impair his/her judgment or control, then the resultant intoxication will be self-induced (*Crimes Act 1958* ss 322T(5)(c), (5)(ca), (5)(d),(6)).

'Reasonable belief' elements of a defence

20. In determining whether a person had a reasonable belief, as an element of the defence of self-defence, duress or sudden and extraordinary emergency, the relevant standard is generally that of reasonable person who is not intoxicated (*Crimes Act 1958* s 322T(2)).

21. The operation of s 322T(2) can be illustrated using an example. In determining whether an accused's belief was reasonable under the duress provisions of the *Crimes Act 1958*, the jury ordinarily uses the standard of 'a reasonable person possessing the personal characteristics of the accused that might have affect the accused's appreciation of the circumstances' (*DPP v Parker* [2016] VSCA 101 [8]).

22. However, s 322T means that where the accused was under the effect of self-induced intoxication at the time of his or her offending, that particular characteristic of the accused – his or her level of intoxication – must not be taken into account (see *DPP v Parker* [2016] VSCA 101 [46]). The jury should consider what a reasonable sober person (with the other relevant characteristics of the accused) might have believed.

23. The exception to the general rule in s 322T(2) is where the accused's intoxication at the time he or she committed the offence was not self-induced. Then the relevant standard is a reasonable person intoxicated to the same extent as the accused (*Crimes Act 1958* s 322T(4)).

24. Section 322T does not affect the determination of the accused's subjective beliefs. For example, in determining whether an accused believed his or her actions were necessary in self-defence, his or level of intoxication must be taken into account. Section 322T is relevant only in determining whether an accused's beliefs were reasonable.

'Reasonable response' elements of a defence

25. In determining whether a person's response was reasonable, as an element of the defence of self-defence, duress or sudden and extraordinary emergency, the relevant standard is generally that of reasonable person who is not intoxicated (*Crimes Act 1958* s 322T(3)).

26. The operation of s 322T(3) can be illustrated using an example. In determining the reasonableness of an accused's response to the circumstances under the self-defence provisions, the jury may take into account personal characteristics of the accused such his or her age, gender or health. However, s 322T(3) means that the jury must not take into account any self-induced intoxication of the accused. The jury should consider how a reasonable sober person (with the other relevant characteristics of the accused) might have responded to the threat.

27. The exception to the general rule in s 322T(2) is where the accused's intoxication at the time he or she committed the offence was not self-induced. Then the relevant standard is a reasonable person intoxicated to the same extent as the accused (*Crimes Act 1958* s 322T(4)).

Last updated: 19 March 2018

8.5.1 Charge: Statutory Intoxication (Self-Induced)

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This charge should be given where:

i) there is evidence the accused was intoxicated when s/he committed any offence on or after 1 November 2014;

ii) a defence of self-defence, duress, or sudden and extraordinary emergency is in issue; and

iii) it is not contested that the accused's intoxication was self-induced.

The relevant aspects of this charge should be inserted into directions on the defence in issue: self-defence, duress, or sudden and extraordinary emergency.

'Reasonable belief' element of a defence

[*If any element of the defence relates to whether the accused had a* reasonable belief*, add the following shaded section to the directions on that element:*]

In this case you have heard evidence that NOA was intoxicated at the time that s/he [*insert relevant act*]. If you find that s/he was intoxicated, you must not take this into account when assessing whether his/her belief about [*insert relevant reasonable belief element*] was reasonable. The law requires you to consider what the beliefs of a reasonable person who was sober might have been.

'Reasonable response' element of a defence

[*If any element of the defence relates to whether the accused's* response was reasonable*, add the following shaded section to the directions on that element:*]

In this case you have heard evidence that NOA was intoxicated at the time that s/he [*insert relevant act*]. If you find that s/he was intoxicated, you must not take this into account when assessing whether his/her response to [*insert relevant reasonable response element*] was reasonable. The law requires you to consider what the response of a reasonable person who was sober might have been.

Last updated: 27 September 2016

8.5.2 Charge: Statutory Intoxication (Self-Induced Contested)

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When to use this charge

This charge should be given where:

i) there is evidence the accused was intoxicated when s/he committed any offence on or after 1 November 2014;

ii) a defence of self-defence, duress, or sudden and extraordinary emergency is in issue; and

iii) the defence raises evidence to the effect that the accused's intoxication was not self-induced.

Caution should be exercised in giving this direction. Victorian courts have not considered which party has the onus of proof when self-induced intoxication is in issue. See 'Onus of Proof' in 8.5 Statutory Intoxication (From 1/11/14).

The relevant aspects of this charge should be inserted into directions on the defence in issue: self-defence, duress, or sudden and extraordinary emergency.

Intoxication – whether self-induced

[*If any elements of the defence relate to whether the accused had a* reasonable belief OR *to whether the accused's* response was reasonable*, add the following shaded section to the directions on that element. If more than one such element is relevant to a particular defence, you need only add the following shaded section to the first of those elements:*]

In this case you have heard evidence that NOA was intoxicated at the time that s/he [*insert relevant act*]. If you find that NOA was intoxicated, you must decide whether the intoxication was self-induced, which means whether NOA was responsible for the intoxication himself/herself.

How do you decide whether NOA was responsible for his/her intoxication? The law says that a person is responsible for his/her intoxication unless it:

[*Insert relevant direction*]

(a) Occurred involuntarily;

(b) Occurred because of fraud, such as trickery or deception;

(c) Occurred because of a sudden or extraordinary emergency;

(d) Occurred because of an accident;

(e) Occurred because of a reasonable mistake;

(f) Occurred because s/he became intoxicated under duress or force, for example, by threats or coercion;

(g) Occurred because s/he took a prescription drug while following the prescribed directions and did not know or have reason to believe that it would significantly impair his/her judgment or control;

(h) Occurred because s/he took a non-prescription drug for its recommended purpose and at its recommended dosage and did not know or have reason to believe that it would significantly impair his/her judgment or control.

The defence argued that [*summarise defence argument and evidence*]. The prosecution ask you to reject this [*summarise prosecution argument and evidence*].

'Reasonable belief' element of a defence

[*If any element of the defence relates to whether the accused had a* reasonable belief*, add the following shaded section to the directions on that element:*]

As part of deciding whether the prosecution has proved that the accused's belief was not reasonable, you must consider the evidence that NOA was intoxicated.

The first question you must consider is whether NOA's intoxication was self-induced, which means

whether NOA was responsible for his/her intoxication.

If you find NOA was responsible for his/her intoxication, then you must not take his/her intoxication into account when assessing whether his/her belief about [*insert relevant reasonable belief element*] was reasonable. In other words, you must consider what the beliefs of a reasonable person who was sober might have been.

If you do not find NOA was responsible for his/her intoxication, then you must take his/her intoxication into account when assessing whether his/her belief about [*insert relevant reasonable belief element*] was reasonable. In other words, you must consider what the beliefs of a reasonable person might have been if he/she was intoxicated to the same extent as NOA.

Remember, the defence does not have to prove anything. Therefore, you must take intoxication into account for this element unless the prosecution proves that NOA was responsible for his/her intoxication.

'Reasonable response' element of a defence

[*If any element of the defence relates to whether the accused's* response was reasonable*, add the following shaded section to the directions on that element:*]

As part of deciding whether the prosecution has proved that the accused's response was not reasonable, you must consider the evidence that NOA was intoxicated.

The first question you must consider is whether NOA's intoxication was self-induced, which means whether NOA was responsible for his/her intoxication.

If you find NOA was responsible for his/her intoxication, then you must not take his/her intoxication into account when assessing whether his/her response to [*insert relevant reasonable response element*] was reasonable. In other words, you must consider what the response of a reasonable person who was sober might have been.

If you do not find NOA was responsible for his/her intoxication, then you must take his/her intoxication into account when assessing whether his/her response to [*insert relevant reasonable response element*] was reasonable. In other words, you must consider what the response of a reasonable person might have been if he/she was intoxicated to the same extent as NOA.

Remember, the defence does not have to prove anything. Therefore, you must take intoxication into account for this element unless the prosecution proves that NOA was responsible for his/her intoxication.

Last updated: 27 September 2016

8.6 Statutory Intoxication (23/11/05–31/10/14)

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Introduction

1. Prior to 2005, the issue of intoxication in Victoria was governed solely by the common law. This situation has been altered by the *Crimes (Homicide) Act 2005* and the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*, which introduced s 9AJ (now repealed) and s 322T respectively into the *Crimes Act 1958*.

2. This topic covers the issue of intoxication under s 9AJ of the *Crimes Act 1958*, which applies to the statutory defences of self-defence, duress, and sudden and extraordinary emergency in respect of homicide offences committed on or after 23 November 2005 and before 1 November 2014, and to the offence of defensive homicide committed in that period.

3. Section 322T of the *Crimes Act 1958* applies to the defences of self-defence, duress and sudden or extraordinary emergency for all offences committed on or after 1 November 2014. See 8.5 Statutory Intoxication (From 1/11/14).

4. The common law on intoxication remains relevant in respect of non-homicide offences committed before 1 November 2014 and the defences to those offences, and to all offences committed before 23 November 2005 and the defences to those offences. See 8.7 Common Law Intoxication.

5. As both s 9AJ and s 322T of the *Crimes Act 1958* apply only to certain statutory defences, the common law in relation to intoxication also continues to apply to all offences, whenever committed, for the purposes of negating an element of the offence (e.g. voluntariness or intention), or to prove that the accused committed the offence (e.g. by explaining the accused's behaviour). See 8.7 Common Law Intoxication.

Relevant Offences and Defences

6. The intoxication provision in s 9AJ apply to the defences of murder self-defence (s 9AC), manslaughter self-defence (s 9AE), and duress (s 9AG) and sudden and extraordinary emergency (s 9AI) in the context of a homicide offence (*Crimes Act 1958* s 9AB).

7. Section 9AJ also applies to the offence of defensive homicide, an alternative to murder applicable where the accused believed he was acting in self-defence but without reasonable grounds for that belief (*Crimes Act 1958* ss 9AB, 9AD).

8. In particular, it applies to the elements of those defences, or that offence, that refer to either a 'reasonable belief', 'reasonable grounds for a belief' or a 'reasonable response' on the part of the accused (*Crimes Act 1958* ss 9AJ(1)–(3)).

Onus of Proof

9. The onus of proof regarding whether the accused's intoxication was self-induced is not clear on the wording of s 9AJ, and Victorian courts have not considered the issue.

10. On one hand, s 9AJ(5) states that intoxication 'is self-induced unless' one of a number of circumstances set out in s 9AJ(5)(a)–(d) exists. This may indicate a presumption that the intoxication is self-induced unless the accused proves that at least one of those circumstances exists.

11. On the other hand, it seems unlikely that s 9AJ would be interpreted as requiring the accused to prove an aspect of his/her defence, inconsistently with the presumption of innocence, without clear language to that effect (see, e.g. *Slaveski v Smith* (2012) 34 VR 206 [24], [45]; *WBM v Chief Commissioner of Police* (2012) 43 VR 446 [97] (Warren CJ); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 [73]; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 [192] (Tate JA); *Carolan v The Queen* (2015) 48 VR 87 [46]).

12. As a matter of prudence, this charge book adopts the approach that the accused is required only to introduce evidence to the effect that his/her intoxication was not self-induced and that, once such evidence is raised by the defence, the onus is on the prosecution to prove beyond reasonable doubt that the accused's intoxication was not self-induced.

Meaning of intoxication

13. Intoxication for the purposes of s 9AJ is not defined, but expressly includes 'intoxication because of the influence of alcohol, a drug or any other substance' (*Crimes Act 1958* s 9AB(1)). Other substances causing intoxication might include, for example, glue or petrol.

Self-Induced Intoxication

14. The intoxication provision in s 9AJ operates differently depending on whether the accused's intoxication was self-induced or not. If there is evidence that the accused's intoxication was not self-induced, it will be important for the jury to determine this question.

15. Intoxication will not be self-induced if it came about involuntarily or because of 'fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force' (*Crimes Act 1958* ss 9AJ(5)(a)–(b)).

16. Intoxication will also not be self-induced if it came about from using a prescription drug in accordance with the directions of the person who prescribed it, or from using a non-prescription drug for a purpose and at the dosage level recommended by the manufacturer. However, if a person using the prescription or non-prescription drug knew or had reason to believe, when taking the drug, that it would significantly impair his/her judgment or control, then the resultant intoxication will be self-induced (*Crimes Act 1958* ss 9AJ(5)(c)–(d),(6)).

'Reasonable belief' elements of a defence

17. In determining whether a person had a reasonable belief, as an element of the defence of duress or sudden and extraordinary emergency, the relevant standard is generally that of reasonable person who is not intoxicated (*Crimes Act 1958* s 9AJ(1)).

18. The operation of s 9AJ(1) can be illustrated using an example. In determining whether an accused's belief was reasonable under the duress provisions of the *Crimes Act 1958*, the jury ordinarily uses the standard of 'a reasonable person possessing the personal characteristics of the accused that might have affect the accused's appreciation of the circumstances' (*DPP v Parker* [2016] VSCA 101 [8]).

19. However, s 9AJ(1) means that where the accused was under the effect of self-induced intoxication at the time of his or her offending, that particular characteristic of the accused – his or her level of intoxication – must not be taken into account (see *DPP v Parker* [2016] VSCA 101 [46]). The jury should consider what a reasonable sober person (with the other relevant characteristics of the accused) might have believed.

20. The exception to the general rule in s 9AJ(1) is where the accused's intoxication at the time he or she committed the offence was not self-induced. Then the relevant standard is a reasonable person intoxicated to the same extent as the accused (*Crimes Act 1958* s 9AJ(4)).

21. Section 9AJ(1) does not affect the determination of the accused's subjective beliefs. For example, in determining whether an accused believed his or her actions were necessary in self-defence, his or level of intoxication must be taken into account. Section 9AJ(1) is relevant only in determining whether an accused's beliefs were reasonable.

'Reasonable grounds for a belief' elements of an offence or defence

22. In determining whether a person had reasonable grounds for a belief, as an element of the offence of defensive homicide or the defences of murder self-defence or manslaughter self-defence, the relevant standard is generally that of reasonable person who is not intoxicated (*Crimes Act 1958* 9AJ(2)).

23. The operation of s 9AJ(2) can be illustrated using an example. In determining whether the accused had reasonable grounds for believing that his/her conduct was necessary in self-defence, the jury may take into account personal characteristics of the accused. However, s 9AJ(2) means that the jury must not take into account any self-induced intoxication of the accused. The jury should consider whether there were reasonable grounds for a sober person (with the other relevant characteristics of the accused) to have held that belief.

24. The exception to the general rule in s 9AJ(2) is where the accused's intoxication at the time he or she committed the offence was not self-induced. Then the relevant standard is a reasonable person intoxicated to the same extent as the accused (*Crimes Act 1958* s 9AJ(2)).

'Reasonable response' elements of a defence

25. In determining whether a person's response was reasonable, as an element of the defence of duress or sudden and extraordinary emergency, the relevant standard is generally that of reasonable person who is not intoxicated (*Crimes Act 1958* s 9AJ(4)).

26. The exception to the general rule in s 9AJ(4) is where the accused's intoxication at the time he or she committed the offence was not self-induced. Then the relevant standard is a reasonable person intoxicated to the same extent as the accused (*Crimes Act 1958* s 322T(4)).

Last updated: 27 September 2016

8.6.1 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self-Induced)

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This charge should be given where:

i) the accused is charged with murder, manslaughter or defensive homicide alleged to have been committed between 23 November 2005 and 31 October 2014;

ii) there is evidence the accused was intoxicated when s/he committed the offence;

iii) it is not contested that the accused's intoxication was self-induced; and

iv) a defence of self-defence, duress, or sudden and extraordinary emergency is in issue, or the offence of defensive homicide is raised as an alternative to murder.

The relevant aspects of this charge should be inserted into directions on the offence or defence in issue.

'Reasonable belief' element

[*If any element of the defence relates to whether the accused had a* reasonable belief*, add the following shaded section to the directions on that element.*]

In this case you have heard evidence that NOA was intoxicated at the time that s/he [*insert relevant act*]. If you find that s/he was intoxicated, you must not take this into account when assessing whether his/her belief about [*insert relevant reasonable belief element*] was reasonable. The law requires you to consider what the beliefs of a reasonable person who was sober might have been.

'Reasonable grounds for a belief' element

[*If any element of the offence or defence relates to whether the accused had* reasonable grounds for a belief*, add the following shaded section to the directions on that element*.]

In this case you have heard evidence that NOA was intoxicated at the time that s/he [*insert relevant act*]. If you find that s/he was intoxicated, you must not take this into account when assessing whether s/he had reasonable grounds for his/her belief about [*insert relevant reasonable grounds element*].

'Reasonable response' element

[*If any element of the defence relates to whether the accused's* response was reasonable*, add the following shaded section to the directions on that element.*]

In this case you have heard evidence that NOA was intoxicated at the time that s/he [*insert relevant act*].

If you find that s/he was intoxicated, you must not take this into account when assessing whether his/her response to [*insert relevant reasonable response element*] was reasonable. The law requires you to consider what the response of a reasonable person who was sober might have been.

Last updated: 27 September 2016

8.6.2 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self-Induced Contested)

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This charge should be given where:

i) the accused is charged with murder, manslaughter or defensive homicide alleged to have been committed between 23 November 2005 and 31 October 2014;

ii) there is evidence the accused was intoxicated when s/he committed the offence;

iii) the defence raises evidence to the effect that the accused's intoxication was not self-induced; and

iv) a defence of self-defence, duress, or sudden and extraordinary emergency is in issue, or the offence of defensive homicide is raised as an alternative to murder.

Caution should be exercised in giving this direction. Victorian courts have not considered which party has the onus of proof when self-induced intoxication is in issue. See 'Onus of Proof' in 8.5 Statutory Intoxication (From 1/11/14) (23/11/05–31/10/14).

Intoxication – whether self-induced

[*If any elements of the defence relate to whether the accused had a* reasonable belief, reasonable grounds for a belief *OR to whether the accused's* response was reasonable*, add the following shaded section to the directions on that element. If more than one such element is relevant to a particular defence, you need only add the following shaded section to the first of those elements*.]

In this case you have heard evidence that NOA was intoxicated at the time that s/he [*insert relevant act*]. If you find that NOA was intoxicated, you must decide whether the intoxication was self-induced, which means whether NOA s/he was responsible for the intoxication himself/herself.

How do you decide whether NOA was responsible for his/her intoxication? The law says that a person is responsible for his/her intoxication unless it:

[*Insert relevant direction*]

(a) Occurred involuntarily;

(b) Occurred because of fraud, such as trickery or deception;

(c) Occurred because of a sudden or extraordinary emergency;

(d) Occurred because of an accident;

(e) Occurred because of a reasonable mistake;

(f) Occurred because s/he became intoxicated under duress or force, for example, by threats or coercion;

(g) Occurred because s/he took a prescription drug while following the prescribed directions and did not know or have reason to believe that it would significantly impair his/her judgment or control;

(h) Occurred because s/he took a non-prescription drug for its recommended purpose and at its recommended dosage and did not know or have reason to believe that it would significantly

impair his/her judgment or control.

The defence argued that [*summarise defence argument and evidence*]. The prosecution ask you to reject this [*summarise prosecution argument and evidence*].

'Reasonable belief' element

[*If any element of the defence relates to whether the accused had a* reasonable belief*, add the following shaded section to the directions on that element*.]

As part of deciding whether the prosecution has proved that the accused's belief was not reasonable, you must consider the evidence that NOA was intoxicated.

The first question you must consider is whether NOA's intoxication was self-induced, which means whether NOA was responsible for his/her intoxication.

If you find NOA was responsible for his/her intoxication, then you must not take his/her intoxication into account when assessing whether his/her belief about [*insert relevant reasonable belief element*] was reasonable. In other words, you must consider what the beliefs of a reasonable person who was sober might have been.

If you do not find NOA was responsible for his/her intoxication, then you must take his/her intoxication into account when assessing whether his/her belief about [*insert relevant reasonable belief element*] was reasonable. In other words, you must consider what the beliefs of a reasonable person might have been if he/she was intoxicated to the same extent as NOA.

Remember, the defence does not have to prove anything. Therefore, you must take intoxication into account for this element unless the prosecution proves that NOA was responsible for his/her intoxication.

'Reasonable grounds for a belief' element

[*If any element of the offence or defence relates to whether the accused had* reasonable grounds for a belief*, add the following shaded section to the directions on that element*.]

As part of deciding whether the prosecution has proved that the accused's belief was not reasonable, you must consider the evidence that NOA was intoxicated.

The first question you must consider is whether NOA's intoxication was self-induced, which means whether NOA was responsible for his/her intoxication.

If you find NOA was responsible for his/her intoxication, then you must not take his/her intoxication into account when assessing whether he/she had reasonable grounds for the belief about [*insert relevant reasonable grounds element*].

If you do not find NOA was responsible for his/her intoxication, then you must take his/her intoxication into account when assessing whether he/she had reasonable grounds for the belief about [*insert relevant reasonable grounds element*].

Remember, the defence does not have to prove anything. Therefore, you must take intoxication into account for this element unless the prosecution proves that NOA was responsible for his/her intoxication.

'Reasonable response' element

[*If any element of the defence relates to whether the accused's* response was reasonable*, add the following shaded section to the directions on that element.*]

As part of deciding whether the prosecution has proved that the accused's response was not reasonable, you must consider the evidence that NOA was intoxicated.

The first question you must consider is whether NOA's intoxication was self-induced, which means whether NOA was responsible for his/her intoxication.

If you find NOA was responsible for his/her intoxication, then you must not take his/her intoxication into account when assessing whether his/her response to [*insert relevant reasonable response element*] was reasonable. In other words, you must consider what the response of a reasonable person who was sober might have been.

If you do not find NOA was responsible for his/her intoxication, then you must take his/her intoxication into account when assessing whether his/her response to [*insert relevant reasonable response element*] was reasonable. In other words, you must consider what the response of a reasonable person might have been if he/she was intoxicated to the same extent as NOA.

Remember, the defence does not have to prove anything. Therefore, you must take intoxication into account for this element unless the prosecution proves that NOA was responsible for his/her intoxication.

Last updated: 27 September 2016

8.7 Common Law Intoxication

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Scope

1. Prior to 2005, in Victoria the issue of intoxication was governed solely by the common law. This situation has been altered by the passage of the *Crimes (Homicide) Act 2005* and the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*, which introduced s 9AJ (now repealed) and s 322T respectively into the *Crimes Act 1958*.
2. Section 9AJ applies to cases in which:
    - The accused is charged with murder, manslaughter, defensive homicide, attempted murder or attempted defensive homicide (*Crimes Act 1958* s 9AB; *R v Pepper* (2007) 16 VR 637*; DPP v McAllister* [2007] VSC 315); and
    - It is alleged that the offence was committed on or after 23 November 2005 (*Crimes Act 1958* s 603) and before 1 November 2014.
3. Section 322T applies to cases in which:
    - The accused is charged with any offence alleged to have been committed on or after 1 November 2014.
4. Consequently, the common law concerning intoxication continues to apply when:
    - The accused is charged with an offence other than those homicide offences listed above and the offence was alleged to have been committed before 1 November 2014; or
    - The accused is charged with one of the listed homicide offences, and it is alleged that the offence was committed before 23 November 2005.

5. Both sections 9AJ and 322T address the effect of intoxication on the question of "reasonableness".[1161] Thus, even where they apply, the common law concerning intoxication remains relevant to other issues (e.g. the effect of intoxication on the voluntariness of the accused's behaviour, or on his or her mental state).

6. This topic solely addresses the common law concerning intoxication. For information concerning the statutory provisions, see 8.5 Statutory Intoxication (From 1/11/14) (From 1/11/14) and 8.5 Statutory Intoxication (From 1/11/14) (23/11/05–31/10/14).

Overview: Relevance of Intoxication

7. The fact that a person acted under the influence of drugs or alcohol does not give rise to any specific defence or excuse (*Viro v R* (1978) 141 CLR 88; *R v O'Connor* (1979) 146 CLR 64).

8. This is the case even if the accused's intoxication was involuntary (*R v O'Connor* (1979) 146 CLR 64; *R v Kingston* [1995] 2 AC 355).[1162]

9. However, evidence that the accused was intoxicated at the time the offence was committed may be used for the following purposes:

    - To negate an element of the offence (e.g. voluntariness);
    - To prove an element of a defence (e.g. self-defence); or
    - To prove that the accused committed the offence (e.g. by providing an explanation for the accused's behaviour).

10. Other matters that may be affected by intoxication (but which are not addressed here) include:

    - The admissibility of a confession or admission made by a person who was intoxicated (see, e.g. *Sinclair v R* (1946) 73 CLR 316; *R v Buchanan* [1966] VR 9; *R v Garth* (1994) 73 A Crim R 215; *R v Green* [1999] VSC 419; *R v Nelson* [2004] NSWCCA 231);
    - The capacity of an intoxicated person to consent to a sexual act (see, e.g. *R v Francis* [1993] 2 Qd R 300; *R v Bonora* (1994) 35 NSWLR 74; *R v Lambert* [1919] VLR 205);
    - The jury's assessment of the reliability of evidence given by a witness who was intoxicated at the time of the event in question (see, e.g. *O'Leary v Daire* (1984) 13 A Crim R 404; *Bedi v R* (1993) 61 SASR 269; *R v Mathe* [2003] VSCA 165; *R v Baltensberger* (2004) 90 SASR 129; *R v MC* [2009] VSCA 122). See Charge: Assessing Witnesses and Charge: Review of the Assessment of Witnesses;
    - The jury's understanding of the way in which people other than the accused behaved before, during and after the event in question (see, e.g. *R v Egan* (1985) 15 A Crim R 20; *R v Wilson* (1986) 42 SASR 203; *Aidid v R* (2010) 25 VR 593).

Using Evidence of Intoxication to Negate an Element

11. Evidence of intoxication is part of the totality of evidence which may raise a reasonable doubt about the existence of one or more of the elements of an offence (*R v O'Connor* (1979) 146 CLR 64).

[1161] For example, whether a *belief* was reasonable, whether there were reasonable *grounds* for a belief, or whether a *response* to a situation was reasonable.

[1162] The fact that the accused's intoxication was involuntary may be relevant to whether or not he or she acted negligently: see "Negligence" below.

12. If the prosecution cannot eliminate that doubt, the accused should be acquitted – not because he or she was intoxicated, but because the charge has not been proved beyond reasonable doubt (*R v O'Connor* (1979) 146 CLR 64).

13. No distinction is drawn between intoxication that is induced by alcohol, drugs or a combination of both (*R v Haywood* [1971] VR 755; *Viro v R* (1978) 141 CLR 88; *R v O'Connor* (1979) 146 CLR 64).

Voluntariness

14. The existence of a voluntary act is an essential element of every offence. The accused must not be convicted for an act which was independent of his or her will (*Ryan v R* (1967) 121 CLR 205; *R v O'Connor* (1979) 146 CLR 64*; R v Marijancevic* (2009) 22 VR 576).

15. Consequently, if the accused did not commit the relevant act voluntarily due to intoxication, he or she must be acquitted (*R v O'Connor* (1979) 146 CLR 64; *R v Martin* (1983) 32 SASR 419; *R v Faure* [1999] 2 VR 537; *R v Kumar* [2006] VSCA 182).[1163]

16. In Victoria, this applies to all offences, not just offences of specific intent (*R v O'Connor* (1979) 146 CLR 64; *R v Martin* (1984) 51 ALR 540. Cf *DPP v Majewski* [1977] AC 443).

17. It is for the prosecution to prove that the accused acted voluntarily despite his or her level of intoxication (*R v O'Connor* (1979) 146 CLR 64; *R v Coleman* (1990) 19 NSWLR 467).

18. The issue is whether the accused *in fact* acted voluntarily, not whether he or she was *capable* of acting voluntarily (*Viro v R* (1978) 141 CLR 88; *R v O'Connor* (1979) 146 CLR 64; *R v Martin* (1983) 32 SASR 419; *R v Costa* Vic CCA 2/4/96).

19. It will be rare that a person's state of intoxication will have been so extreme that his or her acts were involuntary. Intoxication is more likely to be relevant to the issue of intention (*R v O'Connor* (1979) 146 CLR 64 (Barwick CJ)).

20. See 7.1.1 Voluntariness for information concerning the meaning of "voluntariness", and guidance about which act the accused must have committed voluntarily.

Intention

21. The accused must be acquitted if, due to intoxication, he or she:

    - Did not intend to do the physical act charged ("basic intent");[1164] or
    - Did not intend to attain the result required by the offence ("specific intent") (*R v O'Connor* (1979) 146 CLR 64; *R v Martin* (1983) 32 SASR 419; *R v Coleman* (1990) 19 NSWLR 467; *R v Faure* [1999] 2 VR 537; *R v Kumar* [2006] VSCA 182).

22. It is for the prosecution to prove that the accused acted with the requisite intention, despite his or her level of intoxication (*R v O'Connor* (1979) 146 CLR 64; *R v Coleman* (1990) 19 NSWLR 467).

23. The issue is whether the accused *in fact* formed the requisite intention, not whether he or she was *capable* of doing so (*Ryan v R* (1967) 121 CLR 205; *R v Haywood* [1971] VR 755; *Viro v R* (1978) 141 CLR 88).

[1163] In many jurisdictions there are now statutory provisions specifying that self–induced intoxication cannot be taken into account in determining whether the accused's acts were voluntary. That is not the case in Victoria.

[1164] Australian law differs from the law in the United Kingdom, which holds that self–induced intoxication is irrelevant to crimes of basic intent (*DPP v Majewski* [1977] AC 443).

24. The mere fact that the accused acted differently than he or she would have behaved when sober is irrelevant. A drunken intent is, nevertheless, an intent (*R v Sheehan* [1975] 2 All ER 960; *R v O'Connor* (1979) 146 CLR 64 (Barwick CJ, Aickin J)).

25. The accused does not need to have appreciated the wrongfulness of his or her conduct to have acted with the requisite intention (*R v Morrison* (2007) 171 A Crim R 361).

26. It does not matter that the accused was unable to reason with a sufficient degree of composure, as long as he or she acted voluntarily and with the requisite intent (*R v Collins* [2004] ACTSC 48).

Knowledge or awareness of circumstances

27. Evidence of intoxication may be used to show that the accused had no knowledge or awareness of a particular circumstance (*R v Coleman* (1990) 19 NSWLR 467; *Bedi v R* (1993) 61 SASR 269; *R v Costa* Vic CCA 2/4/96; *R v MC* [2009] VSCA 122).

28. For example, evidence of intoxication may be used:

    - In a sexual offence case, to cast doubt on the prosecution's claim that the accused was aware that the complainant was not or might not be consenting (*R v Costa* Vic CCA 2/4/96; *R v Egan* (1985) 15 A Crim R 20; *R v Wilson* (1986) 42 SASR 203);[1165]
    - In an endangerment case, to cast doubt on the prosecution's claim that the accused knew that his or her actions were likely to endanger a person's life (*Bedi v R* (1993) 61 SASR 269).

Foresight of consequences ("recklessness")

29. Evidence of intoxication may be used to show that the accused did not foresee the consequences of his or her actions (*R v O'Connor* (1979) 146 CLR 64; *R v Coleman* (1990) 19 NSWLR 467; *Bedi v R* (1993) 61 SASR 269; *R v Grant* (2002) 55 NSWLR 80).

30. Consequently, where the accused is charged with an offence of recklessness,[1166] the prosecution will be required to prove that the accused knew that a particular consequence would probably result from his or her conduct, despite his or her level of intoxication (*R v O'Connor* (1979) 146 CLR 64; *R v Coleman* (1990) 19 NSWLR 467; *Bedi v R* (1993) 61 SASR 269; *R v Grant* (2002) 55 NSWLR 80).

Negligence

31. Offences of gross negligence (e.g. manslaughter) require proof:

    i) That the accused acted with criminal negligence; and

    ii) That the relevant act was committed voluntarily.

[1165] Even if this argument is accepted by the jury, it may not be sufficient to secure an acquittal on a charge of rape, as that offence can now also be established by proving that the accused did not give any thought to whether the complainant was not or might not be consenting (see 7.3.2 Rape (From 1/1/92)).

[1166] See 7.1.3 Recklessness.

32. Evidence of intoxication will generally not be relevant to the first issue, as the test for criminal negligence is objective (see, e.g. *R v Richards & Gregory* [1998] 2 VR 1; *R v Lavender* (2005) 222 CLR 67; *R v Sam* [2009] NSWSC 803. See also *AG's Reference (No 1 of 1996)* (1998) 7 Tas R 293).[1167]

33. However, evidence of intoxication may cast doubt on the prosecution's contention that the relevant act was committed voluntarily (*R v Martin* (1983) 9 A Crim R 376; *R v Tajber* (1986) 13 FCR 524).

Relevance of the level of intoxication

34. Different levels of intoxication affect the mind in different ways (*He Kaw Teh v R* (1985) 157 CLR 523 (Brennan J)).

35. Intoxication to a particular degree may be relevant to the existence of one mental state but not the existence of another. For example, the level of intoxication required to negate voluntariness is far greater than the level of intoxication required to negate specific intention (*He Kaw Teh v R* (1985) 157 CLR 523 (Brennan J)).

36. It does not matter that the accused was intoxicated to a substantial degree, or acted in a way he or she would not have acted had he or she not been intoxicated, so long as he or she acted voluntarily and with the requisite mental state (*R v O'Connor* (1979) 146 CLR 64; *South Tweed Heads Rugby Football Club Ltd v Cole* (2002) 55 NSWLR 113; *Russell v Edwards* (2006) 65 NSWLR 373).

37. Thus, even if the intoxication led to a change in personality, a warping of will, an alteration in disposition and a weakening in self-control, the accused will be criminally responsible for his or her acts unless the intoxication was so great that he or she had no will to act or did not form the necessary intention (*R v O'Connor* (1979) 146 CLR 64; *South Tweed Heads Rugby Football Club Ltd v Cole* (2002) 55 NSWLR 113; *Russell v Edwards* (2006) 65 NSWLR 373).

38. The accused may have acted voluntarily and intentionally despite the fact that the intoxication rendered him or her less aware of what he or she was doing, or of the quality, significance or consequence of his or her actions (*R v O'Connor* (1979) 146 CLR 64 (Barwick CJ)).

39. However, the level of the accused's awareness and understanding of his or her actions at the relevant time will be a factor to be taken into account in determining whether he or she acted voluntarily and with the requisite intent (*R v Morrison* (2007) 171 A Crim R 361).

Prior criminal intent ("Dutch courage")

40. A difficulty can arise where the accused became intoxicated specifically for the purpose of gaining sufficient courage to commit the offence in question ("Dutch courage"), but at the time he or she committed the offence acted involuntarily or without the requisite mental state due to being intoxicated:

    - On the one hand, it would seem that the accused should not be convicted, as the basic requirements of criminal responsibility (voluntariness and *mens rea*) were not present at the time the offence was committed;
    - On the other hand, it would seem that the accused should be convicted, as he or she set out to commit the offence in question and actually did so.

[1167] If the accused's intoxication was involuntary, it is possible that it will be relevant to this issue: see, e.g. *Flyger v Auckland City Council* [1979] 1 NZLR 161; *Rooke v Auckland City Council* [1980] 1 NZLR 680; *O'Neill v Ministry of Transport* [1985] 2 NZLR 513.

41. Although this issue has not been directly addressed in Australia,[1168] the High Court has indicated that an accused may still be convicted for such offences, not because of any exception to the requirement of voluntariness and intention, but by virtue of those requirements *being met* (by the accused having *voluntarily* becoming intoxicated *in order* to commit the crime) (*R v O'Connor* (1979) 146 CLR 64).[1169]

42. One problem with this approach is that the elements of voluntariness and intention (which existed at the time of becoming intoxicated) do not seem to be contemporaneous with the commission of the physical acts constituting the offence (which occurred at a later time) (see *R v O'Connor* (1979) 146 CLR 64 (Aickin J)).

43. This problem may be overcome by viewing the accused's conduct in becoming intoxicated and committing the physical act that constitutes the offence as part of the same transaction (see, e.g. *Meli v R* [1954] 1 WLR 228; *R v Church* [1966] 1 QB 59; *Royall v R* (1991) 172 CLR 378 (Mason CJ)).

Intoxication may affect the inferences that can be drawn

44. In most cases, the accused's mental state at the time of the offence will need to be inferred from his or her actions (*R v Foster* [2001] SASC 20).

45. The fact that the accused was intoxicated at that time may make it more difficult than it would otherwise be to infer from his or her actions that he or she had the requisite mental state (*R v Perks* (1986) 41 SASR 335; *R v Wingfield* [2001] SASC 20; *R v Foster* [2001] SASC 20; *Spencer v R* (2003) 137 A Crim R 444).[1170]

46. For example, while a jury might readily infer from the serious nature of injuries caused by a sober person that he or she had an intention to cause serious injury, such an inference might not be as readily drawn if the person was drunk or drugged at the relevant time (*R v Wingfield* [2001] SASC 20; *R v Foster* [2001] SASC 20; *Spencer v R* (2003) 137 A Crim R 444).[1171]

Loss of memory

47. The fact that the accused cannot remember the relevant events due to his or her state of intoxication does not mean that he or she acted involuntarily or without the requisite intention (*R v O'Connor* (1979) 146 CLR 64 (Barwick CJ); *R v Stockdale* [2002] VSCA 202).

48. See "Loss of Memory" in 8.8 Automatism for further information about this issue.

[1168] The issue has been addressed in the United Kingdom, where it was held that an accused who chooses to become intoxicated in order to commit an offence is *precluded from denying* that he or she acted involuntarily or lacked the requisite mental state (*AG for Northern Ireland v Gallagher* [1963] AC 349). This appears to be an *exception* to the general principles of criminal responsibility, rather than an application of those principles.

[1169] Similarly, it is possible that a person who becomes intoxicated with an awareness that he or she will *probably* commit an offence (e.g. because he or she is prone to violence when intoxicated) may be held responsible for that offence on the grounds of recklessness (see *R v O'Connor* (1979) 146 CLR 64 per Stephen, Murphy and Aickin JJ, Barwick CJ dissenting).

[1170] In this regard, evidence of intoxication is no different from any other evidence that may affect the inferences that can be drawn from the proved facts (*R v Foster* [2001] SASC 20; *R v Wingfield* [2001] SASC 20).

[1171] See "Direct the jury about intoxication and inferences" below for further information about this issue.

Using Evidence of Intoxication to Prove a Defence

49. Evidence of intoxication may be relevant to the defences raised by the evidence (*Bedi v R* (1993) 61 SASR 269; *R v Baltensperger* (2004) 90 SASR 129).

50. This section provides a brief overview of how evidence of intoxication may be relevant to self-defence, provocation and mental impairment. However, this list is not exhaustive. For example, evidence of intoxication may also be relevant to the following defences:

    - Claim of right (e.g. if the accused believed, due to intoxication, that he or she had a right to possession or ownership of the property in question: see *R v Williams* [1988] 1 Qd R 289);
    - Duress (e.g. if the accused feared, due to intoxication, that the threat would be carried out);
    - Mistaken belief (e.g. if the accused believed, due to intoxication, that he or she had consent to enter a property: see *Jaggard v Dickinson* [1981] QB 527).

Self-defence

51. Self-defence contains a subjective and an objective element:

    - The subjective element requires the accused to have believed that what he or she was doing was necessary; and
    - The objective element requires that belief to have been based on reasonable grounds (see 8.3 Common Law Self-defence).[1172]

52. It is clear that evidence of intoxication may be relevant to the subjective element. If the accused was intoxicated at the time he or she committed the relevant acts, the jury can take this into account when determining whether he or she believed:

    - That an occasion for the use of force had arisen; or
    - That the use of force was necessary (*R v Conlon* (1993) 69 A Crim R 92 (NSWSC); *Bedi v R* (1993) 61 SASR 269; *Ninness v Walker* (1998) 143 FLR 239; *R v Katarzynski* [2002] NSWSC 613).

53. It is unclear whether evidence of intoxication is also relevant to the objective element (in the absence of any statutory modifications).[1173] Courts in other Australian jurisdictions have divided on the issue of whether the jury, in determining whether the accused's belief was based on "reasonable grounds", must take into account any personal characteristics of the accused (including his or her state of intoxication) which might have affected:

    - His or her appreciation of the gravity of the threat faced; and
    - The reasonableness of his or her response to that threat (compare *R v Conlon* (1993) 69 A Crim R 92; *R v Katarzynski* [2002] NSWSC 613 with *Ninness v Walker* (1998) 143 FLR 239; *R v McCullough* [1982] Tas R 43).

[1172] The onus is on the prosecution to disprove at least one of these elements beyond reasonable doubt.

[1173] *Crimes Act 1958* s 9AJ modifies the common law position and, where it applies, requires the jury to ignore evidence of self–induced intoxication when determining whether the accused's belief was based on reasonable grounds. See 8.5 Statutory Intoxication (From 1/11/14) and 8.6 Statutory Intoxication (23/11/05–31/10/14).

Provocation

54. The partial defence of provocation (repealed for offences committed on or after 23 November 2005) also contains a subjective and an objective element. See 8.12 Provocation for information on those elements.

55. Evidence of intoxication may be relevant to the subjective element:

    - It may affect the jury's determination of whether the accused acted without self-control (*R v McCullagh (No 3)* (2007) 179 A Crim R 334; *R v Perks* (1986) 41 SASR 335; *R v Copeland* (1997) 194 LSJS 1);
    - It may affect the jury's determination of whether the accused's loss of self-control was caused by the provocative conduct (rather than by the effects of alcohol or drugs) (*R v McCullagh (No 3)* (2007) 179 A Crim R 334; *R v Cooke* (1985) 16 A Crim R 304; *Censori v R* [1983] WAR 89).

56. In most cases, evidence of intoxication will not be relevant to the objective element:

    - It must not be taken into account in determining whether the provocation could have caused an "ordinary person" to lose self-control and act in the way the accused did (*Stingel v R* (1990) 171 CLR 312; *R v O'Neill* [1982] VR 150; *R v Curzon* (2000) 1 VR 416; *R v Gojanovic (No 2)* [2007] VSCA 153; *R v McCullagh (No 3)* (2007) 179 A Crim R 334); and
    - It only affects the jury's assessment of the gravity of the provocation if the provocative conduct related to the accused's intoxication (e.g. being called a "drunk") (*R v McCullagh (No 3)* (2007) 179 A Crim R 334; *R v Perks* (1986) 41 SASR 335; *R v Georgatsoulis* (1994) 62 SASR 351).

Mental impairment

57. The defence of mental impairment requires the accused to have been suffering from a mental impairment (or "disease of the mind") that had the effect that he or she either:

    - Did not know the nature and quality of what her or she was doing; or
    - Did not know that his or her conduct was wrong (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 20(1)) (see Mental Impairment).

58. A temporary state of intoxication does not constitute a "disease of the mind". Consequently, even if the effects of intoxication were so strong that the accused did not know the nature and quality of what he or she was doing, or did not know that his or her conduct was wrong, the requirements of this defence will not be met (*R v Davis* (1881) 14 Cox CC 563; *Dearnley v R* [1947] St R Qd 51; *R v O'Connor* (1979) 146 CLR 64; *Falconer* (1990) 171 CLR 30).[1174]

59. However, the requirements of the defence may be met if:

    - The consumption of drugs or alcohol caused the accused to suffer from a condition which is considered to be a "disease of the mind" (e.g. permanent brain damage) (see, e.g. *R v Stones* (1955) 56 SR (NSW) 25; *R v Shields* [1967] VR 706);
    - The consumption of drugs or alcohol triggered or exacerbated a pre-existing condition which is considered to be a "disease of the mind" (e.g. schizophrenia) (see, e.g. *R v Connolly* (1958) 76 WN (NSW) 184; *R v Meddings* [1966] VR 306); or
    - The accused's mental impairment caused him or her to become intoxicated (see, e.g. *R v Weeks* (1993) 66 A Crim R 466).

[1174] This degree of intoxication may, however, be relevant to whether the accused acted voluntarily and formed the necessary mental state. See Using Evidence of Intoxication to Negate an Element (above).

60. If the accused intentionally became intoxicated in order to trigger a pre-existing mental illness, knowing that he or she was likely to commit an offence when ill, he or she may be guilty of that offence (*AG for Northern Ireland v Gallagher* [1963] AC 349). See "Prior Criminal Intent ('Dutch Courage')" above for further information.

61. See 8.8 Automatism for further information concerning the meaning of "disease of the mind".

Using Evidence of Intoxication to Prove an Offence

Intoxication as an element of an offence

62. In some cases, one of the elements of the offence in question will require proof that the accused was intoxicated to a certain extent (see, e.g. *Road Safety Act 1986* (Vic) s 49).

63. Care must be taken when directing the jury about intoxication in such cases, as there may be a statutory definition of "intoxication" that varies from the definition at common law (see, e.g. *Liquor Control Reform Act 1998* (Vic) s 3AB).

Negligence, recklessness and dangerousness

64. Evidence of intoxication may be used to prove that the accused acted negligently, recklessly or dangerously. For example:

    - In relation to negligence, the prosecution may use evidence of intoxication to prove that the accused acted unreasonably (e.g. by driving whilst drunk) (*R v Guthrie* (1981) 40 ACTR 27);
    - On a charge of dangerous driving, the prosecution may use evidence of intoxication to prove that the accused's driving was "dangerous" (*R v McBride* [1962] 2 QB 167; *R v Owens* (1987) 30 A Crim R 59).

Using evidence of intoxication to explain behaviour

65. The prosecution may use evidence of intoxication to explain the accused's behaviour (*R v O'Connor* (1979) 146 CLR 64; *R v Perks* (1986) 41 SASR 335; *R v Leaf-Milham* (1987) 47 SASR 499; *R v Stokes* (1990) 51 A Crim R 25; *R v Costa* Vic CCA 2/4/96).

66. For example, as alcohol tends to remove inhibitions and self-restraints, and may induce a sense of self-confidence and aggressiveness, the prosecution might use the fact that the accused was drunk to explain how he or she came to commit the offence in question, when ordinarily he or she is a person of good character (*R v O'Connor* (1979) 146 CLR 64 (Barwick CJ). See also *R v Leaf-Milham* (1987) 47 SASR 499; *R v Stokes* (1990) 51 A Crim R 25; *R v Coleman* (1990) 19 NSWLR 467; *R v Le Broc* (2000) 2 VR 43).

67. In relation to sexual offences, evidence of intoxication may be used to explain why the accused pressed on with the act, despite the absence of consent (*R v Egan* (1985) 15 A Crim R 20; *R v Costa* Vic CCA 2/4/96).

68. In some cases the fact that the accused was intoxicated may provide a motive for committing the offence in question (see, e.g. *O'Leary v Daire* (1984) 13 A Crim R 404; *R v Perks* (1986) 41 SASR 335).[1175]

[1175] For example, in *O'Leary v Daire* (1984) 13 A Crim R 404 it was held that the accused's intoxication may have provided a motive for refusing to take a breath test or give the police his address.

When to Direct the Jury About Intoxication

When to direct about intoxication negating an element

69. A direction about intoxication is not required simply because there is evidence showing that the accused was affected by alcohol or drugs at the relevant time. A direction only needs to be given if a direction is requested under Part 3 of the *Jury Directions Act 2015*, or if there are substantial and compelling reasons for giving a direction in the absence of a request. The judge must give a requested direction unless there are good reasons for not doing so (*Jury Directions Act 2015* ss 14–16). See Directions under Jury Directions Act 2015.

70. At common law, judges only needed to give directions on intoxication if there was evidence is capable of raising a reasonable doubt that the accused acted voluntarily, with the requisite intention, or with any required knowledge or foresight (*Viro v R* (1978) 141 CLR 88; *R v O'Connor* (1979) 146 CLR 64; *R v Le Broc* (2000) 2 VR 43).

71. The accused bore an evidentiary burden to point to or to produce evidence which, taken at its highest, is capable of raising a reasonable doubt that the relevant elements have been met (*Braysich v R* (2011) 243 CLR 434. See also *R v Youssef* (1990) 50 A Crim R 1; *R v Stokes* (1990) 51 A Crim R 25).[1176]

72. At common law, it was for the judge to determine whether the evidence was capable of raising a doubt about any of the elements. If he or she was unsure whether there is sufficient evidence to raise a particular issue, the common law stated that the issue should be left to the jury (*Viro v R* (1978) 141 CLR 88; *R v Stokes* (1990) 51 A Crim R 25; *R v Rose* (1996) 87 A Crim R 109).

73. Each case turns on the actual evidence of intoxication and the identity of the element to which that evidence may relate (*R v Le Broc* (2000) 2 VR 43).

74. The mere fact that the accused has made a credible assertion of a lack of memory is not sufficient. Evidence of the accused's state of intoxication is required (*R v O'Connor* (1980) 146 CLR 64 (Barwick CJ)).

75. A direction may be required where witnesses have described the accused as being "affected by alcohol", and there is evidence that the accused was acting strangely (e.g. he or she was seen abusively yelling at a non-existent person) (*R v Rose* (1996) 87 A Crim R 109).

76. Where there was sufficient evidence of intoxication, the judge was required at common law to direct the jury about its relevance to the case, even if such a direction was not sought by either party or defence counsel requested that no direction be given. The nature of obligation must now be read in light of *Jury Directions Act 2015* sections 14 and 16 (compare *Pemble v R* (1971) 124 CLR 109; *R v Stokes* (1990) 51 A Crim R 25; *R v Rose* (1996) 87 A Crim R 107; *R v Khouzame* (1999) 108 A Crim R 170; *R v Challoner* [2000] VSCA 32; *R v Costa* Vic CCA 2/4/96; *R v TC* (2008) 21 VR 596).

77. At common law, the judge was required to give the direction even if it gave an air of unreality to the case sought to be made by the accused in relation to some other issue (*R v Stokes* (1990) 51 A Crim R 25). Under the *Jury Directions Act 2015*, this may be a factor that provides 'good reasons' for not giving a requested direction (see *Jury Directions Act 2015* s 14).

78. Where there is no evidence that the consumption of alcohol or drugs was capable of affecting the accused's volition or powers of reasoning, a direction should *not* be given. Giving a direction in such a case would confuse and mislead the jury, and invite a verdict which is contrary to the evidence (*R v Sullivan* (1981) 6 A Crim R 259; *R v Wilson* (1986) 42 SASR 203; *R v Challoner* (1993) 115 ALR 654).

[1176] See "The Evidentiary Presumption of Voluntariness" in 7.1.1 Voluntariness for information concerning the nature of this evidentiary burden in the context of voluntariness.

79. If the evidence of intoxication is imprecise, vague and uncertain, the judge may decline to direct the jury about the matter, even if the defence requests a direction (*Jury Directions Act 2015* s 14; *R v O'Connor* (1979) 146 CLR 64; *R v Le Broc* (2000) 2 VR 43).

When to direct about other issues (e.g. defences, reliability)

80. If evidence of intoxication is capable of having a bearing on any other issues in the case, such as the accused's defence or the reliability of a witness, the judge may need to identify the relevant evidence and relate it to the pertinent issue (*Bedi v R* (1993) 61 SASR 269; *R v Baltensperger* (2004) 90 SASR 129).

81. At common law, the fact that defence counsel did not wish to rely on the evidence of intoxication did not relieve the judge of the duty to give appropriate directions (*Bedi v R* (1993) 61 SASR 269; *R v Baltensperger* (2004) 90 SASR 129). Under the *Jury Directions Act 2015*, the position of defence counsel is a significant factor that the trial judge must consider (see *Jury Directions Act 2015* s 16).

Content of the Charge

Charging about intoxication negating an element

Give a specific legal direction about intoxication

82. Where evidence of intoxication is capable of raising a doubt as to voluntariness, intention, recklessness or knowledge, the jury must be specifically directed about the relevant issue. It is not sufficient to simply tell the jury that they must be satisfied that the accused acted voluntarily, with the requisite mental state (*Viro v R* (1978) 141 CLR 88; *R v O'Connor* (1979) 146 CLR 64 (Barwick CJ); *R v Rose* (1996) 87 A Crim R 109; *R v McCullagh* [2002] VSCA 163).

83. The direction should be framed as a direction on the law, rather than a reminder of counsel's arguments (*Williams v DPP* [1999] SASC 531).

Direct about any issues that "truly arise" on the facts

84. The judge must direct the jury about whichever issues "truly arise on the facts", and refrain from giving a direction which introduces an issue that does not arise (*R v TC* (2008) 21 VR 596).

85. At common law, it was held that this could require a judge to direct the jury about the relevance of intoxication to both voluntariness and intention. A failure to direct the jury about voluntariness when it was in issue could, at common law, give rise to a miscarriage of justice (even if the jury has been directed about intoxication and intention) (see, e.g. *R v TC* (2008) 21 VR 596. C.f. *R v Tucker* (1984) 36 SASR 135; *R v Williamson* (1996) 67 SASR 428).[1177]

86. Under the *Jury Directions Act 2015*, the judge will need to determine whether a direction is requested on each issue or whether there are substantial and compelling reasons for directing on each issue in the absence of a request (*Jury Directions Act 2015* ss 14–16).

Explain relevant elements and the effects of intoxication

87. Where voluntariness is in issue, the jury must be directed about the meaning of that term (*R v O'Connor* (1979) 146 CLR 64). See 7.1.1 Voluntariness for assistance.

[1177] In South Australia, it has been held that as the existence of intent *implies* the existence of volition, it is only necessary to direct about both voluntariness and intention in the rare case where there can be criminal liability for an unintended act, and the evidence of intoxication could raise a doubt about whether the act was accompanied by the will (*R v Tucker* (1984) 36 SASR 135). This does not appear to be the law in Victoria.

88. Where both voluntariness and intention are in issue, judges must make sure to clearly differentiate them (*R v TC* (2008) 21 VR 596).

89. Where recklessness is in issue, the jury may be directed that the intoxication may have affected the accused's foresight of the probable consequences of his or her actions (*R v Williamson* (1996) 67 SASR 428).

90. Where intoxication is relevant to the accused's awareness of a certain fact (e.g. that he had a knife in his hand) as well as his or her intention to commit an act or cause a result (e.g. to kill or cause really serious injury), the jury must be separately directed about each matter (*R v Williamson* (1996) 67 SASR 428).

91. In a sexual offence case, where intoxication may have affected the accused's belief in consent, a specific direction about that issue must be given (*R v MC* [2009] VSCA 122; *R v Tappe* Vic CCA 18/11/86).

Explain the onus of proof

92. Judges should direct the jury that it is for the prosecution to remove any reasonable doubt raised by the evidence of intoxication. The jury may only convict the accused if they are satisfied, beyond reasonable doubt, that he or she:

    - Voluntarily did the act with which he or she is charged; and
    - Did so with the intent, knowledge or foresight required to prove the offence charged (*Viro v R* (1978) 141 CLR 88; *R v O'Connor* (1979) 146 CLR 64; *R v Coleman* (1990) 19 NSWLR 467; *R v McCullagh* [2002] VSCA 163; *R v Kumar* [2006] VSCA 182).

93. The jury should be told that it therefore is *not* for the accused to prove that he or she was too intoxicated to act voluntarily or with the relevant mental state. The onus is on the prosecution to prove that, notwithstanding the ingestion of drugs or alcohol, the accused acted voluntarily and with the requisite mental state (*R v Coleman* (1990) 19 NSWLR 467).

94. Judges may tell the jury that if the evidence of intoxication does not raise a doubt about the relevant elements, they may put it out of their minds when considering the accused's guilt or innocence (*R v O'Connor* (1979) 146 CLR 64 (Barwick CJ)).[1178]

Direct the jury about intoxication and inferences

95. The jury may be directed to take into account the accused's intoxication when determining what inferences to draw from all of the evidence in the case (*R v Sheehan and Moore* [1975] 2 All ER 960; *Cutter v R* (1997) 143 ALR 498; *R v Stockdale* [2002] VSCA 202).

96. In some cases, the prosecution will have argued that the accused's intention can be inferred from the nature of the injuries he or she caused to the victim. In such cases, the jury may need to be told that inferences about intention which might readily be drawn from the nature of injuries inflicted by a sober person might not be inferred as readily where the perpetrator is intoxicated (*R v Wingfield* [2001] SASC 20; *Williams v DPP* [1999] SASC 531; *Spencer v R* (2003) 137 A Crim R 444. See also *R v Hill* [2007] VSCA 261).

[1178] Such a direction will only be appropriate if the evidence is not relevant to any other matters, such as the accused's defence.

97. For example, if a sober person stabs someone in the heart, the jury may infer that the person intended to kill or cause really serious injury. In such a case, a significant part of the jury's reasoning process would depend upon acceptance of the inference that the accused intended to stab the victim in what is known to be a vital organ. By contrast, if the accused is intoxicated, there might be a doubt about whether or not the knife was aimed at the heart, or whether the accused intended to wound in a vital area of the body. In such circumstances, the jury should be told that it may not be as easy to infer that the accused intended to kill or cause really serious injury as it might have been had the accused been sober (*Spencer v R* (2003) 137 A Crim R 444).

98. The critical issue for the jury's consideration in such cases is whether, by reason of his or her intoxication, the accused might have inflicted the injuries without the requisite intention (*R v Wingfield* [2001] SASC 20; *Williams v DPP* [1999] SASC 531; *Spencer v R* (2003) 137 A Crim R 444. See also *R v Hill* [2007] VSCA 261).

99. It has been suggested that a judicial direction on this issue may not always be necessary, given that the effects of the consumption of alcohol are well appreciated and easily recognised by virtually every adult member of our society. It is thus reasonable to assume that, even without such a direction, the members of a jury would recognise that individuals, under the influence of alcohol, may:

- Form intentions and act in fashions that would be foreign to their ordinary conduct; or
- Act thoughtlessly through an alcohol induced loss of inhibition, without intending to achieve a particular result (*R v Hill* [2007] VSCA 261).

Identify relevant evidence

100. Judges should highlight the evidence and factual circumstances which bear on the extent of the accused's intoxication (*Bedi v R* (1993) 61 SASR 269; *R v Williamson* (1996) 67 SASR 428; *Spencer v R* (2003) 137 A Crim R 444; *R v TC* (2008) 21 VR 596).

101. For example, judges should highlight evidence about the amount of alcohol or drugs consumed, the general behaviour of the accused, the specific nature of the conduct constituting the offence, and any other evidence going to the degree of intoxication (*R v TC* (2008) 21 VR 596).

Other directions

102. Depending on the circumstances and the nature of any request from the parties, it may also be appropriate to:

- Direct the jury that intoxication does not amount to a defence (i.e., that the mere fact that a person is affected by an intoxicating substance at the time of committing a criminal act does not itself require an acquittal);
- Explain the various effects the relevant substance may have on a person (e.g. that it may affect the voluntariness of a person's acts or his or her intention, or it may simply remove a person's inhibitions or restraints and induce a sense of self confidence or aggressiveness);
- Tell the jury that intoxication may provide a motive or explanation for what happened;
- Tell the jury that the issue is not whether the accused did something which he or she would not have done in a sober state, but whether he or she acted voluntarily and with the requisite mental state;
- Tell the jury that merely because alcohol has caused a person to lose his or her inhibitions to an extreme extent does not usually mean that his or her actions have ceased to be voluntary;
- Tell the jury that a person can form an intention to commit an act or cause a result notwithstanding the consumption of alcohol or drugs;

- Direct the jury that the fact the accused cannot remember what happened does not necessarily mean that he or she acted involuntarily or without the requisite intent (see, e.g. *Viro v R* (1978) 141 CLR 88; *R v O'Connor* (1979) 146 CLR 64; *R v Coleman* (1990) 19 NSWLR 467; *R v McLeod* (1991) 56 A Crim R 320; *R v Kumar* [2006] VSCA 182; *R v Stokes* (1990) 51 A Crim R 25).

103. The jury should be directed that it is for them to determine the extent to which the accused was intoxicated, and the effects the intoxication had on him or her, based on their own experience and judgment (*R v Gill* (2005) 159 A Crim R 243).

104. Where it is alleged that the accused's conduct was affected by both intoxication and another factor (e.g. concussion), the jury should be directed to consider all of the factors collectively. The intoxication should not be viewed in isolation (see, e.g. *R v Martin* (1983) 32 SASR 419).

105. If the evidence of intoxication is insignificant, the judge may tell the jury to ignore it (*R v O'Connor* (1979) 146 CLR 64).

Do not tell the jury the issue is one of capacity

106. The judge must *not* tell the jury that the issue is whether the accused was *capable* of acting voluntarily or forming the required mental state. While the jury can consider the question of whether or not the accused had the relevant capacity, the ultimate question is whether he or she *in fact* acted voluntarily with the requisite mental state (*Viro v R* (1978) 141 CLR 88; *Herbert v R* (1982) 42 ALR 631; *R v Coleman* (1990) 19 NSWLR 467; *R v McLeod* (1991) 56 A Crim R 320; *R v Makisi* (2004) 151 A Crim R 245).

107. Where the issue of capacity is raised, the jury must be directed that it is not sufficient for them to find that the accused was capable of acting voluntarily or forming the requisite mental state. They must also be satisfied that the accused did in fact act voluntarily with that mental state (*Viro v R* (1978) 141 CLR 88; *Herbert v R* (1982) 42 ALR 631).

Charging about other matters (e.g. defences, reliability)

108. If evidence of intoxication is capable of having a bearing on any other issues in the case, such as the accused's defence or the reliability of a witness, the judge must identify the relevant evidence and relate it to the pertinent issue (*Bedi v R* (1993) 61 SASR 269; *R v Baltensperger* (2004) 90 SASR 129).

Last updated: 29 June 2015

8.7.1 Charge: Intoxication and Voluntariness

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When to use this charge

This charge may be used where the evidence is capable of raising a reasonable doubt that the accused acted involuntarily due to intoxication.

If the accused may have acted unintentionally or recklessly due to intoxication, use 8.7.2 Charge: Intoxication and Intention.

If intoxication may have affected both the voluntariness of the accused's actions and the issue of intention/recklessness, both charges should be given. In such circumstances, the charge on intention/recklessness will need be modified to avoid repetition.

How to use this charge

The charge has been designed to be given as part of the judge's charge on voluntariness. If Charge: 7.1.1 Voluntariness is used, it should be inserted where indicated.

Intoxication and Voluntariness

In this case, the defence has argued that NOA was so intoxicated that his/her act of [*describe act, e.g.* "driving"] was not voluntary. I must therefore give you some directions about intoxication.

The fact that a person acted under the influence of alcohol[1179] does not give rise to any specific defence or excuse. This means that a person cannot avoid responsibility for his/her acts simply by providing evidence that s/he was intoxicated at the time s/he committed those acts.

However, as I have just mentioned, a person must not be convicted for acts which were committed involuntarily. You may take evidence of intoxication into account in determining whether the accused acted voluntarily.

You will appreciate that alcohol can affect people to different extents. Sometimes it simply diminishes a person's inhibitions, or creates a sense of self-confidence or aggressiveness. In more extreme cases it can affect the voluntariness of a person's actions. However, the mere fact that, due to intoxication, a person does something which s/he would not have done when sober does not mean that act was done involuntarily. As I have explained, an act is only involuntary if it is not subject to the control or direction of the person's will.

It is important to note that it is not for the defence to prove that NOA was so intoxicated that s/he acted involuntarily. It is for the prosecution to prove that NOA acted voluntarily, despite his/her level of intoxication. If you are not satisfied that this was the case, then you must find him/her not guilty of [*identify offence*].

If you are satisfied that the accused acted voluntarily, you may take the effects of alcohol into account when determining whether the accused committed the offence s/he is charged with. For example, you might find that his/her behaviour can be explained by the fact that his/her inhibitions were diminished by the influence of alcohol, or by the extra sense of self-confidence that alcohol sometimes gives people.

[*Summarise relevant evidence and arguments. Judges should highlight evidence about the amount of alcohol consumed, the general behaviour of the accused, the specific nature of the conduct constituting the offence, and any other evidence going to the degree of intoxication.*]

[*If it is alleged that the accused has no memory of events due to intoxication, add the following shaded section.*]

In this case you have heard evidence that NOA has no memory of [*identify act*]. While you may take this evidence into account in determining the extent of his/her intoxication, you should keep in mind the fact that the issue is not whether NOA remembers the relevant events, but whether s/he acted voluntarily when s/he [*describe relevant act*].

It is for you to determine, based on all the evidence in the case, the extent to which the accused was intoxicated, and the effects the intoxication had on him/her. If you are not satisfied that the prosecution has proven, beyond reasonable doubt, that NOA [*identify act*] voluntarily despite being intoxicated, then you must find him/her not guilty of [*identify offence*].

Last updated: 26 September 2011

8.7.2 Charge: Intoxication and Intention

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This charge may be used where the evidence is capable of raising a reasonable doubt that the accused acted intentionally due to intoxication. It may be adapted for use in cases where evidence of intoxication may affect the issue of recklessness.

If the accused may have acted involuntarily due to intoxication, use 8.7.1 Charge: Intoxication and 7.1.1 Voluntariness.

[1179] This charge has been designed for cases involving alcohol intoxication. It will need to be modified for cases involving drugs.

If intoxication may have affected both the voluntariness of the accused's actions and the issue of intention, both charges should be given. However, this charge should be modified to avoid repetition.

How to use this charge

The charge has been designed to be given as part of the judge's charge on the element relating to intention. It should be given after the judge has explained the requirements of that element.

Intoxication and Intention

In this case, you have heard evidence that NOA was intoxicated when s/he [*identify act, e.g.* "hit NOV"]. I must therefore give you some directions about intoxication.

The fact that a person acted under the influence of alcohol[1180] does not give rise to any specific defence or excuse. This means that a person cannot avoid responsibility for his/her acts simply by providing evidence that s/he was intoxicated at the time s/he committed those acts.

However, evidence of intoxication may be taken into account when considering what a person intended when s/he committed a particular act.

On the one hand, the fact that a person was intoxicated when he or she committed an act may make it more likely that he or she acted with a certain intention, by providing an explanation or motive for his or her behaviour. This may be the case, for example, where the intoxication diminishes a person's ordinary inhibitions, or creates a sense of self-confidence or aggressiveness.

On the other hand, the fact that a person was intoxicated may make it less likely that he or she acted with a particular intent. This may be the case, for example, where because of the effects of alcohol, a person doesn't realise that his or her actions will produce a certain result. Consequently, it may not be as easy to draw inferences from the actions of an intoxicated person as it is to draw inferences from the actions of a sober person. You will recall what I have told you about inferences.

You can see from these examples that the relevance of intoxication may vary, depending on the extent of the intoxication and the circumstances. While in some cases it may affect a person's intentions, in others it will simply reduce his or her inhibitions. The mere fact that, due to intoxication, a person does something which s/he would not have done when sober does not mean it was done unintentionally.

It is important to note that it is not for the defence to prove that NOA was so intoxicated that s/he acted without the necessary intention. It is for the prosecution to prove that NOA acted intentionally, despite his/her level of intoxication.

[*Summarise relevant evidence and arguments. Judges should highlight evidence about the amount of alcohol consumed, the general behaviour of the accused, the specific nature of the conduct constituting the offence, and any other evidence going to the degree of intoxication.*]

[*If it is alleged that the accused has no memory of events due to intoxication, add the following shaded section*.]

In this case you have heard evidence that NOA has no memory of [*identify act*]. While you may take this evidence into account in determining the extent of his/her intoxication, you should keep in mind the fact that the issue is not whether NOA remembers the relevant events, but whether s/he acted with the necessary intention.

It is for you to determine, based on all the evidence in the case, the extent to which the accused was intoxicated, and the effects the intoxication had on him/her. If you are not satisfied that the prosecution has proven, beyond reasonable doubt, that despite being intoxicated NOA [*identify act*] intentionally, then you must find him/her not guilty of [*identify offence*].

[1180] This charge has been designed for cases involving alcohol intoxication. It will need to be modified for cases involving drugs.

Last updated: 26 September 2011

8.8 Automatism

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Overview

1. In some cases, it may be alleged that the accused committed an offence involuntarily, in a state of "automatism" (see, e.g. *R v Falconer* (1990) 171 CLR 30; *Hawkins v R* (1994) 179 CLR 500).
2. The consequences of successfully raising the defence[1181] of automatism depend on the cause of the automatism:
    - Where it was caused by a "disease of the mind" it is considered to be "insane automatism", and the appropriate verdict is not guilty because of mental impairment;[1182]
    - Where it was caused by something other than a "disease of the mind" it is considered to be "sane automatism",[1183] and the appropriate verdict is an acquittal (*R v Falconer* (1990) 171 CLR 30; *Hawkins v R* (1994) 179 CLR 500).
3. Due to these different consequences, where it is alleged that the accused acted in a state of automatism, the judge must determine which type of automatism (if any) to charge the jury about. This will largely depend on an assessment of what the evidence supports as being the possible cause of the state of automatism (*R v Falconer* (1990) 171 CLR 30; *Hawkins v R* (1994) 179 CLR 500).
4. In most cases, the evidence will solely point to one particular type of automatism, and charging the jury will be relatively straightforward. For example:
    - Where the only possible cause of the state of automatism is a "disease of the mind", the judge should direct the jury about the defence of mental impairment,[1184] relating the evidence of automatism to the requirements of that defence.
    - Where the only possible cause of the state of automatism is something other than a "disease of the mind", the judge should direct the jury about the requirement for a voluntary act,[1185] relating the evidence of automatism to that requirement.

[1181] While automatism is not technically a defence – it is a claim that the prosecution has not proven one of the elements of the offence (voluntariness) – for the sake of simplicity it will be referred to as a defence.

[1182] This verdict will only be appropriate if the requirements of the defence of mental impairment have also been met: see below.

[1183] While historically the term "non-insane automatism" was used, the term "sane automatism" is now preferred (*R v Milloy* [1993] 1 Qd R 298).

[1184] See 8.4 Mental Impairment.

[1185] See 7.1.1 Voluntariness.

5. However, in rare cases there will be competing explanations of the cause of the state of automatism, with some evidence suggesting that it was caused by a "disease of the mind", and other evidence suggesting it was caused by something else.[1186] In such cases the judge may need to explain the concept of a "disease of the mind" to the jury, and direct them that it is for them to decide:
    - Whether the accused acted in a state of automatism; and
    - Whether that state of automatism was caused by a "disease of the mind" (*R v Falconer* (1990) 171 CLR 30*; R v Youssef* (1990) 50 A Crim R 1).
6. In some cases the jury will also need to be directed that evidence of automatism may also be relevant to the issue of intention (*Hawkins v R* (1994) 179 CLR 500; *Cvetkovic v R* [2010] NSWCCA 329).
7. It is unclear what effect the *Crimes (Mental Impairment) Act 1997* has had on the law in this area. In particular, it is unclear whether that Act has altered:
    - The burden of proof that applies in cases where both 'sane' and 'insane' automatism are in issue; or
    - The judge's duty to direct the jury about 'insane automatism'.

Structure

8. This topic proceeds in the following order:
    - An overview of the meaning of the term "automatism", and the difference between "sane" and "insane" automatism;
    - The interaction between automatism and intention;
    - The judge's role in cases where the defence is raised; and
    - The ways in which the jury should be charged.
9. As the law concerning automatism is a subset of the law concerning voluntariness, this topic should be read in conjunction with 7.1.1 Voluntariness.

What is "Automatism"?

10. Automatism is not a medical term. It is a legal concept that refers to acts that are committed without volition (i.e., where the accused's will does not govern the movement of his or her body) (*R v Cottle* [1958] NZLR 999; *Bratty v AG for Northern Ireland* [1963] AC 386; *R v King* (2004) 155 ACTR 55).
11. The term "automatism" implies the total absence of control and direction by the accused's will. Impaired, reduced or partial control is not sufficient (*Williams v R* [1978] Tas SR 98; *R v Milloy* [1993] 1 Qd R 298; *Edwards v Macrae* (1991) 25 NSWLR 89; *Re AG's Reference (No.2 of 1992)* [1994] QB 91; *Maher v Russell* Tas SC 22/11/93).[1187]

[1186] For example, a dissociative state may be caused by a psychological blow ("sane automatism") or by an underlying mental illness ("insane automatism"). See "Dissociation" below.

[1187] Evidence that the accused's control was impaired or reduced may be relevant to the issue of intention. See "Automatism and Intention".

12. A person who is not conscious or aware of what he or she is doing acts as an automaton. However, the key issue is the lack of the exercise of will, not the lack of consciousness or knowledge (*Ryan v R* (1967) 121 CLR 205 (Barwick CJ); *R v Radford* (1985) 42 SASR 266; *R v Falconer* (1990) 171 CLR 30).

13. Consequently, a degree of awareness or cognition is not necessarily fatal to the defence of automatism. The issue is whether or not there was an absence of all the deliberative functions of the mind so that the accused acted automatically (*R v Radford* (1985) 42 SASR 266; *R v Burr* [1969] NZLR 736 (Turner J)).

14. People who are aware of events occurring as if they are in a dream, but who cannot control their conduct (e.g. because they are in a state of dissociation), may therefore be in a state of automatism (see, e.g. *R v Mansfield* Vic SC 5/5/94; *R v Rabey* (1981) 54 CCC (2d) 1; *R v Parks* (1992) 75 CCC (3d) 287).

15. There is a distinction between automatism and irresistible impulse. The mere fact that a person could not control his or her impulses does not mean that he or she acted involuntarily (*Bratty v AG for Northern Ireland* [1963] AC 386; *R v Harm* (1975) 13 SASR 84; *Nolan v R* WA CCA 22/5/97; *R v King* (2005) 155 ACTR 55).

16. There is also a distinction between automatism and dissociation. It is possible to act voluntarily while in a dissociative state (*Nolan v R* WA CCA 22/5/97; *R v Joyce* [2005] NSWDC 13).[1188]

17. The fact that the accused did not know that his or her actions were wrong is not relevant to the defence of automatism (*R v Isitt* (1978) 67 Cr App R 44; *R v Hennessy* [1989] 1 WLR 287).

18. Acting involuntarily due to the consumption of drugs or alcohol may be considered to be a type of automatism (see, e.g. *R v Keogh* [1964] VR 400). However, due to the specific issues raised by intoxication, the topic is addressed separately in 8.7 Common Law Intoxication.

Loss of Memory

19. Amnesia is one of the main symptoms of having acted in a state of automatism. Where the defence is raised the accused will therefore usually claim to have no memory of the relevant events (*R v King* (2005) 155 ACTR 55).

20. While amnesia may indicate that the accused acted in a state of automatism, the fact that amnesia exists does not inevitably lead to that conclusion. There may be other explanations for amnesia, such as trauma resulting from the commission of the offence which caused the memory of it to be blocked (*R v King* (2005) 155 ACTR 55).

21. Thus, even if the jury are satisfied that the accused has no memory of the events in issue, they do not need to acquit on the basis of automatism. The question is not what the accused remembers, but what his or her state of mind was at the relevant time (*Broadhurst v R* [1964] AC 441; *R v Stockdale* [2002] VSCA 202; *R v King* (2005) 155 ACTR 55).

22. Conversely, the absence of amnesia does not necessarily mean that the accused acted voluntarily. For example, people who act in a state of dissociation may have some memory of the relevant events, even though they could not control their conduct at the time (*R v King* (2005) 155 ACTR 55. See also *Donyadideh v R* [1995] FCA 1425).

"Sane" and "Insane" Automatism

23. The consequences of successfully raising the defence of automatism depend on the cause of the automatism:

[1188] See "Dissociation".

- Where it was caused by a "disease of the mind" it is considered to be "insane automatism", and the appropriate verdict is not guilty because of mental impairment;[1189]
- Where it was caused by something other than a "disease of the mind" it is considered to be "sane automatism", and the appropriate verdict is an acquittal (*R v Falconer* (1990) 171 CLR 30; *Hawkins v R* (1994) 179 CLR 500).

What is a "disease of the mind"?

24. The expression "disease of the mind" is synonymous with "mental illness" (*R v Falconer* (1990) 171 CLR 30; *R v Radford* (1985) 42 SASR 266).

25. To fit within the definition of a "disease of the mind", the accused must have been suffering from some kind of mental disease, disorder or disturbance, rather than "mere excitability, passion…stupidity, obtuseness, lack of self-control and impulsiveness". A "disease of the mind" exists where a person's ability to understand is thrown into "derangement or disorder" (*R v Porter* (1933) 55 CLR 182).

26. Historically, the courts used two different tests to determine what mental conditions should be considered to be "diseases of the mind":

    i) The recurrence/continuing danger test: A mental condition is a "disease of the mind" if it is prone to recur (see, e.g. *R v Carter* [1959] VR 105; *Bratty v AG for Northern Ireland* [1963] AC 386 (Lord Denning); *R v Meddings* [1966] VR 306; *R v Burgess* [1991] 2 QB 92);

    ii) The internal/external test: A mental condition is a "disease of the mind" if it is "internal" to the accused (as opposed to arising from an external cause) (see, e.g. *R v Quick* [1973] QB 910*; R v Sullivan* [1984] AC 156; *R v Radford* (1985) 42 SASR 266; *R v Hennessy* [1989] 2 All ER 9).

27. These have now been replaced by the sound/unsound mind test, which holds that a mental condition is a "disease of the mind" if it is the reaction of an unsound mind to its own delusions or external stimuli (as opposed to the reaction of a sound mind to external stimuli) (*R v Falconer* (1990) 171 CLR 30; *R v Radford* (1985) 42 SASR 266; *R v Youssef* (1990) 50 A Crim R 1; *Woodbridge v R* [2010] NSWCCA 185).

28. The fundamental distinction is between those mental states which, although resulting in abnormal behaviour, are or may be experienced by normal people (e.g. a state of mind resulting from a blow to the head), and those which are never experienced by or encountered in normal people (*R v Falconer* (1990) 171 CLR 30 (Gaudron J)).

29. The sound/unsound mind test incorporates aspects of both of the previous tests, but differs slightly:

    - It is similar to the internal/external test in that a condition that is *solely caused by* an external stimuli will not be a "disease of the mind". However, it differs in that it classifies an underlying infirmity that is *triggered by* an external stimuli as a "disease of the mind".
    - It is similar to the recurrence test insofar as a mental state that is prone to recur will normally be classified as a "disease of the mind" (as the likelihood of recurrence will generally indicate a mind that is diseased or infirm). However, the fact that a condition is prone to recur is not conclusive (*R v Falconer* (1990) 171 CLR 30 (Toohey, Gaudron, Deane and Dawson JJ, Mason CJ, Brennan and McHugh JJ dissenting). See also *R v Radford* (1985) 42 SASR 266; *R v Youssef* (1990) 50 A Crim R 1; *Woodbridge v R* [2010] NSWCCA 185).

[1189] This verdict will only be appropriate if the requirements of the defence of mental impairment have also been met.

30. There need not have been a physical deterioration in the cells of the brain, or an actual change in the constitution of the brain, for a condition to be a "disease of the mind" (*R v Falconer* (1990) 171 CLR 30; *R v Porter* (1933) 55 CLR 182; *R v Kemp* [1957] 1 QB 399; *R v Hennessy* [1989] 1 WLR 287).

31. A "disease of the mind" may be permanent or temporary, organic or functional, curable or incurable (*R v Falconer* (1990) 171 CLR 30; *R v Radford* (1985) 42 SASR 266; *R v Youssef* (1990) 50 A Crim R 1).

32. The expression "disease of the mind" is not to be narrowly construed. The dichotomy is not between a mind affected by psychotic disturbances and a mind affected by less serious ailments. The distinction is between those minds which are healthy and those suffering from an underlying pathological infirmity (*Woodbridge v R* [2010] NSWCCA 185).

33. Where drugs or alcohol are involved, the classification of the resulting state will depend on the role played by those substances:

    - Where the accused suffers from an underlying condition (e.g. epilepsy) which was triggered by the drugs or alcohol, the resulting state of automatism will be classified as "insane" (see, e.g. *R v Meddings* [1966] VR 306).
    - Where the accused's mind is simply not working properly due to the effects of the drugs or alcohol, the resulting state of automatism will be classified as "sane" (*R v Carter* [1959] VR 105; *R v Quick* [1973] QB 910; *R v Sullivan* (1984) AC 156).[1190]

34. Cases of sane automatism will be quite rare, as there are not many conditions which cause a state of automatism that will not be considered to be "diseases of the mind" (*R v Falconer* (1990) 171 CLR 30; *DPP v Olcer* [2003] VSC 457; *Edwards v Macrae* (1991) 25 NSWLR 89).

35. However, the categories of sane automatism are not limited to those which have been mentioned in the cases to date (*R v Pantelic* (1973) 1 ACTR 1).

Examples of "diseases of the mind"

36. Examples of conditions which have been stated to be diseases of the mind include:

    - Major mental illnesses such as schizophrenia (*R v Falconer* (1990) 171 CLR 30; *R v Radford* (1985) 42 SASR 266);
    - Brain injuries, tumours or disorders (*R v Hughes* (1989) 42 A Crim R 270; *Nolan v R* WA CCA 22/5/97);
    - Hyperglycaemia (caused by excessive blood sugar levels) (*R v Hennessy* [1989] 1 WLR 287).
    - Physical diseases which affect the soundness of mental faculties, such as cerebral arteriosclerosis (*R v Kemp* [1957] 1 QB 399; *R v Radford* (1985) 42 SASR 266);
    - Some cases of dissociation and epilepsy (see below) (*R v Falconer* (1990) 171 CLR 30 (Deane and Dawson JJ)).

37. Examples of conditions which have been stated *not* to be diseases of the mind include:

    - Concussion from a blow to the head (*R v Scott* [1967] VR 276; *R v Wogandt* (1988) 33 A Crim R 31);
    - Hypoglycaemia (caused by excessive insulin intake) (*R v Quick* [1973] QB 910; *August v Fingleton* [1964] SASR 22);
    - Drug-induced psychosis (*R v Sebalj* [2006] VSCA 106*; R v Whelan* [2006] VSC 319);

[1190] See 8.7 Common Law Intoxication for further information concerning involuntary behaviour caused by drugs or alcohol.

- Some cases of dissociation and epilepsy (see below) (*R v Falconer* (1990) 171 CLR 30 (Deane and Dawson JJ)).

38. Sleepwalking is usually considered to be a form of sane automatism (see, e.g. *R v Parks* [1992] 2 SCR 871; *R v Carter* [1959] VR 105; *R v Youssef* (1990) 50 A Crim R 1). However, this view has been disputed in England (see *R v Burgess* [1991] 2 QB 92).

Dissociation

39. Automatism resulting from a dissociative state may be classified as either sane automatism (see, e.g. *R v Radford* (1985) 42 SASR 266; *R v Falconer* (1990) 171 CLR 30) or insane automatism (see, e.g. *R v Milloy* [1993] 1 Qd R 298; *Woodbridge v R* [2010] NSWCCA 185).[1191]

40. For automatism resulting from dissociation to be considered to be sane automatism, there must be a shock precipitating the state of automatism. Dissociation caused by a low stress threshold and surrender to anxiety is not sufficient (and is thus considered to be insane automatism) (*R v Falconer* (1990) 171 CLR 30; *R v Rabey* (1981) 54 CCC 1 (Dickson J); *R v Milloy* [1993] 1 Qd R 298).

41. The shock can be the product of a physical or emotional blow (a "psychological trauma") (*R v Falconer* (1990) 171 CLR 30 (Toohey J); *R v Radford* (1985) 42 SASR 266).

42. If the shock acted upon some underlying infirmity of mind to produce the automatism, it will be a case of insane automatism. If the shock produces a transient malfunction of an otherwise sound mind it will be sane automatism (*R v Falconer* (1990) 171 CLR 30; *R v Milloy* [1993] 1 Qd R 298).

43. The key question is whether the accused's actions were caused by the shock (sane automatism), or whether they were caused by the susceptibility of the accused's mind to being affected by shock (insane automatism) (*R v Falconer* (1990) 171 CLR 30 (Mason CJ, Brennan and McHugh JJ)).

Epilepsy

44. Epilepsy may have a number of different causes, such as brain damage due to birth trauma, head injuries or brain tumours that occur at any stage of life, or cerebral infections from various diseases (*R v Youssef* (1990) 50 A Crim R 1).

45. Automatism resulting from an epileptic seizure may be classified as sane or insane automatism, depending on its cause (*R v Youssef* (1990) 50 A Crim R 1. See also *R v Foy* [1960] Qd R 225; *R v Meddings* [1966] VR 306; *R v Sullivan* [1984] AC 156; *Bratty v AG for Northern Ireland* [1963] AC 386).

46. The appropriate classification depends on whether the epileptic seizure in issue falls within the definition of "disease of the mind":

    - If the seizure is the reaction of an unsound mind to its own delusions or external stimuli (e.g. where it is caused by brain damage due to birth trauma), any resulting automatism will be classified as "insane";

    - If the seizure is the reaction of a sound mind to external stimuli (e.g. where it is directly and immediately caused by a blow to the head), any resulting automatism will be classified as "sane" (see, e.g. *R v Youssef* (1990) 50 A Crim R 1; *R v Meddings* [1966] VR 306).

47. Where the accused's pre-existing epileptic condition is *triggered* by an external stimuli (such as a blow to the head), any resulting state of automatism should be classified as "insane" (as it is the reaction of an *unsound* mind to external stimuli). It is only where an epileptic seizure is *solely caused by* an external stimuli that it may result in a state of sane automatism (see, e.g. *R v Meddings* [1966] VR 306).

[1191] While a person who acts in a dissociative state will ordinarily act involuntarily, it appears that it is possible to act voluntarily while in a dissociative state (see, e.g. *Nolan v R* WA CCA 22/5/97; *R v Joyce* [2005] NSWDC 13). The issue is thus *not* simply whether or not the accused was in a state of dissociation, but whether he or she acted involuntarily as a result of the dissociation.

48. If it is unclear what the cause of the epilepsy is, the question of whether or not it is a "disease of the mind" (and thus whether any resulting state of automatism is sane or insane) should be left to the jury to determine (*R v Youssef* (1990) 50 A Crim R 1).

Consequences of acting in a state of sane automatism

49. If the accused committed the relevant act in a state of "sane automatism" he or she must be acquitted (*R v Falconer* (1990) 171 CLR 30; *Hawkins v R* (1994) 179 CLR 500).

50. This is because the accused cannot be convicted for an act which was independent of his or her will. The existence of a voluntary, willed act is an essential element of a crime (*Ryan v R* (1967) 121 CLR 205; *R v Falconer* (1990) 171 CLR 30; *Hawkins v R* (1994) 179 CLR 500).[1192]

51. It is important to keep in mind that the issue is not simply whether there was "automatism", but whether the acts of the accused were voluntary, in the sense that they were the result of his or her conscious volition (*R v Falconer* (1990) 171 CLR 30 (Toohey J); *R v Pantelic* (1973) 1 ACTR 1).

Consequences of acting in a state of insane automatism

52. Where the accused committed the relevant act in a state of "insane automatism", the defence of automatism is subsumed by the defence of mental impairment (*R v Falconer* (1990) 171 CLR 30; *Bratty v AG for Northern Ireland* [1963] AC 386; *R v S* [1979] 2 NSWLR 1).

53. This means that unlike cases of "sane automatism" (see above), the accused must *not* be acquitted on the grounds of having acted involuntarily. Instead, the jury must consider whether the requirements of the defence of mental impairment have been met:[1193]

    - If they have been met, then the accused must be found not guilty on the basis of mental impairment;
    - If they have not been met, then the accused must be convicted[1194] despite the fact that he or she acted involuntarily (*R v Falconer* (1990) 171 CLR 30; *R v S* [1979] 2 NSWLR 1; *R v Radford* (1985) 42 SASR 266; *Hawkins v R* (1994) 179 CLR 500).[1195]

54. Evidence of insane automatism must *not* be considered in relation to the issue of voluntariness (*Hawkins v R* (1994) 179 CLR 500).[1196]

[1192] See 7.1.1 Voluntariness.

[1193] See 8.4 Mental Impairment for information concerning the requirements of the defence.

[1194] As long as all the elements of the offence (other than voluntariness) have been proven.

[1195] While theoretically possible, such cases are unlikely to arise in practice, as in most cases where the accused acted involuntarily due to insane automatism he or she will not have known the nature and quality of what he or she was doing, or will not have known that his or her conduct was wrong (*R v Radford* (1985) 42 SASR 266; *R v Falconer* (1990) 171 CLR 30 per Mason CJ, Brennan and McHugh JJ).

[1196] Such evidence may, however, be relevant to the issue of intention.

Onus of proof

55. In cases where *only sane automatism* is in issue, the onus of proof is clear. It is for the prosecution to prove, beyond reasonable doubt, that the accused acted voluntarily. If it is reasonably possible that the accused acted involuntarily due to a state of sane automatism, he or she must be acquitted (*R v Falconer* (1990) 171 CLR 30).

56. The onus of proof is also clear in cases where *only insane automatism* is in issue.The onus of proving the defence of mental impairment rests on the party who raises the issue. It must be proved on the balance of probabilities (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 21).

57. However, difficulties arise in cases where it is possible that the state of automatism was *either sane or insane*. In particular, it is unclear what the verdict should be in a case where:

    - The jury finds that it is *likely* that the accused acted involuntary due to a "disease of the mind" (and, if asked, would be satisfied that the requirements of the defence of mental impairment have been proven on the balance of probabilities); but
    - Cannot exclude beyond reasonable doubt the *possibility* that the state of automatism was caused by something other than a "disease of the mind".

58. This issue was addressed in *R v Falconer* (1990) 171 CLR 30, in the context of the Western Australian Criminal Code. The majority (Toohey, Gaudron, Deane and Dawson JJ) held that the accused should be acquitted in such circumstances, as the prosecution will have failed to prove, beyond reasonable doubt, that his or her acts were voluntary.

59. It is not clear, however, whether this is currently the law in Victoria, due to section 20 of the *Crimes (Mental Impairment) Act 1997*, which states:

> (1) The defence of mental impairment is established for a person charged with an offence if, at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that had the effect that–
>
> (a) he or she did not know the nature and quality of the conduct; or
>
> (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).
>
> (2) If the defence of mental impairment is established, the person must be found not guilty because of mental impairment.

60. It is arguable that s 20(2) *requires* a person to be found not guilty by reason of mental impairment whenever the requirements in s 20(1) have been proven on the balance of probabilities (see s 21), even if it is *possible* that he or she acted involuntary due to another cause.

61. However, it should be noted that the *Crimes (Mental Impairment) Act 1997* was enacted after *Falconer* was decided, and does not explicitly address the issue of voluntariness. It is therefore also arguable that the Act was *not* intended to change the general principles outlined in *Falconer*, and that even if the requirements of s 20(1) have been proven on the balance of probabilities, the accused must be acquitted if it is reasonably possible that the accused acted involuntarily due to sane automatism.

Automatism and Intention

62. Evidence that is led to prove that the accused acted involuntarily due to automatism may also be relevant to the issue of intention (*Hawkins v R* (1994) 179 CLR 500; *R v Hall* (1988) 36 A Crim R 369; *R v Arnold* [2002] QCA 3; *Cvetkovic v R* [2010] NSWCCA 329).

63. For example, where the accused is charged with murder, and claims that he or she was acting in a state of sane automatism due to suffering a blow to the head, the jury may:

- Reject the defence of automatism, if they are satisfied that, despite his or her injury, the accused was still acting voluntarily;
- Acquit the accused of murder on the grounds that he or she lacked the specific intention required for murder (to kill or cause really serious injury) due to the "mental confusion" caused by the head injury (*R v Hall* (1988) 36 A Crim R 369).

64. The accused should not be acquitted merely because his or her mind was not functioning properly. Even when people's minds are not working as they ordinarily do (e.g. where, due to stress, their minds block out the moral inhibitions which ordinarily control their lives), they can act intentionally (*R v Isitt* (1978) 67 Cr App R 44).

Judge's Role

65. Where automatism is in issue, the judge must resolve two issues before charging the jury:

    i) Whether a proper evidential foundation for the defence has been laid; and

    ii) Whether the evidence shows the case to be one of sane or insane automatism (*R v Falconer* (1990) 171 CLR 30; *R v Youssef* (1990) 50 A Crim R 1; *R v Burgess* [1991] 2 QB 92).

Is there a proper evidential foundation for the defence?

66. The issue of automatism must not be left to the jury unless the judge has determined that a proper foundation has been laid (*R v Falconer* (1990) 171 CLR 30*; R v Youssef* (1990) 50 A Crim R 1; *Cvetkovic v R* [2010] NSWCCA 329).

67. The accused bears an evidentiary burden[1197] to point to or to produce evidence which, taken at its highest, is capable of raising a reasonable doubt that the act was committed in a state of automatism (*Braysich v R* (2011) 243 CLR 434. See also *R v Youssef* (1990) 50 A Crim R 1; *R v Falconer* (1990) 171 CLR 30; *Cvetkovic v R* [2010] NSWCCA 329; *Woodbridge v R* [2010] NSWCCA 185).

68. For this burden to be satisfied, there must be credible evidence which supports the claim that the accused acted in a state of automatism (*R v Falconer* (1990) 171 CLR 30; [1990] HCA 49; *Bratty v AG for Northern Ireland* [1963] AC 386 (Lord Denning); *DPP v Olcer* [2003] VSC 457; *R v Gibson* [2006] ACTSC 114; *Cvetkovic v R* [2010] NSWCCA 329).

69. The evidence of the accused him or herself will rarely be sufficient to meet this burden, unless it is supported by medical evidence which points to the cause of the automatism (*Bratty v AG for Northern Ireland* [1963] AC 386 (Lord Denning). See also *R v Falconer* (1990) 171 CLR 30; *DPP v Olcer* [2003] VSC 457; *R v Gibson* [2006] ACTSC 114; *Cvetkovic v R* [2010] NSWCCA 329).

70. A claim of involuntariness which is not based on mental illness is almost certain to be treated as frivolous unless supported by medical evidence that identifies a mental state in which acts can occur independently of the will, assigns a causative explanation for that state and postulates that the accused did or may have experienced that state (*R v Falconer* (1990) 171 CLR 30 (Gaudron J)).

71. Sane automatism is, by its nature, extraordinary and so the evidence must be very persuasive before involuntariness will be a reasonable possibility (*R v Falconer* (1990) 171 CLR 30 (Gaudron J)).

72. Medical evidence is especially important where the relevant act is said to have been caused by a "medical or pharmacological condition". In such cases, there must be evidence from an expert in the relevant field supporting that proposition (*DPP v Olcer* [2003] VSC 457).

[1197] See "The Evidentiary Presumption of Voluntariness" in 7.1.1 Voluntariness for information concerning the nature of this evidentiary burden.

73. Evidence that the accused *could* have been in a state of automatism at the relevant time is sufficient. There does not need to be evidence showing that the accused was *in fact* acting in a state of automatism (*R v Youssef* (1990) 50 A Crim R 1).

74. Even if the judge is sceptical about whether the accused acted involuntarily, if there is sufficient evidence to raise the issue of automatism it must be left to the jury to decide (*R v Radford* (1985) 42 SASR 266; *R v Scott* [1967] VR 276).

75. However, it is not appropriate to invite the jury to engage in fanciful supposition (*R v Clarke* (1995) 78 A Crim R 226; *R v Boyle* (2009) 26 VR 219; *Woodbridge v R* [2010] NSWCCA 185).

76. It will generally not be sufficient for the accused to simply say "I had a black-out" or "I can't remember what happened", even if that evidence is credible (*R v Cottle* [1958] NZLR 999; *Bratty v AG for Northern Ireland* [1963] AC 386 (Lord Denning); *Cook v Atchison* [1968] Crim LR 266).

Is the case one of sane or insane automatism?

77. Where there is sufficient evidence of automatism to leave the issue to the jury, the judge must determine which type of automatism (sane, insane or both) is supported by that evidence (*Hawkins v R* (1994) 179 CLR 500; *R v Hennessy* [1989] 1 WLR 287; *R v Falconer* (1990) 171 CLR 30).

Evidence of sane automatism

78. If it is reasonably possible that the state of automatism was caused by something other than a "disease of the mind", the jury must be directed about sane automatism (*R v Falconer* (1990) 171 CLR 30; *R v Radford* (1985) 42 SASR 266; *R v Youssef* (1990) 50 A Crim R 1; *Hawkins v R* (1994) 179 CLR 500).

79. Where there is sufficient evidence to raise the issue of sane automatism the jury must be directed about it, even if a direction is not raised or sought by defence counsel (*R v Falconer* (1990) 171 CLR 30; *R v Milloy* [1993] 1 Qd R 298).

80. The fact that the automatism *may* have resulted from a "disease of the mind" does not relieve the judge of the obligation of leaving sane automatism to the jury where there is sufficient evidence to raise the issue (*R v Radford* (1985) 42 SASR 266; *Bedelph v R* (1980) 1 A Crim R 445).

81. However, the judge must not direct the jury about sane automatism if the *only possible* cause of the automatism was a "disease of the mind" (*Hawkins v R* (1994) 179 CLR 500; *R v Radford* (1985) 42 SASR 266; *R v Milloy* [1993] 1 Qd R 298; *R v Arnold* [2002] QCA 3).

Evidence of insane automatism

82. In a number of cases it has been held that, where it is reasonably possible that the state of automatism was caused by a "disease of the mind", the judge must give a direction about insane automatism, regardless of whether such a direction is sought by either party (*See, e.g. Hawkins v R* (1994) 179 CLR 500; *R v Starecki* [1960] VR 141; *R v Meddings* [1966] VR 306; *R v Joyce* [1970] SASR 184; *R v Ayoub* [1984] 2 NSWLR 511; *Nolan v R* WA CCA 22/5/97).

83. It is not clear, however, whether this is currently the law in Victoria. Section 22 of the *Crimes (Mental Impairment) Act 1997* states:

> (1) The question of mental impairment may be raised at any time during a trial by the defence or, with the leave of the trial judge, by the prosecution.
>
> (2) If there is admissible evidence that raises the question of mental impairment and a jury has been empanelled-
>
> (a) the judge must direct the jury to consider the question and explain to the jury the findings which may be made and the legal consequences of those findings; and
>
> (b) if the jury finds the accused not guilty, it must specify in its verdict whether or not it so finds because of mental impairment.

84. It seems clear from this provision that a direction about insane automatism *must* be given if there is sufficient evidence to raise the issue, and a direction is sought by *defence counsel*.

85. It also seems clear that a direction about insane automatism *may* be given, at the judge's discretion, if there is sufficient evidence to raise the issue, and a direction is sought by the *prosecution*.

86. However, it is unclear whether the judge may *refuse* a prosecution request to direct the jury about insane automatism, where there is sufficient evidence to raise the issue.

    - On the one hand, the approach adopted in cases such as *Hawkins v R* (1994) 179 CLR 500 would suggest that the judge has a *duty* to direct the jury about the issue in such circumstances;
    - On the other hand, the wording of s 22(1) would suggest that the judge has a *discretion* to refuse to give such a direction.

87. Similarly, it is also unclear whether the judge must direct the jury about insane automatism where there is sufficient evidence to raise the issue, but a direction is *not sought by either party*:

    - The approach adopted in cases such as *Hawkins v R* (1994) 179 CLR 500 would suggest that the judge has a *duty* to direct the jury about the issue in such circumstances;
    - However, it is not clear from the wording of s 22 that the judge has the *power* to give a direction about insane automatism on his or her own motion. It is possible that a direction may *only* be given if raised by the defence or the prosecution.

Evidence of sane and insane automatism

88. If it is reasonably possible that the state of automatism was caused *either* by a "disease of the mind" *or* by something else, the jury may need to be directed about both sane and insane automatism (*R v Falconer* (1990) 171 CLR 30; *R v Radford* (1985) 42 SASR 266; *R v Youssef* (1990) 50 A Crim R 1; *Hawkins v R* (1994) 179 CLR 500).

Content of the Charge

89. The charge will differ depending on whether the evidence supports the issue of sane automatism, insane automatism or both forms of automatism. These possibilities are addressed in turn below.

Charging the jury about sane automatism alone

90. There are no special rules of law relating to sane automatism. It is simply an issue of voluntariness (*Hall v R* (1988) 36 A Crim R 368; *R v Falconer* (1990) 171 CLR 30; *Cvetkovic v R* [2010] NSWCCA 329).

91. The jury should therefore be directed in accordance with the principles outlined in 7.1.1 Voluntariness.

92. The judge should direct the jury that the issue is *not* whether the accused suffered from the alleged condition (e.g. psychological blow dissociation), but whether he or she acted involuntarily as a result of that condition (*R v Falconer* (1990) 171 CLR 30 (Toohey J)).

93. Similarly, the judge should direct the jury that the issue is *not* whether or not the accused was conscious or aware of what he or she was doing. It is whether he or she was acting involuntarily. A person can act involuntarily even if he or she is conscious of what he or she is doing (see, e.g. *Ryan v R* (1967) 121 CLR 205; *R v Falconer* (1990) 171 CLR 30).

94. Care must be taken not to suggest that it is for the accused to prove that he or she suffered from the alleged condition, or for the accused to prove that that condition caused him or her to act involuntarily. It is for the prosecution to prove beyond reasonable doubt that the accused was *not* acting involuntarily due to a state of automatism (*R v Manly* SA CCA 22/8/95. See also *R v Falconer* (1990) 171 CLR 30).

Charging the jury about insane automatism alone

95. Where the evidence solely supports insane automatism, the judge should direct the jury using 8.4.1 Charge: Mental Impairment, relating the evidence of automatism to the requirements of that defence.

96. The judge must take care not to lead the jury to believe that the defence of mental illness will only be proven if they find that the accused acted involuntarily due to a disease of the mind. The defence of mental impairment may be proven even if the accused acted voluntarily (e.g. if the accused did not know that what he or she was doing was wrong, despite acting voluntarily) (*R v Radford* (1985) 42 SASR 266; *Taylor v R* (1978) 22 ALR 599).

Charging the jury about both sane and insane automatism

97. In some cases it will be for the jury to decide whether, upon the evidence they accept, the automatism was sane or insane in nature (*R v Falconer* (1990) 171 CLR 30; *R v Youssef* (1990) 50 A Crim R 1).

98. Due to the uncertainties surrounding the onus of proof in this area (see above), it is not possible to provide firm guidance about the best way to charge the jury in such cases. Consequently, the Charge Book does not contain a charge on this issue.

99. It is recommended that a judge who is required to address both sane and insane automatism in the one charge carefully consider the issues outlined in the 'Onus of proof' section above, the provisions of the *Crimes (Mental Impairment) Act 1997* and the judgments in *R v Falconer* (1990) 171 CLR 30 and *Hawkins v R* (1994) 179 CLR 500.

100. In drafting a charge on this issue, it is essential that the judge carefully explain the legal meanings of "voluntariness" and "disease of the mind" to the jury (*R v Radford* (1985) 42 SASR 266; *R v King* (2005) 155 ACTR 55).

Charging the jury about automatism and intention

101. Where the evidence that is led to prove that the accused acted involuntarily due to automatism is also relevant to the issue of intention, the jury should be directed about that issue (*Hawkins v R* (1994) 179 CLR 500; *R v Hall* (1988) 36 A Crim R 369; *R v Arnold* [2002] QCA 3; *Cvetkovic v R* [2010] NSWCCA 329).[1198]

102. In determining whether this direction is required, the judge must consider whether a direction is requested or whether there are substantial and compelling reasons for giving a direction in the absence of any request (see *Jury Directions Act 2015* ss 14–16).

103. For example, where the defence of automatism is raised in relation to a crime of specific intent, and it is possible the accused acted in a state of "mental confusion" rather than automatism, the judge must:

- Explain the difference between automatism and mental confusion;
- Direct the jury that they must acquit the accused if it is reasonably possible that he or she acted involuntarily due to automatism;
- Tell the jury that if they reject the possibility that the accused acted involuntarily due to automatism, they must next determine whether or not the accused lacked the requisite intention due to mental confusion;

[1198] See "Automatism and Intention".

- Direct the jury that they must acquit the accused if it is reasonably possible that he or she did not form the requisite intention due to mental confusion (*R v Hall* (1988) 36 A Crim R 369. See also *Cvetkovic v R* [2010] NSWCCA 329).

104. The jury must *not* be left with the impression that an accused person is deemed to lack specific intention only where there is a *total* absence of control or knowledge of what is being done. A reasonable doubt about specific intention can be raised by evidence of other forms of mental abnormality (*R v Hall* (1988) 36 A Crim R 369; *Hawkins v R* (1994) 179 CLR 500).

105. The jury must not consider the issue of intention until any issues of voluntariness or mental impairment have been resolved (*Hawkins v R* (1994) 179 CLR 500).

Charging the jury about loss of memory

106. Where the accused claims to be unable to answer the charge due to a loss of memory, a direction about that issue may be warranted (*Russell v HM Advocate* [1946] SLT 93; *R v Podola* [1960] 1 QB 325; *Broadhurst v R* [1964] AC 441).

107. In such circumstances, it may be appropriate to:

- Remind the jury of the accused's claim that he or she could not recall the events in question;
- Summarise any evidence that supports the accused's claim;
- Tell the jury that, even if they accept that the accused had lost his or her memory, that does not mean he or she acted involuntarily or without the requisite intention. The question is not what the accused remembered or did not remember, subsequent to the event in issue, but what his or her state of mind was at the relevant time; and
- Tell the jury that, if they accept that the accused had lost his or her memory, they must bear in mind the possibility that there might be some explanation for the relevant events which the accused might have offered, had he or she had a recollection (see, e.g. *Russell v HM Advocate* [1946] SLT 93*; R v Podola* [1960] 1 QB 325; *Broadhurst v R* [1964] AC 441).

Charging the jury about expert evidence

108. In most cases where automatism is in issue, an expert witness will have given evidence about the matter. It will therefore generally be appropriate to give either Charge: Contested Expert Evidence or Charge: Uncontested Expert Evidence. See General Principles of Opinion Evidence for further information.

109. Depending on the circumstances, it may be appropriate to tell the jury that it is not for an expert witness such as a psychiatrist, to determine whether the accused suffered from a "disease of the mind". That is a question of fact for the jury to determine, based on the judge's definition of the term (*Woodbridge v R* [2010] NSWCCA 185; *R v Falconer* (1990) 171 CLR 30).

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8.9 Statutory Duress (From 1/11/14)

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Introduction

1. Prior to 2005, duress in Victoria was governed solely by the common law. This situation has been altered by the *Crimes (Homicide) Act 2005* and the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*, which introduced duress provisions into the *Crimes Act 1958*. These provisions were s 9AG, now repealed, and s 322O respectively.

2. This topic covers the defence of duress in s 322O of the *Crimes Act 1958*, which applies to all offences committed on or after 1 November 2014.[1199]

3. Section 9AG of the *Crimes Act 1958* applies to homicide offences committed on or after 23 November 2005 and before 1 November 2014. See 8.10 Statutory Duress (23/11/05–31/10/14).

4. The common law defence of duress applies to non-homicide cases committed before 1 November 2014, and to all offences committed before 23 November 2005. See 8.11 Common Law Duress.

Section 322O of the *Crimes Act 1958*

5. Section 322O of the *Crimes Act 1958* states:

> Duress
>
> (1) A person is not guilty of an offence in respect of conduct carried out by the person under duress.
>
> (2) A person carries out conduct under duress if-
>
> (a) the person reasonably believes that–
>
> (i) subject to subsection (3), a threat of harm has been made that will be carried out unless an offence is committed; and
>
> (ii) carrying out the conduct is the only reasonable way that the threatened harm can be avoided; and
>
> (b) the conduct is a reasonable response to the threat.
>
> (3) A person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.
>
> (4) This section only applies in the case of murder if the person believes that the threat is to inflict death or really serious injury.

Abolition of Common Law Duress

6. Statutory duress has replaced the common law defence for all offences committed on or after 1 November 2014 (*Crimes Act 1958* s 322Q).

7. However, the common law defence of duress applies to non-homicide cases committed before 1 November 2014 and to all offences committed before 23 November 2005. See 8.11 Common Law Duress.

Duress: Voluntariness and Intent

8. Under s 322O, conduct is carried out under duress if it is committed in response to a perceived threat of harm that the accused reasonably believes will be carried out if the offence is not committed (*Crimes Act 1958* s 322O).

[1199] For homicide offences, if the date of the victim's death differs from the date on which the *actus reus* was committed, the relevant date for determining which provisions apply is the date of death (see *R v Gould* (2007) 17 VR 393; [2007] VSC 420).

9. As duress implies a deliberate choice to break the law (although under constrained circumstances), it is incorrect to treat duress as related to voluntariness or intention (see *R v Palazoff* (1986) 43 SASR 99, 105; *R v Harding* [1976] VR 129, 141, 169).

10. However, where duress is available as a defence, the accused will have a complete defence to the offence charged (*Crimes Act 1958* s 322O(1)).

11. The defence of duress therefore operates to excuse a person who acts voluntarily and deliberately, but under compulsion (see *DPP v Parker* [2016] VSCA 101 [54]).

Relevant Offences

12. Duress under s 322O is a defence to all criminal offences (*Crimes Act 1958* s 322O(1)).

13. In the case of murder, the defence only applies if the accused 'believes that the threat is to inflict death or really serious injury' (*Crimes Act 1958* s 322O(4)). In contrast, at common law, duress was not available as a defence to murder or to some forms of treason. For more information, see 8.11 Common Law Duress.

Onus of Proof

14. The accused has the evidential onus to raise duress by 'presenting or pointing to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish' that defence (*Crimes Act 1958* s 322I(1)).

15. Once the accused satisfies that evidential onus, the legal onus is on the prosecution to prove beyond reasonable doubt that the accused did not carry out the conduct under duress (*Crimes Act 1958* s 322I(2)).

Elements of Statutory Duress

16. To prove the accused did not act under duress, the prosecution must disprove one or more of the following five elements:

    i. The accused reasonably believes that a threat of harm has been made;

    ii. The accused reasonably believes that the threat will be carried out unless an offence is committed;

    iii. The accused reasonably believes that carrying out the conduct is the only reasonable way the threatened harm can be avoided;

    iv. The conduct is a reasonable response to the threat;

    v. The threat was not made by or on behalf of a person with whom the accused is voluntary associating for the purpose of carrying out violent conduct.

17. The meaning of 'reasonably believes' and each of these five elements is discussed below.

The meaning of 'reasonably believes' under s 322O

Subjective and objective aspects

18. The predecessor to s 322O, *Crimes Act 1958* s 9AG (now repealed), required the accused to reasonably believe that: 'a threat has been made that will be carried out unless an offence is committed; and carrying out the conduct is the only reasonable way that the threatened harm can be avoided; …' (*Crimes Act 1958* s 9AG(2)(a)–(b)).

19. Under s 9AG (and by analogy under s 322O), reasonable belief means that:

    - The accused in fact has the belief (a subjective aspect); and

- The belief is reasonable, determined by reference to whether 'a reasonable person possessing the personal characteristics of the accused that might have affected the accused's appreciation of the circumstances might have held that belief' (a subjective and objective aspect) (*DPP v Parker* [2016] VSCA 101 [8]; see also [44], [47]–[49], [52], [59]).

20. The Court of Appeal has held that:

> The phrase 'the person reasonably believes' in its natural meaning requires regard be had to the characteristics of the accused. The words connote what an accused might reasonably believe in the circumstances in which the accused found himself or herself having regard to the personal characteristics of the accused. They encompass the subjective belief of the accused, informed by the personal characteristics of the accused with an objective overlay in the form of reasonableness which allows community standards to be taken into account when assessing the culpability of an accused (*DPP v Parker* [2016] VSCA 101 [58]).

Assessing reasonableness – Characteristics of the accused

21. As noted above, when determining whether a belief is reasonable, the court must take into account any characteristics of the accused that might have affected his or her appreciation of the circumstances (*DPP v Parker* [2016] VSCA 101 [8]).

22. Evidence of family violence, where duress in the context of family violence is in issue, is expressly allowed to be taken into account for this purpose (*Crimes Act 1958* s 322P). That means that the effects of family violence may bear on a person's belief and its reasonableness (*DPP v Parker* [2016] VSCA 101 [44], [53]). See 'Duress and Family Violence' below for more information.

23. Other relevant characteristics of the accused that may have affected his or her perception of circumstances include his or her sex and maturity, as was the position at common law (see *DPP v Parker* [2016] VSCA 101 [27]), along with the history of the relationship between the accused and the threatener (*Rowan v The King* [2022] VSCA 236, [180]).

24. At common law, features such as history of sexual abuse of the accused by someone other than the threatener, or intellectual disability of the accused, are not imputed to the ordinary person for the purpose of assessing whether a person of ordinary firmness would have been likely to yield to the threats (*Rowan v The King* [2022] VSCA 236, [180]).

25. However, self-induced intoxication is expressly excluded as a characteristic of the accused that may be taken into account in determining the reasonableness of a belief under the duress provision in s 322O. In determining whether a reasonable belief existed, the relevant standard is a person who is not intoxicated (*Crimes Act 1958* ss 322T(2), 322T(4)). See 'Duress and Intoxication' below for more information.

Assessing reasonableness – Circumstances of the accused

26. Under the previous duress provision, s 9AG(2) of the *Crimes Act 1958*, the jury was required to assess the elements of duress (all of which were 'reasonable belief' elements) 'by reference to the circumstances as a reasonable person, possessing the personal characteristics of the accused, would have perceived them to be' (*DPP v Parker* [2016] VSCA 101 [8]).

27. This indicates that the 'reasonable belief' elements of s 322O should be assessed in the same way.

(i) Reasonable belief that a threat of harm has been made

28. The first matter the jury should consider is whether the prosecution has shown that the accused did not reasonably believe that a threat of harm was made (*Crimes Act 1958* s 322O(2)(a)(i)).

29. As noted above, this requires considering whether the accused subjectively believed a threat was made and whether this belief was objectively reasonable. See 'The meaning of "reasonably believes" under s 322O' above.

30. The common law requirements for duress included that a threat was made. In contrast, s 322O(2)(a)(i) of the *Crimes Act 1958* requires the accused to reasonably believe that a threat of harm has been made.

31. This threat may be unstated or inferred from the whole the circumstances facing the accused, including the words and actions of the allegedly threatening party, along with the history of the relationship between the parties, and the reputation of the third party (see, e.g., *R v Rowan* [2024] HCA 9, [42]-[62]; *DPP v Lynch* [19775] AC 653, 704-705; *R v Emery* (1978) 18 A Crim R 49, 51; *R v Harding* [1976] VR 129, 161).

32. In *R v Rowan* [2024] HCA 9, the High Court held that "evidence of pervasive violence, intimidation, control and sexual abuse … raised a reasonable possibility that any express or implicit demand … carried with it the implication that serious violence and more severe sexual abuse would be inflicted … if [the accused] refused" (at [62]).

33. Such a process of inferring a threat does not involve recognition of a principle of 'duress of circumstances', where a person commits an offence to escape or avoid dangerous conditions (see *R v Rowan* [2024] HCA 9).

34. This part of duress does not consider the level of harm threatened. That is a matter considered as part of the fourth element: whether the conduct was a reasonable response to the threat (*Crimes Act 1958* s 322O(2)(a)(ii)).

35. In addition, in cases of murder, the accused must believe the threat is of death or really serious injury (*Crimes Act 1958* s 322O(4)).

36. Under the common law, the relevant threat was not limited to threats made against the accused but to 'a human being' (see, eg, *R v Hurley* [1967] VR 526, 543 (Smith J); *R v Harding* [1976] VR 129, 169 (Murphy J); *R v Emery* (1978) 18 A Crim R 49, 55-56; *R v Dawson* [1978] VR 536, 538, 541; *R v Abusafiah* (1991) 24 NSWLR 531, 537). There is no reason to assume that the *Crimes Act 1958* has narrowed the class of people who may be threatened for the purpose of this defence.

(ii) Reasonable belief that the threat will be carried out unless an offence is committed

37. The second matter the jury should consider is whether the prosecution has shown that the accused did not reasonably believe that the threat of harm would be carried out unless an offence was committed (*Crimes Act 1958* s 322O (2)(a)(i)).

38. This is equivalent to the common law element that the accused must have reasonably apprehended that the threat would be carried out (see *R v Hurley* [1967] VR 526, 543 (Smith J); *R v Emery* (1978) 18 A Crim R 49, 55, 57).

39. As noted above, this requires considering whether the accused subjectively believed that the threat would be carried out unless an offence is committed and whether this belief was objectively reasonable. See 'The meaning of "reasonably believes" under s 322O', above.

40. At common law, the person posing the threat of harm must have demanded that the accused committed the particular offence with which he or she is charged (*R v Dawson* [1978] VR 536, 538; *R v Lorenz* (1998) 146 FLR 369, 376-7; see also *R v Martin* (2010) 28 VR 579 [10]-[12]). For this purpose, a demand may be made expressly, or by implication, such as where the accused reasonably believes that the threatener will inflict some harm whenever the accused fails to comply with the threatener's demands (see *Rowan v The King* [2022] VSCA 236, [169], [174] per Kyrou and Niall JJA; *R v Rowan* [2024] HCA 9, [52]-[62]).

41. While *Crimes Act 1958* s 322O(2)(a)(i) refers to 'an offence' rather than 'the offence', it is suggested that this is not intended to depart from the common law requirement of duress that the threatener demanded the accused commit a particular offence, on pain of a threat. There is no indication in any of the secondary material surrounding the introduction of s 322O or its predecessor in s 9AG that such a radical change was intended.

42. As explained in 8.11 Common Law Duress, at common law duress was not available to an accused who had escaped from prison following a threat on his life by another inmate. The accused had chosen to escape contrary to the wishes of the threatener, rather than on their instruction, so the escape was not the 'particular offence nominated by the person making the threats' (*R v Dawson* [1978] VR 536, 538; c.f. *R v Rowan* [2024] HCA 9 at [102]-[104] per Edelman J). However, in *R v Rowan* [2024] HCA 9, Edelman J held at [97]-[111] that there the defence of duress (whether at common law or under s 322O) does not require the threatener to issue a demand or direction. Instead, any demand or direction is only relevant to the question whether the offending is a reasonable response to the threat. This conceptual approach to the issue of demand or direction was not adopted by the plurality, who resolved the case on the basis that a threat need not be express.

(iii) Reasonable belief that carrying out the conduct is the only reasonable way to avoid the threatened harm

43. Section 322O(2)(a)(ii) states that conduct will be carried out under duress only if the accused reasonably believes that carrying out the conduct is the only reasonable way that the threatened harm can be avoided.

44. As noted above, this requires considering whether the accused subjectively believed that carrying out the conduct was the only reasonable way to avoid the threatened harm and whether this belief was objectively reasonable. See 'The meaning of "reasonably believes" under s 322O', above.

45. When considering this issue, the jury should consider whether the accused knowingly passed up a reasonable opportunity to negate or nullify the threat.

46. For example, an opportunity to escape may be a reasonable way to avoid the threatened harm in some circumstances, but would not necessarily make the threat ineffective in others. If the threat involved harm to be inflicted in the future, for example, or to someone other than the accused, failing to take an opportunity to escape would not necessarily prevent the accused from relying on the defence (see *R v Abusafiah* (1991) 24 NSWLR 531, 538).

47. Similarly, an opportunity to report the threat to the police may be a reasonable way to avoid the threatened harm, unless the accused reasonably believed police protection to be ineffective against the person making the threats or that the police protection may be initially effective but would not save the accused from threatened violence at a later stage. This may be the case where family violence is in issue, for example (see *R v Runjanjic* (1991) 56 SASR 114, 120–122; *R v Lorenz* (1998) 146 FLR 369, 376).

48. In considering whether the accused reasonably believed that carrying out the conduct was the only reasonable way to avoid the threatened harm, the jury should consider the accused's knowledge of the character and reputation of the person perceived to have made the threat, as well as the nature of the perceived threat (see, e.g. *R v Abusafiah* (1991) 24 NSWLR 531, 534–535). This may be relevant in the context of family violence, see 'Duress and Family Violence' below for more information.

49. Family violence may influence the accused's belief in the availability of opportunities to escape, report, or otherwise avoid the harm, and the reasonableness of that belief (*R v Runjanjic* (1991) 56 SASR 114; *Rowan v The King* [2022] VSCA 236, [187] (Kyrou and Niall JJA)). See 'Duress and Family Violence' below for more information.

50. Under the common law, the threat must have been 'present, continuing, imminent and impending'. It was the threat rather than the harm threatened that must have been present, continuing and imminent; that is, the compulsion of the threat must have been active at the time the offence was committed (*R v Hurley* [1967] VR 526, 543 (Smith J); *R v Emery* (1978) 18 A Crim R 49, 55–57; *R v Dawson* [1978] VR 536, 537–538, 541).

51. Under the *Crimes Act 1958*, this is no longer a discrete requirement. However, where the accused knows that a threat has expired, he or she is unlikely to be able to reasonably believe that carrying out the conduct is the only reasonable way that the threatened harm can be avoided.

52. Under the common law, the threat must have induced the accused to commit the offence (*R v Hurley* [1967] VR 526, 543 (Smith J); *R v Dawson* [1978] VR 536, 538, 541). If the accused had an alternative motive to commit the offence, it was less likely that the threat induced the accused to commit it (see *R v Zaharias* (2001) 122 A Crim R 586 [42]–[44]).

53. It seems unlikely that the accused could reasonably have believed that the conduct was the only reasonable way to avoid the threatened harm if the threat did not directly provoke the commission of the offence. However, s 322O(2)(a)(i) does not use the language of the threat 'inducing' the accused to act, and the courts have not considered whether the section retains this common law element.

(iv) Reasonable response to the threat

Objective test

54. Section 322O(2)(b) requires that the accused's conduct 'is a reasonable response to the threat'.

55. Under the previous duress provision in s 9AG (which only applied to homicide offences), this element considered whether the accused reasonably believed that the conduct was a reasonable response to the threat.

56. In obiter comments when considering s 9AG, the Court of Appeal remarked that, in comparison to that earlier provision, the current reasonable response requirement under s 322O(2)(b) is an 'entirely objective assessment' (*DPP v Parker* [2016] VSCA 101 [49]).

57. The Explanatory Memorandum says the following in respect of s 322O(2)(b) (at 9):

> However, in contrast to section 9AG, new section 322O makes clear that the third element of duress (whether the accused's conduct is a reasonable response to the threat) is objective. Requiring an accused's conduct to have been an objectively reasonable response in the circumstances is designed to ensure that the defence only applies in appropriate cases (i.e. where there are objectively appropriate reasons to excuse such conduct).

58. Section 322O(2)(b) therefore requires the jury to ask whether the accused's response to the threat, viewed objectively, was reasonable.

59. The statutory defence of self-defence under s 322K also requires that the accused's conduct was a 'reasonable response'. This is an objective test in which the reasonableness of the accused's response (not that of a reasonable person) is assessed (see *R v Katarzynski* [2002] NSWSC 613; *R v Forbes* [2005] NSWCCA 377; *Ward v R* [2006] NSWCCA 321).

60. The test under the common law defence of duress was whether a person of ordinary firmness would have been likely to yield to the threat in the way the accused did or, in other words, whether the accused could not reasonably have been expected to resist in the circumstances. As part of this test, the 'person of ordinary firmness' is taken to have the accused's characteristics, such as age, gender, history and relationship with the threatener, and was placed in the same objective circumstances as the accused, including any circumstances of family violence (*Rowan v The King* [2022] VSCA 236, [73], [180] (Kyrou and Niall JJA)).

61. However, given the wording of s 322O(2)(b), and by analogy with the self-defence provision in s 322K, the jury should consider the reasonableness of the accused's response, not that of a hypothetical reasonable person assumed to possess the accused's characteristics.

Reasonable response to which threat?

62. There are two possible interpretations available for the term 'the threat' in s 322O(2)(b):

- It refers to the threat as perceived by the accused (the subjectively perceived threat);
- It refers to the threat which the jury considers objectively existed (the objective threat).

63. There are indicia in the Act pointing in each direction.

64. In favour of the subjectively perceived threat approach, the reference to 'the threat' and the position of those words in the section suggest that it is pointing back to the threat referenced in s 322O(2)(i), which the accused reasonably believed would be carried out unless an offence was committed. Otherwise, the jury would be asked to consider the reasonableness of the response in relation to a different threat than the one which the accused reasonably believed he or she faced.

65. In favour of the objective threat approach, it is relevant to note that in contrast to s 322O, the self-defence provision in s 322K (introduced at the same time as s 322O) states that the accused's conduct must be 'a reasonable response in the circumstances as the person perceives them'. The omission of those words in s 322O (and also in s 322R for sudden and extraordinary emergency) suggest that a different approach must be taken for duress and emergency than for self-defence.

66. In addition, as noted above, the Court of Appeal in *DPP v Parker* [2016] VSCA 101, [49] described the new test as 'entirely objective'. However, the Court also suggested 'a symmetry between the duress and the self-defence provisions' in s 322O and s 322K, both of which separate the belief-based requirements of those defences from an 'objective' element that the response be reasonable (see [50]).

67. As a matter of prudence, the model charge adopts the subjectively perceived threat approach, as this presents the lower risk of injustice to an accused.

68. The subjectively perceived threat approach means that the jury should ask whether the accused's conduct in committing the offence was a 'reasonable response' to the threat as perceived by the accused.

Proportionality of the response to the threat

69. Under the other objective statutory tests mentioned above (e.g. s 322K(2)(b) of the *Crimes Act 1958*, s 418(2) of the *Crimes Act 1900* (NSW) and s 10.4(2) of the *Commonwealth Criminal Code*), the reasonableness of the response should also be assessed in terms of the objective proportionality of the conduct to the perceived situation (*Flanagan v R* [2013] NSWCCA 320 [78]–[79]; *Oblach v R* (2005) 65 NSWLR 75 [51]–[54]; *R v Katarzynski* [2002] NSWSC 613 [23]).

70. It is likely that the reasonable response element in s 322O(2)(b) also includes a requirement that the accused's response is objectively proportionate to the perceived threat.

71. As under the common law test for duress, the jury should consider the nature and magnitude of the threats made, the accused's knowledge of the character and reputation of the person making them (see *R v Abusafiah* (1991) 24 NSWLR 531, 534–535), and the history and the relationship between the accused and the threatener (*Rowan v The King* [2022] VSCA 236, [73], [180] (Kyrou and Niall JJA)).

72. Under the common law, where the threat is not against the accused personally but, for example, the accused's family is threatened instead, the jury must determine whether a threat of that nature would be likely to compel a person of ordinary firmness to commit the crime (*R v Abusafiah* (1991) 24 NSWLR 531, 537). The jury could take into account factors such as the strength of the accused's attachment to the third party (see, e.g. *R v Hurley* [1967] VR 526, 542–543 (Smith J)). These factors are likely to remain relevant to assessing the reasonableness of the accused's response under s 322O(2)(b).

Family violence

73. Under the common law, expert evidence on 'battered women's syndrome' was admissible in deciding whether a woman of reasonable firmness in the domestic situation of the accused women would have acted the way she did (*R v Runjanjic* (1991) 56 SASR 114, 120–122; see also *R v Lorenz* (1998) 146 FLR 369, 376).

74. Along with the first legislative version of duress introduced by the *Crimes (Homicide) Act 2005*, and the replacement version introduced by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*, family violence provisions were introduced that specifically stated that evidence of family violence may be relevant in deciding whether conduct was carried out under duress. See 'Duress and Family Violence' below for more information.

75. Discussing the 2005 provision, the Court of Appeal noted that evidence of family violence 'may go to … objective reasonableness and so be used in determining whether or not the actions taken by an accused were a reasonable response to the threat' (*DPP v Parker* [2016] VSCA 101 [40]).

76. However, the Court also said that since the 2014 provision (s 322O) introduced a purely objective test for the 'reasonable response' element, evidence of family violence 'will not bear on whether the response was reasonable' (*DPP v Parker* [2016] VSCA 101 [53]).

77. These two statements in Parker are difficult to reconcile.

78. The approach taken in this charge book is that the fourth element of duress must be assessed against the threat as perceived by the accused. Therefore evidence of family violence that bears on the accused's perception of the threat will be relevant. As at common law, this presumably includes the accused's knowledge of the character and reputation of the person making the threat (see *R v Abusafiah* (1991) 24 NSWLR 531, 534–535).

79. However, the effects of family violence that may have affected the particular accused's response, such as any reduction in capacity to resist the threat due to the long term psychological impact of coercive and controlling violence will not be relevant when assessing the reasonableness of the accused's response to the perceived threat.

(v) Voluntary association with the maker of the threat

80. The accused's conduct is not carried out under duress if the threat compelling the conduct is made by or on behalf of a person with whom the accused is 'voluntarily associating for the purpose of carrying out violent conduct' (*Crimes Act 1958* s 322O(3)).

81. Section 322O(3) applies to voluntary association, which in this context means where the accused freely chose to associate, without being subject to threats or other coercion, into associating with the person making the threat.

82. Section 322O(3) is similar to the common law condition: 'the accused did not, by fault on his part when free from the duress, expose himself to its application' (*R v Hurley* [1967] VR 526, 543; *R v Emery* (1978) 18 A Crim R 49, 55–56; *R v Dawson* [1978] VR 536, 538, 541). Under the common law the accused could not rely on the defence if he or she freely chose to associate with any criminal organisation or became a party to a criminal enterprise (see *R v Palazoff* (1986) 43 SASR 99, 101 (Zelling ACJ)).

83. Under s 322O(3), however, there is the additional requirement that the organisation or enterprise was intended to carry out violent conduct. It will not apply when the accused has associated with others for the purposes of committing non-violent conduct or offences.

84. Section 322O(3) does not state clearly whether duress is excluded following association for the purpose of any violent conduct. As a matter of prudence, this charge book adopts the approach that s 322O(3) is not engaged where the accused is compelled under duress to commit violent conduct which is different from that which formed the purpose of the voluntary association with the other person.

85. This is an approach similar to that taken under the *Commonwealth Criminal Code* s 10.2(3)), which states: '[duress] does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.'

86. However, caution should be exercised in relation to this issue as Victorian courts have not considered s 322O(3).

Duress and Murder

87. Where the accused is charged with murder, the defence of duress under s 322O will only apply where the accused 'believes that the threat is to inflict death or really serious injury' (s 322O(4)).

88. This requirement exists separately from the requirement that the accused must reasonably believe that a threat of harm has been made. Unlike the first element of duress, this threshold requirement is purely subjective.

89. A judge will only need to direct a jury about this threshold requirement in cases of murder.

90. Under the common law, duress was not available on a charge of murder (although it may have been available where the accused did not do the actual killing). However, the statutory defence of duress introduced by s 9AG of the *Crimes Act 1958* related to homicide offences, including murder, committed on or after 23 November 2005 and before 1 November 2014. The current provision, s 322O, applies to all offences committed on or after 1 November 2014.

Duress and Intoxication

91. Section 322T(2)–(3) of the *Crimes Act 1958* states that:

> (2) If any part of a defence to an offence relies on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.
>
> (3) If any part of a defence to an offence relies on reasonable response, in determining whether that response was reasonable, regard must be had to the standard of a reasonable person who is not intoxicated.

92. Section 322T(2) means that any self-induced intoxication by the accused cannot be taken into account in deciding whether he or she holds a reasonable belief in a threat of harm that will be carried out unless an offence is committed, or that carrying out the conduct is the only reasonable way to avoid the threatened harm.

93. Section 322T(3) means that any self-induced intoxication by the accused cannot be taken into account in deciding whether the accused's conduct was a reasonable response to the threat.

94. Section 322T(4) provides that where the intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned. See ss 322T(5)–(6) for the definition of 'self-induced intoxication'.

95. For more information, see 8.5 Statutory Intoxication (From 1/11/14).

Duress and Family Violence

96. The *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* added provisions concerning 'family violence'. These provisions substantially replicate those introduced into the *Crimes Act 1958* by the *Crimes (Homicide) Act 2005*, but are applicable to all offences rather than limited to homicide offences.

97. Sections 322J and 322P of the *Crimes Act 1958* and Part 6 of the *Jury Directions Act 2015* explain how evidence of family violence may be relevant to whether conduct was carried out under duress.

98. Section 322J(2) defines family violence "in relation to a person" as "violence against that person by a family member".

99. A person's "family member" is defined broadly in s 322J(2) and includes:

- a person who is or has been married to the person;
- a person who has or has had an intimate personal relationship with the person;
- a person who is or has been the father, mother, step-father or step-mother of the person;
- a child who normally or regularly resides with the person;
- a guardian of the person; and
- another person who is or has been ordinarily a member of the household of the person.

100. "Violence" is also defined broadly in s 322J(2) to mean:

- physical abuse;
- sexual abuse;
- psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to:
    - intimidation;
    - harassment;
    - damage to property;
    - threats of physical abuse, sexual abuse or psychological abuse;
    - in relation to a child:
        - causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
        - putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

101. A single act may amount to 'abuse' for the purpose of the definition of violence (s 322J(3)). A number of acts that form part of a pattern of behaviour may also amount to "abuse" for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial (s 322J(3)).

102. Section 322P provides that evidence of family violence may be relevant in determining whether a person has carried out conduct under duress, in circumstances where duress in the context of family violence is in issue (*Crimes Act 1958* s 322P).

103. Section 322J states that 'Evidence of family violence, in relation to a person,' includes evidence of:

(a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;

(b) the cumulative effect, including psychological effect, on the person or a family member of that violence;

(c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;

(d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;

(e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;

(f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

104. See 'Chapter 4: Evidence of Relationship and Family Violence' in the Victorian Law Reform Commission's Defences to Homicide: Final Report for a more detailed discussion of the relationship between duress and family violence, and the use which can be made of the evidence outlined above.[1200]

Family Violence and Duress: Jury Directions

105. The *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* introduced a new Part 7 into the Jury *Directions Act 2013*. On 29 June 2015, these provisions were revised and relocated to Part 6 of the *Jury Directions Act 2015*.

106. Part 3 of the *Jury Directions Act 2015* does not apply to Part 6 of the Act.

107. Part 6 of the *Jury Directions Act 2015* applies to any trial commencing on or after 29 June 2015, regardless of the date of any alleged offence.

108. For the purposes of Part 6, "family violence" has the same meaning as in s 322J(2) of the *Crimes Act 1958* (see 'Duress and Family Violence' above)

109. The trial judge must give the jury preliminary directions on family violence, in accordance with s 59 of the *Jury Directions Act 2015*, if the defence counsel requests such directions, unless there are good reasons for not doing so (*Jury Directions Act 2015* s 58). The judge may give the statutory directions if the accused is unrepresented and the judge considers it in the interests of justice to do so (*Jury Directions Act 2015* s 58(3)).

110. The judge must give the statutory directions on family violence as soon as practicable after the request is made and the judge may give the direction before any evidence is adduced in the trial. The directions may be repeated at any time during the trial (*Jury Directions Act 2015* s 58(4)–(5)).

111. The directions must include all of the following (*Jury Directions Act 2015* s 59):

(a) self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial; and

(b) as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires); and

[…]

[1200] The Report can be downloaded here.

(d) in the case of duress, evidence in the trial is likely to include evidence of family violence committed by another person against the accused or a third person.

112. The following directions under s 60 may also be sought and, if sought, must be given unless there are good reasons for not doing so:

(a) that family violence–

(i) is not limited to physical abuse and may include sexual abuse and psychological abuse;

(ii) may involve intimidation, harassment and threats of abuse;

(iii) may consist of a single act;

(iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;

(b) if relevant, that experience shows that–

(i) people may react differently to family violence and there is no typical, proper or normal response to family violence;

(ii) it is not uncommon for a person who has been subjected to family violence–

(A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;

(B) not to report family violence to police or seek assistance to stop family violence;

(iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by-

(A) family violence itself;

(B) cultural, social, economic and personal factors;

(c) that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting [...] under duress [...] in relation to the offence charged.

Duress and Marital Coercion

113. Section 336 of the *Crimes Act 1958* provides for the defence of marital coercion. While similar to duress, marital coercion is a distinct defence that applies in limited circumstances.

114. Marital coercion allows a women to be acquitted of a criminal offence that she committed because her husband coerced her to do so through pressure or threats, if the coercion is 'sufficient to cause a woman of ordinary good character and normal firmness of mind, placed in the circumstances in which the woman was placed, to conduct herself in the manner charged' (*Crimes Act 1958* s 336(3)).

115. Unlike duress, which is available as a defence to all offences and to any accused person, marital coercion is not available for the offences of treason or murder and is available only to married women.

116. The Victoria Law Reform recommended retaining the defence of marital coercion in acknowledgment of the high rate of violence by men against their female partners, and the difficulties which women experience in seeking protection against it. In murder cases, however, the more rigorous requirements of the duress defence apply (Victoria Law Reform Commission, *Defences to Homicide: Final Report*, 2004, 122).

When to Charge the Jury about Duress

117. The judge must direct the jury about duress if the accused indicates that duress is in issue or if the judge considers that there are substantial and compelling reasons to direct the jury about duress despite the absence of a request (*Jury Directions Act 2015* ss 11, 16). See Directions under Jury Directions Act 2015.

118. If a duress direction is requested, it is only if the judge is satisfied that there is no evidence that raises a reasonable possibility that the elements of duress exist that the judge would have good reason to decline to give the requested direction (*R v Rowan* [2024] HCA 9, [33]).

119. Duress may be left to the jury even if the accused's primary defence is that he or she did not commit the relevant conduct. The inconsistency between duress and denial of offending is a matter for the jury to assess (*Rowan v The King* [2022] VSCA 236, [79], [157] per Kyrou and Niall JJA).

120. In criminal proceedings where duress in the context of family violence is in issue, Part 6 of the *Jury Directions Act 2015* specifies certain directions that may be given early in the trial. See 'Family Violence and Duress: Jury Directions' above and Directions under Jury Directions Act 2015.

121. At common law, the judge was required to direct the jury about duress if the evidence was such that it might lead a reasonable jury to decide that the accused committed the relevant act under duress (*R v Evans (No 1)* [1976] VR 517; *Taiapa v R* (2009) 240 CLR 95 [5]; *R v Harding* [1976] VR 129).

122. The question was whether, on the version of events most favourable to the accused that is suggested by the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the accused was not acting under duress (*Taiapa v R* (2009) 240 CLR 95 [5]. See also *Martin v R* (2010) 28 VR 579 [14]-[15]; *Rowan v The King* [2022] VSCA 236, [84] per Kyrou and Niall JJA).

123. Under the common law, the issue of duress could be raised at any time during the trial (*R v Zaharias* (2001) 122 A Crim R 586).

Content of the Charge

124. There is no single formulation that must be followed when charging a jury about duress (*Jury Directions Act 2015* s 6). What is required is instructions expressed with sufficient clarity that the jury could be left in no doubt with respect to the principles that they must apply to the task before them (*R v Zaharias* (2001) 122 A Crim R 586 [56]).

125. The burden of proof should be made very clear to the jury. They should be told that the accused can only be convicted if the prosecution has proved beyond reasonable doubt that he or she did not carry out the conduct under duress (*Crimes Act 1958* s 322I).

126. In most cases it is neither necessary nor desirable to explain every element of the defence in a charge (*R v Emery* (1978) 18 A Crim R 49, 56).

127. Judges should take care to instruct the jury in the context of the evidence and issues raised in the trial (R v Zaharias (2001) 122 A Crim R 586 [56]). The question of duress should be placed in its factual setting, and considerations that may assist the jury to reach its conclusion should be identified (see *R v Goldman (No 5)* [2004] VSC 292 [6]; *R v Emery* (1978) 18 A Crim R 49, 56–57).

128. While not a misdirection, the jury should not be told to examine the evidence relating to duress with great care and scrutiny (due to the ease with which it can be invented). The question whether an accused's claim that he or she was acting under duress is plausible enough to raise a reasonable doubt is exactly the kind of matter which juries are well-equipped to deal with, without the need for any special direction (*R v Goldman* [2007] VSCA 25 [30]).

Last updated: 17 April 2024

8.9.1 Preliminary Directions: Duress in the Context of Family Violence (Jury Directions Act 2015)

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This charge should be given, unless there are good reasons for not doing so, when:

i) the trial commences on or after 29 June 2015, and duress in the context of family violence is in issue;

ii) the offence was committed on or after 1 November 2014; and

iii) defence counsel (or the accused, if unrepresented) has requested that the jury be directed on family violence in accordance with s 58 of the Jury Directions Act 2015.

If the accused is unrepresented and does not request a direction on family violence, this charge can be given if it in the interests of justice to do so.

This charge must be given as soon as practicable after a request has been made in terms of s 58 of the *Jury Directions Act 2015* and may be given before any evidence is adduced in the trial.

Introduction

In this case, duress in the context of family violence [is/is likely to be] in issue. I therefore need to give you some directions about "duress" and "family violence".

The law recognises that sometimes people will be compelled to commit crimes to avoid threatened harm. The law says that a person may act under duress if:

- the person reasonably believes that a threat of harm has been made that will be carried out unless an offence is committed, and

[*If the accused is charged with murder, add the following shaded item*]

- the person believes that the threat was to inflict death or serious injury, and
- the person reasonably believes that their conduct is the only reasonable way to avoid the threatened harm, and
- the conduct is a reasonable response to the threat as the person perceives it, and
- the person did not voluntarily associate with the person making the threat for the purposes of carrying out violent conduct.

The law recognises that evidence of "family violence" may be relevant in deciding whether the accused acted under duress. "Family violence" includes all kinds of physical, sexual and psychological abuse by one family member towards another.

Examples of evidence of family violence include:

- The history of the relationship between family members, including violence by one family member towards any other family member.
- The overall effect of that violence, including any psychological effect, on the person who has been affected by family violence or the other family members.
- Social, cultural or economic factors that impact on the person who has been affected by family violence or the other family members.
- The general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser.

Evidence in this case is likely to include evidence of family violence committed by another person against [the accused/a third person].

Considerations

[*All or specified parts of the following shaded section must be included:*]

Family violence is not limited to physical abuse and can include sexual abuse and psychological abuse.

Family violence can involve intimidation, harassment and threats of abuse.

Family violence can consist of a single act.

Family violence can also consist of separate acts that form part of a pattern of behaviour. Those separate acts can, when looked at together, amount to abuse even though some or all of those acts may, when looked at separately, appear to be minor or trivial.

Experience shows that people may react differently to family violence and there is no typical, proper or normal response to family violence.

Experience also shows that it is not uncommon for a person who has been subjected to family violence to stay with an abusive partner after the family violence starts, or to leave and then return to the partner, or not to report family violence to police or seek assistance to stop family violence.

Experience also shows that family violence itself and cultural, social, economic and personal factors can influence decisions made by a person who is subjected to family violence about how to address the family violence or how to respond to or avoid it.

The law recognises that if the accused assaulted the victim on a previous occasion that does not mean that the accused could not have been acting under duress when [he/she] [i*nsert relevant conduct*].

Last updated: 23 September 2016

8.9.2 Charge: Statutory Duress (From 1/11/14)

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This charge should be given if there is evidence from which a jury might infer that the accused was acting under duress when s/he committed any offence on or after 1 November 2014.

The charge should be given immediately after directing the jury about the relevant offence.

Introduction

In this case the defence alleged that NOA was acting under duress when s/he [*insert relevant act*]. I therefore need to give you some directions about "duress".[1201]

The defence of duress was introduced into the law a long time ago to allow for human frailty. It recognises that sometimes ordinary people will be compelled to commit crimes to avoid threatened harm. When the defence of duress applies, the law excuses them from responsibility given the circumstances.

[1201] This charge only addresses the defence of duress. It is possible that the evidence in question may also have relevance to the determination of the elements (see, e.g. *R v Darrington* [1980] VR 353, 369–370; *R v Harding* [1976] VR 129).

This means that, even if you are satisfied that the prosecution has proven all of the elements of [*insert offence*] beyond reasonable doubt, NOA will not be guilty of that offence if s/he acted under duress.

Because the prosecution must prove the accused's guilt, it is for the prosecution to prove, beyond reasonable doubt, that NOA was not acting under duress. It is not for NOA to prove that s/he did act under duress.

Unfortunately, it is always difficult to give directions about duress in a way which completely avoids any suggestion that it is a matter for the accused to prove. However, it is important to remember that the accused does not have to prove anything. You must keep in mind at all times that it is the prosecution who must remove any reasonable possibility that the accused acted under duress.

So before you can find the accused guilty of [*insert offence*], you must be satisfied, beyond reasonable doubt, that the prosecution has proven all of the elements of the offence and has negated the defence of duress.

Elements of duress

There are five [*for murder:* six] ways in which the prosecution can negate the defence of duress. I will list them for you, and then examine each one in detail.[1202]

The prosecution must satisfy you beyond reasonable doubt of at least one of the following:

One, the accused did not reasonably believe that a threat of harm had been made.

[*If the accused is charged with murder, add the following shaded item*]

Two, the accused did not believe that the threat was to inflict death or serious injury.

[Two/Three], the accused did not reasonably believe that the threat would be carried out unless the offence was committed.

[Three/Four], the accused did not reasonably believe that his/her conduct in committing the offence was the only reasonable way to avoid the threatened harm.

[Four/Five], the accused's conduct in committing the offence was not a reasonable response to the threat.

[Five/Six], the accused voluntarily associated with the maker of the threat for the purposes of carrying out the violent conduct.

If the prosecution can prove any of these matters beyond reasonable doubt, then they will have negated the defence of duress. In such circumstances, if you are also satisfied that the prosecution has proven, beyond reasonable doubt, all of the elements of [*describe offence*], then s/he will be guilty of that offence.

I will now examine each of these matters in more detail.

Reasonable belief in a threat of harm

The first way the prosecution can negate the defence of duress is by proving that the accused did not reasonably believe that a threat of harm had been made.

The prosecution can prove this in one of two ways.

One – Has the prosecution proved that NOA did not believe that a threat of harm had been made?

[1202] If any of these methods of negating duress are not relevant in the circumstances of the case, they should be deleted and the charge modified accordingly.

For the purpose of this question, you must consider all NOA's personal characteristics and all the circumstances as he/she perceived them.

OR Two – If you decide that the accused might have believed that a threat of harm was made, has the prosecution proved that such a belief would not be reasonable?

When you are deciding whether NOA's belief was reasonable, you must consider whether a reasonable person, with such personal characteristics of the accused as might have affected his/her understanding of the circumstances, might have believed that a threat of harm had been made.

In doing this, you must consider the circumstances as a reasonable person, with the personal characteristics of the accused, would have perceived them to be.

[*If it is alleged that the accused was intoxicated, insert the direction relating to a 'reasonable belief' of the accused from either* 8.5.1 Charge: Statutory Intoxication (From 1/11/14) (Self-induced) *or* 8.5.2 Charge: Statutory Intoxication (From 1/11/14) (self-induced contested)*, as relevant.*]

[*Summarise arguments and evidence on NOA's relevant characteristics*].

[*If the threat was made against someone other than the accused, add the following shaded section.*]

The threat does not have to be a threat of harm to the accused [himself/herself]. Here, NOA says that the threat was [*describe threat*].

The prosecution alleged that the accused did not reasonably believe that a threat of harm had been made. [*Summarise prosecution arguments and evidence. The charge should clearly identify whether the argument is (i) that the accused did not believe that a threat was made; and/or (ii) that the accused's belief that a threat was made was not reasonable.*]

The defence denied this, arguing [*summarise defence evidence and/or arguments*].

Threat to inflict death or serious injury

[*If the accused is charged with murder, add the following shaded section.*]

The second way the prosecution can negate the defence of duress is by proving that that the accused did not believe that the threat was to inflict death or serious injury.

The prosecution alleged that that was the case here. [*Summarise prosecution arguments and evidence.*]

The defence denied this, arguing [*summarise defence evidence and/or arguments*].

Reasonable belief that the threat will be carried out unless the offence is committed

The [second/third] way the prosecution can negate the defence of duress is by proving that the accused did not reasonably believe that the threat would be carried out unless the offence was committed.

This requires the prosecution to prove that NOA did not reasonably believe that [*identify threatener*] would actually [*identify threat*] if s/he did not [*describe offence*].

Again, the prosecution can prove this in one of two ways.

One – Has the prosecution proved that NOA did not believe that the threat would be carried out unless the offence was committed?

Again, for this question, you must consider all NOA's personal characteristics and all the circumstances as he/she perceived them.

OR Two – If you decide that the accused might have believed that the threat would be carried out unless the offence was committed, has the prosecution proved that such a belief would not be reasonable?

When you are deciding whether NOA's belief was reasonable, you must consider whether a reasonable person, with such personal characteristics of the accused as might have affected his/her understanding of the circumstances, might have believed that the threat would be carried out unless the offence was committed.

When you are deciding whether NOA's belief was reasonable, you must consider the circumstances as a reasonable person with all the personal characteristics of the accused would have perceived them to be.

[*If it is alleged that the accused was intoxicated, insert the direction relating to a 'reasonable belief' of the accused from either* 8.5.1 Charge: Statutory Intoxication (From 1/11/14) (Self-induced) *or* 8.5.2 Charge: Statutory Intoxication (From 1/11/14) (self-induced contested)*, as relevant.*]

Remember, [*summarise arguments and evidence on NOA's relevant characteristics*].

One matter to consider is whether the perceived threat was still active at the time the accused committed the offence. If the prosecution can prove that the accused did not reasonably believe that the threat was still active at the time the offence was committed, the defence of duress will fail.

[*If the alleged threat was to commit harm in the future, add the following shaded section.*]

This does not mean that the threat must have been to harm [*identify threatened party*] immediately if NOA did not commit the offence. The defence of duress does not fail simply because the threat was to harm [him/her/someone else] in the future. The issue here is whether the accused reasonable believed that the threat – whatever its nature – was still active at the time the crime was committed.

[*If the threatener may not have been present at the time the offence was committed, add the following shaded section.*]

This does not mean that the person who made the threat must have been present when the offence was committed. The issue is whether the accused reasonably believed that the threat was still present and continuing at that time. Threats can still be active, even if the person who made them is not physically present.

[*Summarise prosecution arguments and evidence. The charge should clearly identify whether the argument is (i) that the accused did not actually believe that the threat would be carried out; and/or (ii) that the accused's belief was not reasonable.*]

The defence denied this, arguing [*summarise defence evidence and/or arguments*].

Reasonable belief that committing offence was the only reasonable way to avoid the threatened harm

The [third/fourth] way the prosecution can negate the defence of duress is by proving that the accused did not reasonably believe that his/her conduct in committing the offence was the only reasonable way to avoid the threatened harm.

Again, the prosecution can prove this in one of two ways.

One – Has the prosecution proved that NOA did not believe that committing the offence was the only reasonable way to avoid the threatened harm?

Again, for this question, you must consider all NOA's personal characteristics and all the circumstances as he/she perceived them.

OR Two – If you decide that the accused might have believed that committing the offence was the only reasonable way to avoid the threatened harm, has the prosecution proved that such a belief would not be reasonable?

When you are deciding whether NOA's belief was reasonable, you must consider whether a reasonable person, with such personal characteristics of the accused as might have affected his/her understanding of the circumstances, might have believed that the threat would be carried out unless the offence was committed.

When you are deciding whether NOA's belief was reasonable, you must consider the circumstances as a reasonable person with all the personal characteristics of the accused would have perceived them to be.

[*If it is alleged that the accused was intoxicated, insert the direction relating to a 'reasonable belief' of the accused from either* 8.5.1 Charge: Statutory Intoxication (From 1/11/14) (Self-induced) *or* 8.5.2 Charge: Statutory Intoxication (From 1/11/14) (self-induced contested)*, as relevant.*]

Remember, [*summarise arguments and evidence on NOA's relevant characteristics*].

The prosecution argue that NOA could have [*describe the actions the accused could have taken to prevent the threat, e.g.* "escaping when…" *or* "reporting the matter to the police"].

For the prosecution to succeed on this basis, it is not enough to prove that NOA could have [*describe action*]. The prosecution must prove that no reasonable person, with those characteristics of the accused might have affected his/her understanding of the circumstances, could think that committing the offence was the only reasonable way to avoid the threatened harm.

You should take into account the fact that there may not have been time for calm and measured consideration in the circumstances.

[*Where the accused's knowledge of the threatener's reputation may have influenced his or her response, add the following shaded section.*]

In determining this issue, you should consider the nature of the threats made, as well as NOA's knowledge of the character and reputation of [*identify threatener*].

[*Summarise prosecution arguments and evidence.*] The defence denied this, arguing [*insert defence arguments and evidence*].

Reasonable response to the threat

Warning! There is little to no Victorian jurisprudence on this element. Please refer to 8.9 Statutory Duress (From 1/11/14).

The [fourth/fifth] way the prosecution can negate the defence of duress is by proving that the accused's conduct in committing the offence was not a reasonable response to the threat.

In deciding this issue, it does not matter if NOA was mistaken in his/her perception of the threat. You must look at the threat which NOA believed s/he faced. You must then consider whether NOA's conduct was a reasonable response to that perceived threat.

In determining this issue, you should consider the nature and seriousness of the threat as NOA perceived it and the proportionality of the crime committed to that threat. You should also take into account anything that NOA knew about [*identify threatener*], which may have affected how s/he perceived the threat.

In this case the prosecution alleged that, in the circumstances, it was not reasonable to respond to the perceived threat in the way NOA did. [*Summarise prosecution arguments and evidence*]. The defence denied this, arguing [*summarise defence argument and evidence*].

Again, you should take into account the fact that there may not have been time for calm and measured consideration in the circumstances.

[*If it is alleged that the accused was intoxicated, insert the direction relating to a 'reasonable response' of the accused from either* 8.5.1 Charge: Statutory Intoxication (From 1/11/14) (Self-induced) *or* 8.5.2 Charge: Statutory Intoxication (From 1/11/14) (self-induced contested)*, as relevant.*]

Voluntary association with the maker of the threat

Warning! There is no Victorian jurisprudence on this element yet. Judges should seek submissions from counsel when directing the jury about this element.

The [fifth/sixth] way the prosecution can negate the defence of duress is by proving that that the accused voluntarily associated with the maker of the threat for the purposes of carrying out the violent conduct involved in [*insert the accused's alleged offence*].[1203]

This will be the case if, for example, the accused voluntarily joined or associated with an organisation, or became party to an enterprise knowing of its purpose to carry out [*specify the violent conduct allegedly carried out*]. In such circumstances, the accused cannot rely on duress as a defence to any offences s/he commits in response to threats arising out of his/her association with the organisation, or his/her participation in the enterprise. Because s/he voluntarily put him/herself in a position where such threats could be made, s/he is held responsible for the consequences.

[*If the accused may have been coerced into joining the relevant organisation or enterprise, or may not have known of its violent purpose, or if the association may have been for a different purpose than to carry out the conduct allegedly committed, add the following shaded section.*]

It is important to note that the prosecution can only negate the defence of duress this way if it proves that the accused voluntarily exposed himself/herself to the duress. This will not be the case if s/he [was coerced into joining the organisation or enterprise in the first place/did not know that the organisation or enterprise s/he was joining had a violent purpose/joined the organisation or enterprise for a different purpose than to carry out] [*specify the violent conduct allegedly carried out*].

In this case the prosecution alleged that NOA voluntarily exposed himself/herself to duress by [*summarise prosecution arguments and evidence.*] The defence denied this, arguing [*summarise defence arguments and evidence*].

Family Violence

[*If there is evidence of family violence involving the accused and the person making the threat, add the following shaded section. If the existence or extent of family violence is in issue, this direction will need to be modified to account for the prosecution's onus of disproving the reasonable possibility that the accused had been subject to family violence.*[1204]]

In this case you have heard evidence of family violence between NOA and [*identify the person making the threat*]. [*Insert evidence and/or arguments.*]

The law says that where the accused has allegedly [*insert relevant act*] in circumstances where family violence is alleged, the following matters may be relevant to deciding whether the prosecution has negated the defence of duress:

[1203] See 8.9 Statutory Duress (From 1/11/14), it is currently unclear whether the purpose of the association must be to carry out the violent conduct allegedly committed, or whether association for the purposes of carrying out any kind of violent conduct will negate the defence.

[1204] For criminal proceedings where duress in the context of family violence is in issue, Part 6 the *Jury Directions Act 2015* applies and certain preliminary directions may need to be given to the jury (see *Jury Directions Act 2013*, ss 58–60). See 8.9.1 Preliminary Directions: Duress in the Context of Family Violence (Jury Directions Act 2015).

[*Where there is evidence of one or more of the following matters (listed in* Crimes Act 1958 *s 322J(1), the judge should identify the evidence and relate it to the facts in issue:*

(a) The *history of the relationship* between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;

(b) The *cumulative effect*, including psychological effect, on the person or a family member of that violence;

(c) *Social, cultural or economic factors* that impact on the person or a family member who has been affected by family violence;

(d) The general *nature and dynamics* of relationships affected by family violence, including the possible consequences of separation from the abuser;

(e) The *psychological effect of violence* on people who are or have been in a relationship affected by family violence;

(f) *Social or economic factors* that impact on people who are or have been in a relationship affected by family violence.]

In this case, the defence has submitted that this evidence shows that NOA was acting under duress when s/he [*insert relevant act and arguments*]. The prosecution denied this was the case, alleging [*insert relevant evidence and/or arguments*].

Summary

To summarise, even if you decide that all of the elements of [*insert offence*] have been proven beyond reasonable doubt, you may find that NOA was not guilty of that offence because s/he was acting under duress.

Before you can find NOA guilty of [*insert offence*], you must therefore be satisfied not only that all of the elements have been proved, but also that the prosecution has proven, beyond reasonable doubt, at least one of the following five [*for murder:* six] matters:

One – that the accused did not reasonably believe that a threat of harm had been made;

[*If the accused is charged with murder*]

Two – that the accused did not believe that the threat was to inflict death or serious injury;

[Two/Three] – that the accused did not reasonably believe that the threat would be carried out unless the offence was committed;

[Three/Four] – that the accused did not reasonably believe that his/her conduct in committing the offence was the only reasonable way to avoid the threatened harm;

[Four/Five] – that the accused's conduct in committing the offence was not a reasonable response to the threat; or

[Five/Six] – that the accused voluntarily associated with the maker of the threat for the purposes of carrying out the violent conduct.

If the prosecution cannot prove at least one of these matters beyond reasonable doubt, then you must find NOA not guilty of [*insert offence*].

Last updated: 4 August 2016

8.10 Statutory Duress (23/11/05–31/10/14)

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Introduction

1. Prior to 2005, duress in Victoria was governed solely by the common law. This situation has been altered by the *Crimes (Homicide) Act 2005* and the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*, which introduced duress provisions into the *Crimes Act 1958*. These provisions were s 9AG, now repealed, and s 322O respectively.
2. This topic covers the defence of duress in s 9AG of the *Crimes Act 1958*, which applies to homicide offences committed on or after 23 November 2005 and before 1 November 2014.[1205]
3. Section 322O of the *Crimes Act 1958* applies to all offences committed on or after 1 November 2014. See 8.9 Statutory Duress (From 1/11/14).
4. The common law defence of duress applies to non-homicide cases committed before 1 November 2014, and to all offences committed before 23 November 2005. See 8.11 Common Law Duress and 'Common Law Duress' below.

Section 9AG of the Crimes Act 1958

5. Section 9AG of the *Crimes Act 1958* states:

[1205] If the date of the victim's death differs from the date on which the *actus reus* was committed, the relevant date for determining whether the provisions of the *Crimes (Homicide) Act 2005* apply is the date of death (*R v Gould* (2007) 17 VR 393; [2007] VSC 420).

Duress

(1) A person is not guilty of a relevant offence in respect of conduct carried out by him or her under duress.

(2) A person carries out conduct under duress if and only if the person reasonably believes that–

(a) subject to sub-section (3), a threat has been made that will be carried out unless an offence is committed; and

(b) carrying out the conduct is the only reasonable way that the threatened harm can be avoided; and

(c) the conduct is a reasonable response to the threat.

(3) However, a person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.

(4) This section only applies in the case of murder if the threat is to inflict death or really serious injury.

Note: See section 9AH for evidentiary provisions where family violence is alleged.

Common Law Duress

6. Section 9AG of the *Crimes Act 1958* applies only to homicide offences committed on or after 23 November 2005 and before 1 November 2014.
7. Subdivision 1AAA of the *Crimes Act 1958*, including section 9AG, was introduced by the *Crimes (Homicide) Act 2005*. It had the effect of abrogating common law defences, including duress, to homicide offences and replacing them with statutory versions (*Babic v The Queen* (2010) 28 VR 297 [52]).
8. The common law defence of duress applies to non-homicide cases committed before 1 November 2014, and to all offences committed before 23 November 2005.
9. If the accused is charged with both homicide and non-homicide offences committed before 1 November 2014, it will be necessary to give multiple directions about duress. The jury will need to be charged about statutory duress in relation to the homicide charges, and common law duress in relation to any other charges (see *R v Parr* (2009) 21 VR 590; *R v Pepper* (2007) 16 VR 637; *DPP v McAllister* [2007] VSC 315 for similar issues that arise in the context of self-defence).
10. Statutory duress has replaced the common law defence for all offences committed on or after 1 November 2014 (*Crimes Act 1958* s 322Q). See 8.9 Statutory Duress (From 1/11/14).

Duress: Voluntariness and Intent

11. Under s 9AG, a person carries out conduct under duress if he/she reasonably believes that the conduct is a reasonable response to a perceived threat of harm that will be carried out if the offence is not committed (*Crimes Act 1958* s 9AG).
12. As duress implies a deliberate choice to break the law (although under constrained circumstances), it is incorrect to treat duress as related to voluntariness or intention (see *R v Palazoff* (1986) 43 SASR 99, 105; *R v Harding* [1976] VR 129, 141, 169).
13. However, where duress is available as a defence, the accused will have a complete defence to the relevant homicide offence charged (*Crimes Act 1958* s 9AG(1)).

14. The defence of duress therefore operates to excuse a person who acts voluntarily and deliberately, but under compulsion (see *DPP v Parker* [2016] VSCA 101 [54]).

Relevant Offences

15. Duress under s 9AG is a defence to murder, manslaughter or defensive homicide (*Crimes Act 1958* ss 9AG(1), 9AB).

16. In the case of murder, the defence only applies if 'the threat is to inflict death or really serious injury' (*Crimes Act 1958* s 9AG(4)).

17. In contrast, at common law, duress is not available as a defence to murder or to some forms of treason. For more information, see 8.11 Common Law Duress.

Onus of Proof

18. Under the common law, it is for the prosecution to prove, beyond reasonable doubt, that the accused was not acting under duress (*R v Smyth* [1963] VR 737; *R v Harding* [1976] VR 129; *R v Emery* (1978) 18 A Crim R 49; *R v Zaharias* (2001) 122 A Crim R 586; *R v Garde–Wilson* [2005] VSC 441 [32], [37]).

19. This is sometimes expressed as requiring the prosecution to eliminate any reasonable possibility that the accused acted under duress (*R v Abusafiah* (1991) 24 NSWLR 531).

20. Nothing in the duress and related provisions of the *Crimes Act 1958* (Division 1, Part (1AA) 'Exceptions to Homicide Offences') indicates that the common law approach to the onus of proof was changed with respect to homicide offences committed from 23 November 2005 and 31 October 2014.

Elements of Statutory Duress

21. To prove the accused did not act under duress, the prosecution must disprove one or more of the following five elements:

    i) The accused reasonably believes that a threat of harm has been made;

    ii) The accused reasonably believes that the threat will be carried out unless an offence is committed;

    iii) The accused reasonably believes that carrying out the conduct is the only reasonable way the threatened harm can be avoided;

    iv) The accused reasonably believes that the conduct is a reasonable response to the threat;

    v) The threat was not made by or on behalf of a person with whom the accused is voluntary associating for the purpose of carrying out violent conduct.

22. The meaning of 'reasonably believes' and each of these five elements is discussed below.

The meaning of 'reasonably believes' under s 9AG

Subjective and objective aspects

23. Under s 9AG, reasonable belief means that:

    - The accused in fact has the belief (a subjective aspect); and

- The belief is reasonable, determined by reference to whether 'a reasonable person possessing the personal characteristics of the accused that might have affected the accused's appreciation of the circumstances might have held that belief' (a subjective and objective aspect) (*DPP v Parker* [2016] VSCA 101 [8]; see also [44], [47]–[49], [52], [59]).

24. The Court of Appeal has held that:

> The phrase 'the person reasonably believes' in its natural meaning requires regard be had to the characteristics of the accused. The words connote what an accused might reasonably believe in the circumstances in which the accused found himself or herself having regard to the personal characteristics of the accused. They encompass the subjective belief of the accused, informed by the personal characteristics of the accused with an objective overlay in the form of reasonableness which allows community standards to be taken into account when assessing the culpability of an accused (*DPP v Parker* [2016] VSCA 101 [58]).

Assessing reasonableness – Characteristics of the accused

25. As noted above, when determining whether a belief is reasonable, the court must take into account any characteristics of the accused that might have affected his or her appreciation of the circumstances (*DPP v Parker* [2016] VSCA 101 [8]).

26. Evidence of family violence, where duress in the context of family violence is in issue, is expressly allowed to be taken into account for this purpose (*Crimes Act 1958* s 9AH(2)(c)). That means that the effects of family violence may bear on a person's belief and its reasonableness (*DPP v Parker* [2016] VSCA 101 [44], [53]). See 'Duress and Family Violence' below for more information.

27. Other relevant characteristics of the accused that may have affected his or her perception of circumstances include his or her sex and maturity, as was the position at common law (see *DPP v Parker* [2016] VSCA 101 [27]), along with the history of the relationship between the accused and the threatener (*Rowan v The King* [2022] VSCA 236, [180]).

28. At common law, features such as history of sexual abuse of the accused by someone other than the threatener, or intellectual disability of the accused, are not imputed to the ordinary person for the purpose of assessing whether a person of ordinary firmness would have been likely to yield to the threats (*Rowan v The King* [2022] VSCA 236, [180]).

29. However, self-induced intoxication is expressly excluded as a characteristic of the accused that may be taken into account in determining the reasonableness of a belief under the duress provision in s 9AG. In determining whether a reasonable belief existed, the relevant standard is a person who is not intoxicated (*Crimes Act 1958* s 9AJ). See 'Duress and Intoxication' below for more information.

Assessing reasonableness – Circumstances of the accused

30. The jury is required to assess the reasonable belief elements of duress under s 9AG(2) 'by reference to the circumstances as a reasonable person, possessing the personal characteristics of the accused, would have perceived them to be' (*DPP v Parker* [2016] VSCA 101 [8]).

(i) Reasonable belief that a threat of harm has been made

31. The first matter the jury should consider is whether the prosecution has shown that the accused did not reasonably believe that a threat of harm was made (*Crimes Act 1958* s 9AG(2)(a)).

32. As noted above, this requires considering whether the accused subjectively believed a threat was made and whether this belief was objectively reasonable. See 'The meaning of "reasonably believes" under s 9AG' above.

33. The common law requirements for duress included that a threat was made. In contrast, s 9AG(2)(a) of the *Crimes Act 1958* requires the accused to reasonably believe that a threat of harm has been made.

34. This threat may be unstated or inferred from the whole the circumstances facing the accused, including the words and actions of the allegedly threatening party, along with the history of the relationship between the parties, and the reputation of the third party (see, e.g., *R v Rowan* [2024] HCA 9, [42]-[62]; *DPP v Lynch* [19775] AC 653, 704-705; *R v Emery* (1978) 18 A Crim R 49, 51; *R v Harding* [1976] VR 129, 161).

35. In *R v Rowan* [2024] HCA 9, the High Court held that "evidence of pervasive violence, intimidation, control and sexual abuse … raised a reasonable possibility that any express or implicit demand … carried with it the implication that serious violence and more severe sexual abuse would be inflicted … if [the accused] refused" (at [62]).

36. Such a process of inferring a threat does not involve recognition of a principle of 'duress of circumstances', where a person commits an offence to escape or avoid dangerous conditions (see *R v Rowan* [2024] HCA 9).

37. This part of duress does not consider the level of harm threatened. That is a matter considered as part of the fourth element: whether the accused reasonably believed that the conduct was a reasonable response to the threat (*Crimes Act 1958* s 9AG(2)(c)).

38. In addition, in cases of murder, the accused must believe the threat is of death or really serious injury (*Crimes Act 1958* s 9AG(4)).

39. Under the common law, the relevant threat was not limited to threats made against the accused but to 'a human being' (see, eg, *R v Hurley* [1967] VR 526, 543 (Smith J); *R v Harding* [1976] VR 129, 169 (Murphy J); *R v Emery* (1978) 18 A Crim R 49, 55-56; *R v Dawson* [1978] VR 536, 538, 541; *R v Abusafiah* (1991) 24 NSWLR 531, 537). There is no reason to assume that s 9AG of the *Crimes Act 1958* has narrowed the class of people who may be threatened for the purpose of this defence.

(ii) Reasonable belief that the threat will be carried out unless an offence is committed

40. The second matter the jury should consider is whether the prosecution has shown that the accused did not reasonably believe that the threat of harm would be carried out unless an offence was committed (*Crimes Act 1958* s 9AG(2)(a)).

41. This is equivalent to the common law element that the accused must have reasonably apprehended that the threat would be carried out (see *R v Hurley* [1967] VR 526, 543 (Smith J); *R v Emery* (1978) 18 A Crim R 49, 55, 57).

42. As noted above, this requires considering whether the accused subjectively believed that the threat would be carried out unless an offence is committed and whether this belief was objectively reasonable. See 'The meaning of "reasonably believes" under s 9AG', above.

43. At common law, the person posing the threat of harm must have demanded that the accused committed the particular offence with which he or she is charged (*R v Dawson* [1978] VR 536, 538; *R v Lorenz* (1998) 146 FLR 369, 376-7; see also *R v Martin* (2010) 28 VR 579 [10]-[12]). For this purpose, a demand may be made expressly, or by implication, such as where the accused reasonably believes that the threatener will inflict some harm whenever the accused fails to comply with the threatener's demands (see *Rowan v The King* [2022] VSCA 236, [169], [174] per Kyrou and Niall JJA; *R v Rowan* [2024] HCA 9, [52]-[62]).

44. As explained in 8.11 Common Law Duress, at common law duress was not available to an accused who had escaped from prison following a threat on his life by another inmate. The accused had chosen to escape contrary to the wishes of the threatener, rather than on their instruction, so the escape was not the 'particular offence nominated by the person making the threats' (*R v Dawson* [1978] VR 536, 538; c.f. *R v Rowan* [2024] HCA 9 at [102]-[104] per Edelman J).

45. However, in *R v Rowan* [2024] HCA 9, Edelman J held at [97]-[111] that there the defence of duress (whether at common law or under s 322O) does not require the threatener to issue a demand or direction. Instead, any demand or direction is only relevant to the question whether the offending is a reasonable response to the threat. This conceptual approach to the issue of demand or direction was not adopted by the plurality, who resolved the case on the basis that a threat need not be express.

(iii) Reasonable belief that carrying out the conduct is the only reasonable way to avoid the threatened harm

46. Section s 9AG(2)(b) states that conduct will be carried out under duress only if the accused reasonably believes that carrying out the conduct is the only reasonable way that the threatened harm can be avoided.

47. As noted above, this requires considering whether the accused subjectively believed that carrying out the conduct was the only reasonable way to avoid the threatened harm and whether this belief was objectively reasonable. See 'The meaning of "reasonably believes" under s 9AG', above.

48. When considering this issue, the jury should consider whether the accused knowingly passed up a reasonable opportunity to negate or nullify the threat.

49. For example, an opportunity to escape may be a reasonable way to avoid the threatened harm in some circumstances, but would not necessarily make the threat ineffective in others. If the threat involved harm to be inflicted in the future, for example, or to someone other than the accused, failing to take an opportunity to escape would not necessarily prevent the accused from relying on the defence (see *R v Abusafiah* (1991) 24 NSWLR 531, 538).

50. Similarly, an opportunity to report the threat to the police may be a reasonable way to avoid the threatened harm, unless the accused reasonably believed police protection to be ineffective against the person making the threats or that the police protection may be initially effective but would not save the accused from threatened violence at a later stage. This may be the case where family violence is in issue, for example (see *R v Runjanjic* (1991) 56 SASR 114, 120–122; *R v Lorenz* (1998) 146 FLR 369, 376).

51. In considering whether the accused reasonably believed that carrying out the conduct was the only reasonable way to avoid the threatened harm, the jury should consider the accused's knowledge of the character and reputation of the person perceived to have made the threat, as well as the nature of the perceived threat (see, e.g. *R v Abusafiah* (1991) 24 NSWLR 531, 534–535). This may be relevant in the context of family violence, see 'Duress and Family Violence' below for more information.

52. Family violence may influence the accused's belief in the availability of opportunities to escape, report, or otherwise avoid the harm, and the reasonableness of that belief (*R v Runjanjic* (1991) 56 SASR 114; *Rowan v The King* [2022] VSCA 236, [187] (Kyrou and Niall JJA)). See 'Duress and Family Violence' below for more information.

53. Under the common law, the threat must have been 'present, continuing, imminent and impending'. It was the threat rather than the harm threatened that must have been present, continuing and imminent; that is, the compulsion of the threat must have been active at the time the offence was committed (*R v Hurley* [1967] VR 526, 543 (Smith J); *R v Emery* (1978) 18 A Crim R 49, 55–57; *R v Dawson* [1978] VR 536, 537–538, 541).

54. Under the *Crimes Act 1958*, this is no longer a discrete requirement. However, where the accused knows that a threat has expired, he or she is unlikely to be able to reasonably believe that carrying out the conduct is the only reasonable way that the threatened harm can be avoided.

55. Under the common law, the threat must have induced the accused to commit the offence (*R v Hurley* [1967] VR 526, 543 (Smith J); *R v Dawson* [1978] VR 536, 538, 541). If the accused had an alternative motive to commit the offence, it was less likely that the threat induced the accused to commit it (see *R v Zaharias* (2001) 122 A Crim R 586 [42]–[44]).

56. It seems unlikely that the accused could reasonably have believed that the conduct was the only reasonable way to avoid the threatened harm if the threat did not directly provoke the commission of the offence. However, s 9AG(2)(b) does not use the language of the threat 'inducing' the accused to act, and the courts have not considered whether the section retains this common law element.

(iv) Reasonable belief that the conduct is a reasonable response to the threat

57. Section s 9AG(2)(c) states that conduct will be carried out under duress if and only if the accused reasonably believes the conduct is a reasonable response to the threat.

58. As noted above, this requires considering whether the accused subjectively believed that the conduct was a reasonable response to the threat and whether this belief was objectively reasonable. See 'The meaning of "reasonably believes" under s 9AG', above.

Response to which threat?

59. Section 9AG(2)(c) refers to 'the threat'.

60. For the purpose of deciding whether the accused subjectively believed that his/her conduct was a reasonable response to the threat, the relevant threat will be the threat as perceived by the accused.

61. However, for the purposes of deciding whether the accused's belief was reasonable, the relevant circumstances are those a reasonable person, possessing the personal characteristics of the accused, would have perceived them to be (*DPP v Parker* [2016] VSCA 101 [8], [58]).

62. Therefore, for the purposes of determining the reasonableness of the accused's belief, the threat in question is the one a reasonable person, possessing the personal characteristics of the accused, would have perceived it to be.

Proportionality of the response to the threat

63. Under other statutory tests requiring a response to be reasonable (e.g. the self-defence provisions in s 322K(2)(b) of the *Crimes Act 1958*, s 418(2) of the *Crimes Act 1900* (NSW) and s 10.4(2) of the *Commonwealth Criminal Code*), the reasonableness of the response should also be assessed in terms of the proportionality of the conduct to the perceived situation (*Flanagan v R* [2013] NSWCCA 320 [78]–[79]; *Oblach v R* (2005) 65 NSWLR 75 [51]–[54]; *R v Katarzynski* [2002] NSWSC 613 [23]).

64. These tests differ from s 9AG(2)(c), as they do not consider the reasonableness of the response in terms of the accused's beliefs. However, it is likely that the proportionality of the conduct to the perceived threat will be relevant in determining the reasonableness of the accused's belief that his/her conduct was a reasonable response to the threat under s 9AG(2)(c).

65. Under the common law, the relevant question is whether a person of ordinary firmness would have been likely to yield to the threat in the way the accused did (*R v Hurley* [1967] VR 526; *R v Zaharias* (2001) 122 A Crim R 586; *R v Dawson* [1978] VR 536; *R v Garde–Wilson* [2005] VSC 441 [32]).

66. This question may also be relevant in determining the reasonableness of the accused's belief that his/her conduct was a reasonable response to the threat.

67. As part of this test, the 'person of ordinary firmness' is taken to have the accused's characteristics, such as age, gender, history and relationship with the threatener, and was placed in the same objective circumstances as the accused, including any circumstances of family violence (*Rowan v The King* [2022] VSCA 236, [73], [180] (Kyrou and Niall JJA)).

68. Under the common law, the same test (whether a threat of that nature would be likely to compel a person of ordinary firmness to commit the crime) applies where the threat is not against the accused personally but, for example, the accused's family is threatened instead (*R v Abusafiah* (1991) 24 NSWLR 531, 537). The jury can take into account factors such as the strength of the accused's attachment to the third party (see, e.g. *R v Hurley* [1967] VR 526, 542–543 (Smith J)). These factors are likely to remain relevant to assessing the reasonableness of the accused's response under s 9AG(2)(c).

Family violence

69. Under the common law, expert evidence on 'battered women's syndrome' is admissible in deciding whether a woman of reasonable firmness in the domestic situation of the accused women would have acted the way she did, or to explain why a women of reasonable firmness in the accused's position would not escape the situation rather than participate in criminal activity (*R v Runjanjic* (1991) 56 SASR 114, 120–122; see also R v Lorenz (1998) 146 FLR 369, 376).

70. The *Crimes (Homicide) Act 2005* that introduced the duress provision, s 9AG, into the *Crimes Act 1958* also introduced family violence provisions that specifically stated that evidence of family violence may be relevant in deciding whether conduct was carried out under duress. See 'Duress and Family Violence' below for more information.

71. The Court of Appeal has noted that evidence of family violence 'may go to subjective belief or objective reasonableness and so be used in determining whether or not the actions taken by an accused were a reasonable response to the threat' (*DPP v Parker* [2016] VSCA 101 [40]).

72. Therefore evidence of family violence that bears on the accused's perception of the threat will be relevant. As at common law, this presumably includes the accused's knowledge of the character and reputation of the person making the threat (see *R v Abusafiah* (1991) 24 NSWLR 531, 534–535).

73. Additionally, personal characteristics of the accused that might have affected his or her appreciation of the circumstances must be taken into account (see 'The meaning of 'reasonably believes' under s 9AG' above). Therefore, the effects of family violence that may have affected the particular accused's response, such as the long term psychological impact of coercive and controlling violence will also be relevant when assessing the reasonableness of that response to the perceived threat.

(v) Voluntary association with the maker of the threat

74. The accused's conduct is not carried out under duress if the threat compelling the conduct is made by or on behalf of a person with whom the accused is 'voluntarily associating for the purpose of carrying out violent conduct' (*Crimes Act 1958* s 9AG(3)).

75. Section 9AG (3) applies to voluntary association, which in this context means where the accused freely chose to associate, without being subject to threats or other coercion, into associating with the person making the threat.

76. Section 9AG (3) is similar to the common law condition: 'the accused did not, by fault on his part when free from the duress, expose himself to its application' (*R v Hurley* [1967] VR 526, 543; *R v Emery* (1978) 18 A Crim R 49, 55–56; *R v Dawson* [1978] VR 536, 538, 541). Under the common law the accused cannot rely on the defence if he or she freely chose to associate with any criminal organisation or became a party to a criminal enterprise (see *R v Palazoff* (1986) 43 SASR 99, 101 (Zelling ACJ)).

77. Under s 9AG(3), however, there is the additional requirement that the organisation or enterprise was intended to carry out violent conduct. It will not apply when the accused has associated with others for the purposes of committing non-violent conduct or offences.

78. Section 9AG(3) does not state clearly whether duress is excluded following association for the purpose of any violent conduct. As a matter of prudence, this charge book adopts the approach that s 9AG (3) is not engaged where the accused is compelled under duress to commit violent conduct which is different from that which formed the purpose of the voluntary association with the other person.

79. This is an approach similar to that taken under the Commonwealth Criminal Code s 10.2(3)), which states: '[duress] does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.'

80. However, caution should be exercised in relation to this issue as Victorian courts have not considered s 9AG(3).

Duress and Murder

81. Where the accused is charged with murder, the defence of duress under s 9AG will only apply if 'the threat is to inflict death or really serious injury' (s 9AG(4)).

82. Section 9AG(4) refers to 'the threat' and is separated from the elements relating to the accused's beliefs in s 9AG(2). There are two possible interpretations available for the term 'the threat' in s 9AG(4):

    - It refers to the threat as perceived by the accused (the subjectively perceived threat);
    - It refers to the threat which the jury considers objectively existed (the objective threat).

83. In favour of the subjectively perceived threat approach, the reference to 'the threat' and the position of those words in the section suggest that it is pointing back to the threat referenced in s 9AG(2)(a), which the accused reasonably believed would be carried out unless an offence was committed.

84. In favour of the objective threat approach, it is relevant to note that s 9AG(4) differs in wording from its replacement provision s 322O(4) (s 322O is the duress provision that applies to offences committed on or after 1 November 2014). Section 9AG(4) states that duress applies to murder only 'if the threat is to inflict death or really serious injury', while s 322O(4) states that duress applies to murder only 'if the person believes that the threat is to inflict death or really serious injury.'

85. As a matter of prudence, the model charge adopts the subjectively perceived threat approach, as this presents the lower risk of injustice to an accused.

86. The subjectively perceived threat approach means that the jury should ask whether the threat as perceived by the accused was to inflict death or really serious injury.

87. However, the wording of s 9AG(4) does not indicate that the accused belief about the nature of the threat must reasonable. This threshold requirement in the case of a murder charge therefore appears to be purely subjective.

88. A judge will only need to direct a jury about this threshold requirement in cases of murder.

89. Under the common law, duress was not available on a charge of murder (although it may have been available where the accused did not do the actual killing). However, s 9AG of the *Crimes Act 1958* relates to homicide offences, including murder, committed on or after 23 November 2005 and before 1 November 2014.

Duress and Intoxication

90. Sections 9AJ(1) and (3) of the *Crimes Act 1958* state that:

> (1) If any part of an element of a relevant offence, or of a defence to a relevant offence, relies on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated. …
>
> (3) If any part of an element of a relevant offence, or of a defence to a relevant offence, relies on reasonable response, in determining whether that response was reasonable, regard must be had to the standard of a reasonable person who is not intoxicated.

91. Section 9AJ(1) means that any self-induced intoxication by the accused cannot be taken into account in deciding whether he/she holds a reasonable belief. For the purposes of the duress provision in s 9AG, this means that self-induced intoxication cannot be taken into account in deciding the reasonableness of the accused's beliefs that:

    - a threat has been made;
    - the threat will be carried out unless an offence is committed;

- carrying out the conduct is the only reasonable way that the threatened harm can be avoided, and
- the conduct is a reasonable response to the threat.

92. Additionally, s 9AJ(3) means that any self-induced intoxication by the accused cannot be taken into account in deciding whether his/her conduct was a reasonable response to the threat.

93. Section 9AJ(4) provides that where the intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned. See ss 9AJ(5)–(6) for the definition of 'self-induced intoxication'.

94. For more information, see 8.5 Statutory Intoxication (From 1/11/14) (23/11/05–31/10/14).

Duress and Family Violence

95. The *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* introduced provisions concerning 'family violence' into the *Crimes Act 1958* (Division 1, Part (1AA) 'Exceptions to Homicide Offences').

96. Section 9AH of the *Crimes Act 1958* and Part 6 of the *Jury Directions Act 2015* explain how evidence of family violence may be relevant to whether conduct was carried out under duress.

97. Section 9AH(4) defines family violence "in relation to a person" as "violence against that person by a family member".

98. A person's "family member" is defined broadly in s 9AH(4) and includes:

- a person who is or has been married to the person;
- a person who has or has had an intimate personal relationship with the person;
- a person who is or has been the father, mother, step-father or step-mother of the person;
- a child who normally or regularly resides with the person;
- a guardian of the person; and
- another person who is or has been ordinarily a member of the household of the person.

99. "Violence" is also defined broadly in s 9AH(4) to mean:

- physical abuse;
- sexual abuse;
- psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to:
    - intimidation;
    - harassment;
    - damage to property;
    - threats of physical abuse, sexual abuse or psychological abuse;
    - in relation to a child:
        - causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
        - putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

100. A single act may amount to 'abuse' for the purpose of the definition of violence (s 9AH(5)). A number of acts that form part of a pattern of behaviour may also amount to "abuse" for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial (s 9AH(5)).

101. Section 9AH(2) provides that evidence of family violence may be relevant in determining whether a person has carried out conduct under duress, in circumstances where duress in the context of family violence is in issue (*Crimes Act 1958* s 9AH2).

102. Section 9AH(3) sets out evidence of family violence, including evidence of:

> (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
>
> (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
>
> (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
>
> (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
>
> (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
>
> (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

103. See 'Chapter 4: Evidence of Relationship and Family Violence' in the Victorian Law Reform Commission's Defences to Homicide: Final Report for a more detailed discussion of the relationship between duress and family violence, and the use which can be made of the evidence outlined above.[1206]

Family Violence and Duress: Jury Directions

104. The *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* introduced a new Part 7 into the *Jury Directions Act 2013*. On 29 June 2015, these provisions were revised and relocated to Part 6 of the *Jury Directions Act 2015*.

105. Part 3 of the *Jury Directions Act 2015* does not apply to Part 6 of the Act.

106. Part 6 of the *Jury Directions Act 2015* applies to any trial commencing on or after 29 June 2015, regardless of the date of any alleged offence.

107. For the purposes of Part 6, "family violence" has the same meaning as in s 9AH(4) of the *Crimes Act 1958* (see 'Duress and Family Violence' above).

108. The trial judge must give the jury preliminary directions on family violence, in accordance with s 59 of the *Jury Directions Act 2015*, if the defence counsel requests such directions, unless there are good reasons for not doing so (*Jury Directions Act 2015* s 58). The judge may give the statutory directions if the accused is unrepresented and the judge considers it in the interests of justice to do so (*Jury Directions Act 2015* s 58(3)).

109. The judge must give the statutory directions on family violence as soon as practicable after the request is made and the judge may give the direction before any evidence is adduced in the trial. The directions may be repeated at any time during the trial (*Jury Directions Act 2015* s 58(4)–(5)).

110. The directions must include all of the following (*Jury Directions Act 2015* s 59):

[1206] The Report can be downloaded here.

(a) self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial; and

(b) as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires); and

[...]

(d) in the case of duress, evidence in the trial is likely to include evidence of family violence committed by another person against the accused or a third person.

111. The following directions under s 60 may also be sought and, if sought, must be given unless there are good reasons for not doing so:

(a) that family violence–

(i) is not limited to physical abuse and may include sexual abuse and psychological abuse;

(ii) may involve intimidation, harassment and threats of abuse;

(iii) may consist of a single act;

(iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;

(b) if relevant, that experience shows that–

(i) people may react differently to family violence and there is no typical, proper or normal response to family violence;

(ii) it is not uncommon for a person who has been subjected to family violence–

(A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;

(B) not to report family violence to police or seek assistance to stop family violence;

(iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by-

(A) family violence itself;

(B) cultural, social, economic and personal factors;

(c) that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting [...] under duress [...] in relation to the offence charged.

Duress and Marital Coercion

112. Section 336 of the *Crimes Act 1958* provides for the defence of marital coercion. While similar to duress, marital coercion is a distinct defence that applies in limited circumstances.

113. Marital coercion allows a women to be acquitted of a criminal offence that she committed because her husband coerced her to do so through pressure or threats, if the coercion is 'sufficient to cause a woman of ordinary good character and normal firmness of mind, placed in the circumstances in which the woman was placed, to conduct herself in the manner charged' (*Crimes Act 1958* s 336(3)).

114. Unlike duress, which is available as a defence to any accused person, marital coercion is available only to married women. Additionally, duress under s 9AG is available to as defence to murder, but marital coercion is not.

115. The Victoria Law Reform recommended retaining the defence of marital coercion in acknowledgment of the high rate of violence by men against their female partners, and the difficulties which women experience in seeking protection against it. In murder cases, however, the more rigorous requirements of the duress defence apply (Victoria Law Reform Commission, *Defences to Homicide: Final Report*, 2004, 122).

When to Charge the Jury about Duress

116. The judge must direct the jury about duress if the accused indicates that duress is in issue or if the judge considers that there are substantial and compelling reasons to direct the jury about duress despite the absence of a request (*Jury Directions Act 2015* ss 11, 16). See Directions under Jury Directions Act 2015.

117. If a duress direction is requested, it is only if the judge is satisfied that there is no evidence that raises a reasonable possibility that the elements of duress exist that the judge would have good reason to decline to give the requested direction (*R v Rowan* [2024] HCA 9, [33]).

118. Duress may be left to the jury even if the accused's primary defence is that he or she did not commit the relevant conduct. The inconsistency between duress and denial of offending is a matter for the jury to assess (*Rowan v The King* [2022] VSCA 236, [79], [157] per Kyrou and Niall JJA).

119. In criminal proceedings where duress in the context of family violence is in issue, Part 6 of the *Jury Directions Act 2015* specifies certain directions that may be given early in the trial. See 'Family Violence and Duress: Jury Directions' above and Directions under Jury Directions Act 2015.

120. At common law, the judge is required to direct the jury about duress if the evidence was such that it might lead a reasonable jury to decide that the accused committed the relevant act under duress (*R v Evans* (No 1) [1976] VR 517; *Taiapa v R* (2009) 240 CLR 95 [5]; *R v Harding* [1976] VR 129).

121. The question is whether, on the version of events most favourable to the accused that is suggested by the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the accused was not acting under duress (*Taiapa v R* (2009) 240 CLR 95 [5]. See also *Martin v R* (2010) 28 VR 579 [14]-[15]; *Rowan v The King* [2022] VSCA 236, [84] per Kyrou and Niall JJA).

122. Under the common law, the issue of duress can be raised at any time during the trial (*R v Zaharias* (2001) 122 A Crim R 586).

Content of the Charge

123. There is no single formulation that must be followed when charging a jury about duress (*Jury Directions Act 2015* s 6). What is required is instructions expressed with sufficient clarity that the jury could be left in no doubt with respect to the principles that they must apply to the task before them (*R v Zaharias* (2001) 122 A Crim R 586 [56]).

124. The burden of proof should be made very clear to the jury. They should be told that the accused can only be convicted if the prosecution has proved beyond reasonable doubt that he or she did not carry out the conduct under duress. See 'Onus of Proof' above.

125. In most cases it is neither necessary nor desirable to explain every element of the defence in a charge (*R v Emery* (1978) 18 A Crim R 49, 56).

126. Judges should take care to instruct the jury in the context of the evidence and issues raised in the trial (*R v Zaharias* (2001) 122 A Crim R 586 [56]). The question of duress should be placed in its factual setting, and considerations that may assist the jury to reach its conclusion should be identified (see *R v Goldman* (No 5) [2004] VSC 292 [6]; *R v Emery* (1978) 18 A Crim R 49, 56–57).

127. While not a misdirection, the jury should not be told to examine the evidence relating to duress with great care and scrutiny (due to the ease with which it can be invented). The question whether an accused's claim that he or she was acting under duress is plausible enough to raise a reasonable doubt is exactly the kind of matter which juries are well-equipped to deal with, without the need for any special direction (*R v Goldman* [2007] VSCA 25 [30]).

Last updated: 17 April 2024

8.10.1 Preliminary Directions: Duress in the Context of Family Violence (Jury Directions Act 2015) (23/11/05–31/10/14)

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This charge should be given, unless there are good reasons for not doing so, when:

- the trial commences on or after 29 June 2015, and duress in the context of family violence is in issue;
- the offence was committed between 23 November 2005 and 31 October 2014; and
- defence counsel (or the accused, if unrepresented) has requested that the jury be directed on family violence in accordance with s 58 of the Jury Directions Act 2015.

If the accused is unrepresented and does not request a direction on family violence, this charge can be given if it in the interests of justice to do so.

This charge must be given as soon as practicable after a request has been made in terms of s 58 of the Jury Directions Act 2015 and may be given before any evidence is adduced in the trial.

Introduction

In this case, duress in the context of family violence [is/is likely to be] in issue. I therefore need to give you some directions about "duress" and "family violence".

The law recognises that sometimes people will be compelled to commit crimes to avoid threatened harm. The law says that a person may act under duress if:

- the person reasonably believes that a threat of harm has been made that will be carried out unless an offence is committed, and

[*If the accused is charged with murder, add the following shaded item*]

- the threat was to inflict death or serious injury, and
- the person reasonably believes that their conduct is the only reasonable way to avoid the threatened harm, and
- the person reasonably believes that their conduct is a reasonable response to the threat, and
- the person did not voluntarily associate with the person making the threat for the purposes of carrying out violent conduct.

The law recognises that evidence of "family violence" may be relevant in deciding whether the accused acted under duress. "Family violence" includes all kinds of physical, sexual and psychological abuse by one family member towards another.

Examples of evidence of family violence include:

- The history of the relationship between family members, including violence by one family member towards any other family member.
- The overall effect of that violence, including any psychological effect, on the person who has been affected by family violence or the other family members.

- Social, cultural or economic factors that impact on the person who has been affected by family violence or the other family members.
- The general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser.

Evidence in this case is likely to include evidence of family violence committed by another person against [the accused/a third person].

Considerations

[*All or specified parts of the following shaded section must be included:*]

Family violence is not limited to physical abuse and can include sexual abuse and psychological abuse.

Family violence can involve intimidation, harassment and threats of abuse.

Family violence can consist of a single act.

Family violence can also consist of separate acts that form part of a pattern of behaviour. Those separate acts can, when looked at together, amount to abuse even though some or all of those acts may, when looked at separately, appear to be minor or trivial.

Experience shows that people may react differently to family violence and there is no typical, proper or normal response to family violence.

Experience also shows that it is not uncommon for a person who has been subjected to family violence to stay with an abusive partner after the family violence starts, or to leave and then return to the partner, or not to report family violence to police or seek assistance to stop family violence.

Experience also shows that family violence itself and cultural, social, economic and personal factors can influence decisions made by a person who is subjected to family violence about how to address the family violence or how to respond to or avoid it.

The law recognises that if the accused assaulted the victim on a previous occasion that does not mean that the accused could not have been acting under duress when [he/she] [*insert relevant conduct*].

Last updated: 23 September 2016

8.10.2 Charge: Statutory Duress (23/11/05–31/10/14)

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[*This charge should be given if there is evidence from which a jury might infer that the accused was acting under duress when s/he committed a* homicide offence *from* 23 November 2005 to 31 October 2014*.*

- *For any offence committed on or after 1 November 2014, see* 8.9.2 Charge: Statutory Duress (From 1/11/14)*.*
- *For non-homicide cases committed before 1 November 2014, and all offences committed before 23 November 2005, see* 8.11.1 Charge: Common Law Duress*.*

The charge should be given immediately after directing the jury about the relevant offence.]

Introduction

In this case the defence alleged that NOA was acting under duress when s/he [*insert relevant act*]. I therefore need to give you some directions about "duress".[1207]

The defence of duress was introduced into the law a long time ago to allow for human frailty. It recognises that sometimes ordinary people will be compelled to commit crimes to avoid threatened harm. When the defence of duress applies, the law excuses them from responsibility given the circumstances.

This means that, even if you are satisfied that the prosecution has proven all of the elements of [*insert offence*] beyond reasonable doubt, NOA will not be guilty of that offence if s/he acted under duress.

Because the prosecution must prove the accused's guilt, it is for the prosecution to prove, beyond reasonable doubt, that NOA was not acting under duress. It is not for NOA to prove that s/he did act under duress.

Unfortunately, it is always difficult to give directions about duress in a way which completely avoids any suggestion that it is a matter for the accused to prove. However, it is important to remember that the accused does not have to prove anything. You must keep in mind at all times that it is the prosecution who must remove any reasonable possibility that the accused acted under duress.

So before you can find the accused guilty of [*insert offence*], you must be satisfied, beyond reasonable doubt, that the prosecution has proven all of the elements of the offence and has negated the defence of duress.

Elements of duress

There are five [*for murder:* six] ways in which the prosecution can negate the defence of duress. I will list them for you, and then examine each one in detail.[1208]

The prosecution must satisfy you beyond reasonable doubt of at least one of the following:

One, the accused did not reasonably believe that a threat of harm had been made.

[*If the accused is charged with murder, add the following shaded item*]

Two, the threat was not to inflict death or serious injury.

[Two/Three], the accused did not reasonably believe that the threat would be carried out unless the offence was committed.

[Three/Four], the accused did not reasonably believe that his/her conduct in committing the offence was the only reasonable way to avoid the threatened harm.

[Four/Five], the accused did not reasonably believe that his/her conduct in committing the offence was a reasonable response to the threat.

[Five/Six], the accused voluntarily associated with the maker of the threat for the purposes of carrying out the violent conduct.

[1207] This charge only addresses the defence of duress. It is possible that the evidence in question may also have relevance to the determination of the elements (see, e.g. *R v Darrington* [1980] VR 353, 369–370; *R v Harding* [1976] VR 129).

[1208] If any of these methods of negating duress are not relevant in the circumstances of the case, they should be deleted and the charge modified accordingly.

If the prosecution can prove any of these matters beyond reasonable doubt, then they will have negated the defence of duress. In such circumstances, if you are also satisfied that the prosecution has proven, beyond reasonable doubt, all of the elements of [*describe offence*], then s/he will be guilty of that offence.

I will now examine each of these matters in more detail.

Reasonable belief in a threat of harm

The first way the prosecution can negate the defence of duress is by proving that the accused did not reasonably believe that a threat of harm had been made.

The prosecution can prove this in one of two ways.

One – Has the prosecution proved that NOA did not believe that a threat of harm had been made?

For the purpose of this question, you must consider all NOA's personal characteristics and all the circumstances as he/she perceived them.

OR Two – If you decide that the accused might have believed that a threat of harm was made, has the prosecution proved that such a belief would not be reasonable?

When you are deciding whether NOA's belief was reasonable, you must consider whether a reasonable person, with such personal characteristics of the accused as might have affected his/her understanding of the circumstances, might have believed that a threat of harm had been made.

In doing this, you must consider the circumstances as a reasonable person, with the personal characteristics of the accused, would have perceived them to be.

[*If it is alleged that the accused was intoxicated, insert the direction relating to a 'reasonable belief' of the accused from either* 8.6.1 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self-induced) *or* 8.6.2 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self-induced contested)*, as relevant.*]

[*Summarise arguments and evidence on NOA's relevant characteristics*].

[*If the threat was made against someone other than the accused, add the following shaded section.*]

The threat does not have to be a threat of harm to the accused [himself/herself]. Here, NOA says that the threat was [*describe threat*].

The prosecution alleged that the accused did not reasonably believe that a threat of harm had been made. [*Summarise prosecution arguments and evidence. The charge should clearly identify whether the argument is (i) that the accused did not believe that a threat was made; and/or (ii) that the accused's belief that a threat was made was not reasonable.*]

The defence denied this, arguing [*summarise defence evidence and/or arguments*].

Threat to inflict death or serious injury

[*If the accused is charged with murder, add the following shaded section.*]

The second way the prosecution can negate the defence of duress is by proving that that the threat perceived by the accused was not a threat to inflict death or serious injury.

The prosecution alleged that that was the case here. [*Summarise prosecution arguments and evidence.*]

The defence denied this, arguing [*summarise defence evidence and/or arguments*].

Reasonable belief that the threat will be carried out unless the offence is committed

The [second/third] way the prosecution can negate the defence of duress is by proving that the accused did not reasonably believe that the threat would be carried out unless the offence was committed.

This requires the prosecution to prove that NOA did not reasonably believe that [*identify threatener*] would actually [*identify threat*] if s/he did not [*describe offence*].

Again, the prosecution can prove this in one of two ways.

One – Has the prosecution proved that NOA did not believe that the threat would be carried out unless the offence was committed?

Again, for this question, you must consider all NOA's personal characteristics and all the circumstances as he/she perceived them.

OR Two – If you decide that the accused might have believed that the threat would be carried out unless the offence was committed, has the prosecution proved that such a belief would not be reasonable?

When you are deciding whether NOA's belief was reasonable, you must consider whether a reasonable person, with such personal characteristics of the accused as might have affected his/her understanding of the circumstances, might have believed that the threat would be carried out unless the offence was committed.

When you are deciding whether NOA's belief was reasonable, you must consider the circumstances as a reasonable person with all the personal characteristics of the accused would have perceived them to be.

[*If it is alleged that the accused was intoxicated, insert the direction relating to a 'reasonable belief' of the accused from either* 8.6.1 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self-induced) *or* 8.6.2 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self-induced contested)*, as relevant.*]

Remember, [*summarise arguments and evidence on NOA's relevant characteristics*].

One matter to consider is whether the perceived threat was still active at the time the accused committed the offence. If the prosecution can prove that the accused did not reasonably believe that the threat was still active at the time the offence was committed, the defence of duress will fail.

[*If the alleged threat was to commit harm in the future, add the following shaded section.*]

This does not mean that the threat must have been to harm [*identify threatened party*] immediately if NOA did not commit the offence. The defence of duress does not fail simply because the threat was to harm [him/her/someone else] in the future. The issue here is whether the accused reasonable believed that the threat – whatever its nature – was still active at the time the crime was committed.

[*If the threatener may not have been present at the time the offence was committed, add the following shaded section*.]

This does not mean that the person who made the threat must have been present when the offence was committed. The issue is whether the accused reasonably believed that the threat was still present and continuing at that time. Threats can still be active, even if the person who made them is not physically present.

[*Summarise prosecution arguments and evidence. The charge should clearly identify whether the argument is (i) that the accused did not actually believe that the threat would be carried out; and/or (ii) that the accused's belief was not reasonable.*]

The defence denied this, arguing [*summarise defence evidence and/or arguments*].

Reasonable belief that committing offence was the only reasonable way to avoid the threatened harm

The [third/fourth] way the prosecution can negate the defence of duress is by proving that the accused did not reasonably believe that his/her conduct in committing the offence was the only reasonable way to avoid the threatened harm.

Again, the prosecution can prove this in one of two ways.

One – Has the prosecution proved that NOA did not believe that committing the offence was the only reasonable way to avoid the threatened harm?

Again, for this question, you must consider all NOA's personal characteristics and all the circumstances as he/she perceived them.

OR Two – If you decide that the accused might have believed that committing the offence was the only reasonable way to avoid the threatened harm, has the prosecution proved that such a belief would not be reasonable?

When you are deciding whether NOA's belief was reasonable, you must consider whether a reasonable person, with such personal characteristics of the accused as might have affected his/her understanding of the circumstances, might have believed that his/her conduct in committing the offence was the only reasonable way to avoid the threatened harm.

When you are deciding whether NOA's belief was reasonable, you must consider the circumstances as a reasonable person with all the personal characteristics of the accused would have perceived them to be.

[*If it is alleged that the accused was intoxicated, insert the direction relating to a 'reasonable belief' of the accused from either* 8.6.1 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self-induced) *or* 8.6.2 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self-induced contested)*, as relevant.*]

Remember, [*summarise arguments and evidence on NOA's relevant characteristics*].

The prosecution argue that NOA could have [*describe the actions the accused could have taken to prevent the threat, e.g.* "escaping when…" *or* "reporting the matter to the police"].

For the prosecution to succeed on this basis, it is not enough to prove that NOA could have [*describe action*]. The prosecution must prove that no reasonable person, with those characteristics of the accused as might have affected his/her understanding of the circumstances, might have believed that committing the offence was the only reasonable way to avoid the threatened harm.

You should take into account the fact that there may not have been time for calm and measured consideration in the circumstances.

[*Where the accused's knowledge of the threatener's reputation may have influenced his or her response, add the following shaded section.*]

In determining this issue, you should consider the nature of the threats made, as well as NOA's knowledge of the character and reputation of [*identify threatener*].

[*Summarise prosecution arguments and evidence.*] The defence denied this, arguing [*insert defence arguments and evidence*].

Reasonable belief that committing offence was a reasonable response to the threat

The [fourth/fifth] way the prosecution can negate the defence of duress is by proving that the accused did not reasonably believe that his/her conduct in committing the offence was a reasonable response to the threat.

Again, the prosecution can prove this in one of two ways.

One – Has the prosecution proved that NOA did not believe his/her response to the threat was reasonable?

For the purpose of this question, you must consider all NOA's personal characteristics and all the circumstances as he/she perceived them.

OR Two – If you decide that the accused might have believed that his/her response to the threat was reasonable, has the prosecution proved that such a belief would not be reasonable?

When you are deciding whether NOA's belief was reasonable, you must consider whether a reasonable person, with such personal characteristics of the accused as might have affected his/her understanding of the circumstances, might have believed that that his/her conduct in committing the offence was a reasonable response to the threat.

When you are deciding whether NOA's belief was reasonable, you must consider the circumstances as a reasonable person with all the personal characteristics of the accused would have perceived them to be.

Remember, [*summarise arguments and evidence on NOA's relevant characteristics*].

In determining this issue, you should consider the nature and seriousness of the threat and the proportionality of the crime committed to that threat. You should also take into account anything that NOA knew about [*identify threatener*], which may have affected how he/she perceived the threat, or how a reasonable person, with the personal characteristics of the accused, would have perceived the threat.

Again, you should take into account the fact that there may not have been time for calm and measured consideration in the circumstances.

[*If it is alleged that the accused was intoxicated, insert the direction relating to a 'reasonable response' of the accused from either* 8.6.1 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self-induced) *or* 8.6.2 Charge: Statutory Intoxication (23/11/05–31/10/14) (Self-induced contested)*, as relevant.*]

The prosecution alleged that the accused did not reasonably believe that his/her conduct was a reasonable response to the threat. [*Summarise prosecution arguments and evidence. The charge should clearly identify whether the argument is (i) that the accused did not believe that his/her conduct was a reasonable response to the threat; and/or (ii) that the accused's belief that his/her conduct was a reasonable response to the threat was not reasonable.*]

The defence denied this, arguing [*summarise defence evidence and/or arguments*].

Voluntary association with the maker of the threat

Warning! There is no Victorian jurisprudence on this element yet. Judges should seek submissions from counsel when directing the jury about this element.

The [fifth/sixth] way the prosecution can negate the defence of duress is by proving that that the accused voluntarily associated with the maker of the threat for the purposes of carrying out the violent conduct involved in [*insert the accused's alleged offence*].[1209]

[1209] See 8.6 Statutory Duress (23/11/05–31/10/14), it is currently unclear whether the purpose of the association must be to carry out the violent conduct allegedly committed, or whether association for the purposes of carrying out any kind of violent conduct will negate the defence.

This will be the case if, for example, the accused voluntarily joined or associated with an organisation, or became party to an enterprise knowing of its purpose to carry out [*specify the violent conduct allegedly carried out*]. In such circumstances, the accused cannot rely on duress as a defence to any offences s/he commits in response to threats arising out of his/her association with the organisation, or his/her participation in the enterprise. Because s/he voluntarily put him/herself in a position where such threats could be made, s/he is held responsible for the consequences.

[*If the accused may have been coerced into joining the relevant organisation or enterprise, or may not have known of its violent purpose, or if the association may have been for a different purpose than to carry out the conduct allegedly committed, add the following shaded section.*]

It is important to note that the prosecution can only negate the defence of duress this way if it proves that the accused voluntarily exposed himself/herself to the duress. This will not be the case if s/he [was coerced into joining the organisation or enterprise in the first place/did not know that the organisation or enterprise s/he was joining had a violent purpose/joined the organisation or enterprise for a different purpose than to carry out] [*specify the violent conduct allegedly carried out*].

In this case the prosecution alleged that NOA voluntarily exposed himself/herself to duress by [*summarise prosecution arguments and evidence.*] The defence denied this, arguing [*summarise defence arguments and evidence*].

Family Violence

[*If there is evidence of family violence involving the accused and the person making the threat, add the following shaded section. If the existence or extent of family violence is in issue, this direction will need to be modified to account for the prosecution's onus of disproving the reasonable possibility that the accused had been subject to family violence.*[1210]]

In this case you have heard evidence of family violence between NOA and [*identify the person making the threat*]. [*Insert evidence and/or arguments.*]

The law says that where the accused has allegedly [*insert relevant act*] in circumstances where family violence is alleged, the following matters may be relevant to deciding whether the prosecution has negated the defence of duress:

[*Where there is evidence of one or more of the following matters (listed in* Crimes Act 1958 *s 9AH(3), the judge should identify the evidence and relate it to the facts in issue:*

(a) The *history of the relationship* between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;

(b) The *cumulative effect*, including psychological effect, on the person or a family member of that violence;

(c) *Social, cultural or economic factors* that impact on the person or a family member who has been affected by family violence;

(d) The general *nature and dynamics* of relationships affected by family violence, including the possible

[1210] For criminal proceedings where duress in the context of family violence is in issue, Part 6 the *Jury Directions Act 2015* applies and certain preliminary directions may need to be given to the jury (see *Jury Directions Act 2013*, ss 58–60). See 8.10.1 Preliminary Directions: Duress in the Context of Family Violence (Jury Directions Act 2015) (23/11/05–31/10/14).

consequences of separation from the abuser;

(e) The *psychological effect of violence* on people who are or have been in a relationship affected by family violence;

(f) *Social or economic factors* that impact on people who are or have been in a relationship affected by family violence.]

In this case, the defence has submitted that this evidence shows that NOA was acting under duress when s/he [*insert relevant act and arguments*]. The prosecution denied this was the case, alleging [*insert relevant evidence and/or arguments*].

Summary

To summarise, even if you decide that all of the elements of [*insert offence*] have been proven beyond reasonable doubt, you may find that NOA was not guilty of that offence because s/he was acting under duress.

Before you can find NOA guilty of [*insert offence*], you must therefore be satisfied not only that all of the elements have been proved, but also that the prosecution has proven, beyond reasonable doubt, at least one of the following five [*for murder:* six] matters:

One – that the accused did not reasonably believe that a threat of harm had been made;

[*If the accused is charged with murder*]

Two – that the threat was not to inflict death or serious injury;

[Two/Three] – that the accused did not reasonably believe that the threat would be carried out unless the offence was committed;

[Three/Four] – that the accused did not reasonably believe that his/her conduct in committing the offence was the only reasonable way to avoid the threatened harm;

[Four/Five] – that the accused did not reasonably believe that his/her conduct in committing the offence was a reasonable response to the threat; or

[Five/Six] – that the accused voluntarily associated with the maker of the threat for the purposes of carrying out the violent conduct.

If the prosecution cannot prove at least one of these matters beyond reasonable doubt, then you must find NOA not guilty of [*insert offence*].

Last updated: 23 September 2016

8.11 Common Law Duress

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Introduction

1. Prior to 2005, duress in Victoria was governed solely by the common law. This situation has been altered by the passage of the *Crimes (Homicide) Act 2005* and the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*, which introduced duress provisions into the *Crimes Act 1958* (s 9AG, now repealed, and s 322O respectively).

2. Section 9AG of the *Crimes Act 1958* applies to homicide offences committed on or after 23 November 2005 and before 1 November 2014.[1211]

3. Section 322O of the *Crimes Act 1958* applies to all offences committed on or after 1 November 2014.

4. It is still necessary to apply the common law when there is evidence of duress in non-homicide cases committed before 1 November 2014. It is also necessary to rely on the common law in relation to homicides committed before 23 November 2005.

5. Subdivision 1AAA of the *Crimes Act 1958*, including section 9AG, was introduced by the *Crimes (Homicide) Act 2005*. It had the effect of abrogating common law defences, including duress, to homicide offences and replacing them with statutory versions (*Babic v The Queen* (2010) 28 VR 297 [52]).

6. The *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* abolished the common law defence of duress with respect to all offences committed on or after 1 November 2014 (*Crimes Act 1958* s 322Q).

7. If the accused is charged with both homicide and non-homicide offences, committed before 1 November 2014, it will be necessary to give multiple directions about duress. The jury will need to be charged about statutory duress in relation to the homicide charges, and common law duress in relation to any other charges (see *R v Pepper* (2007) 16 VR 637; [2007] VSC 234; *DPP v McAllister* [2007] VSC 315 for similar issues that arise in the context of self-defence).

8. This topic outlines the common law defence of duress. For information concerning the statutory provisions, see 8.9 Statutory Duress (From 1/11/14) and 8.10 Statutory Duress (23/11/05–31/10/14).

What is Duress?

9. An act is said to be committed under duress if it is committed due to a threat of physical harm if the act is not done (*R v Dawson* [1978] VR 536).

10. To have acted under duress, the circumstances must have been such that the accused's will was really and absolutely so constrained that he or she became a mere innocent instrument of the crime (*R v Dawson* [1978] VR 536; *R v Darrington* [1980] VR 353).

11. Where duress is available as a defence, and the prosecution cannot prove that the accused did not act under duress, he or she will have a complete defence to the offence charged (*R v Japaljarri* (2002) 134 A Crim R 261).

Duress and Voluntariness

12. As duress implies a deliberate choice to break the law (although under constrained circumstances), it is incorrect to treat duress as related to the voluntariness requirement (*R v Palazoff* (1986) 43 SASR 99).

13. People who act under duress are therefore not excused because they acted involuntarily. They are excused because of the wrongfulness of the threat (*R v Palazoff* (1986) 43 SASR 99).

Duress and Intent

14. In a true duress case, the accused will have had the necessary intent to commit the crime, but will be found not guilty due to the fact that he or she formed that intent due to a threat (*R v Harding* [1976] VR 129 (Murphy J); *R v Palazoff* (1986) 43 SASR 99).

[1211] If the date of the victim's death differs from the date on which the actus reus was committed, the relevant date for determining whether the provisions of the *Crimes (Homicide) Act 2005* apply is the date of death (*R v Gould* (2007) 17 VR 393; [2007] VSC 420).

To Which Crimes is Duress Available as a Defence?

15. Duress is a defence to all criminal acts except for murder and some forms of treason (*R v Harding* [1976] VR 129; *R v Goldman (No 4)* (2004) 147 A Crim R 472; *Attorney-General v Whelan* [1934] IR 518; *R v Hurley* [1967] VR 526; *R v Tawill* [1974] VR 84).

16. In Australia the defence has been applied to:

    - Manslaughter (*R v Evans (No 1)* [1976] VR 517);
    - Drug offences (*R v Lawrence* [1980] 1 NSWLR 122; *R v Brown* (1986) 43 SASR 33; *R v Palazoff* (1986) 43 SASR 99);
    - Prison escape (*R v Smyth* [1963] VR 737; *R v Dawson* [1978] VR 536);
    - Contempt of court (*R v Garde–Wilson* (2005) 158 A Crim R 20).

Duress and Murder

17. It is clear that duress is not available on a charge of murder where the accused did the actual killing (*R v Japaljarri* (2002) 134 A Crim R 261; *R v Evans (No 1)* [1976] VR 517; *R v Darrington* [1980] VR 353).[1212]

18. However, it is unclear whether duress is available to a person who was present at the killing and aided or abetted the crime (a "principal in the second degree"), or who was not present but counselled or procured the killing (an "accessory before the fact"):

    - Initially, it was held that in Victoria duress was not available to principals in the second degree (*R v Harding* [1976] VR 129).
    - The House of Lords subsequently held that duress was a defence to a person charged with murder as a principal in the second degree (*Director of Public Prosecutions (Northern Ireland) v Lynch* [1975] AC 653).
    - Although somewhat disapproving of the decision in *Lynch*, the Victorian Supreme Court felt obliged at the time to follow the House of Lords decision, and overruled *Harding* (holding that duress is denied only to the actual killer) (*R v Darrington* [1980] VR 353).
    - Subsequently, the House of Lords overruled its own decision in *Lynch*, holding that duress is not a defence to principals in the second degree, nor is it a defence to an accessory before the fact (*R v Howe* [1987] AC 417. See also *R v Brown* [1968] SASR 467).

19. While the matter has not been authoritatively settled by a Victorian court, the issue has been the subject of judicial discussion in the following two cases:

    - In *R v Japaljarri* (2002) 134 A Crim R 261 the court stated that, due to *Darrington*, duress may be available on a charge of murder where the accused is a principal in the second degree. However, they also noted that the House of Lords had overruled its own decision in *Lynch*.
    - In *R v Goldman (No 4)* (2004) 147 A Crim R 472 Redlich J noted that, had the Court in *Darrington* had the benefit of the High Court's guidance about when it was acceptable to depart from House of Lords decisions (that was subsequently given in *Cook v Cook* (1986) 162 CLR 376), it would have followed *Harding* instead (as *Lynch* was not perceived to be based upon established principles of common law).

[1212] For murders committed on or after 23 November 2005, duress is a defence. See 8.9 Statutory Duress (From 1/11/14) and 8.10 Statutory Duress (23/11/05–31/10/14).

20. Even if duress is not available as a defence to people who aid, abet, counsel or procure murder, it may be available to accessories after the fact (as they have committed an offence against justice, rather than an offence against the person or the State) (Fairall and Yeo, 2005, p 141).

Attempted Murder

21. The question whether duress is a defence to attempted murder has not been authoritatively resolved in Australia (*R v Japaljarri* (2002) 134 A Crim R 261; *R v Goldman (No 4)* (2004) 147 A Crim R 472).

22. In *R v Gotts* [1992] 2 AC 412 a majority of the House of Lords held that duress is not a defence to attempted murder.

23. However, in *R v Goldman (No 4)* (2004) 147 A Crim R 472 Redlich J followed the decision of the minority in *Gotts* (and the Canadian judgments of *R v Hibbert* [1995] 2 SCR 973 and *Paquette v R* (1976) 30 CCC (2d) 417), holding that duress is a defence to attempted murder.

Manslaughter

24. Duress is available as a defence to a charge of manslaughter (*R v Evans (No 1)* [1976] VR 517; *R v Harding* [1976] VR 129).

25. This means that a judge will need to charge the jury about duress in a case where the accused is charged with murder, but manslaughter is available as an alternative verdict (*R v Evans (No 1)* [1976] VR 517; *R v Harding* [1976] VR 129).

Other Heinous Crimes

26. It has traditionally been held that duress is a defence to all crimes other than murder and "any other crime so heinous as to be excepted from the doctrine" (*R v Hurley* [1967] VR 526; *R v Darrington* [1980] VR 353; *R v Dawson* [1978] VR 536; *R v Emery* (1978) 18 A Crim R 49; *R v Zaharias* (2001) 122 A Crim R 586; *R v Japaljarri* (2002) 134 A Crim R 261).

27. The other "heinous" crimes to which duress is denied as a defence seems to have been limited to some serious forms of treason (*R v Goldman (No 4)* (2004) 147 A Crim R 472).

Onus of Proof

28. It is for the prosecution to prove, beyond reasonable doubt, that the accused was not acting under duress (*R v Smyth* [1963] VR 737; *R v Harding* [1976] VR 129; *R v Emery* (1978) 18 A Crim R 49; *R v Zaharias* (2001) 122 A Crim R 586).

29. This is sometimes expressed as requiring the prosecution to eliminate any reasonable possibility that the accused acted under duress (*R v Abusafiah* (1991) 24 NSWLR 531).

30. In some cases the fact that the accused was acting under duress may be raised as a "reasonable excuse" to a statutory offence, rather than as a defence in its own right (see e.g. *R v Tawill* [1974] VR 84; *R v Daher* [1981] 2 NSWLR 669). Depending on the terms of the relevant provision, in such cases the onus may be on the accused to prove that he or she was acting under duress (and therefore had a reasonable excuse).

Elements of Duress

31. The prosecution can prove that the accused was not acting under duress by proving any of the following matters (each of which are discussed below):

    i) That no-one was threatened with serious harm if the accused failed to commit the crime charged;

ii) That the threat was not present and continuing, imminent and impending;

iii) That the accused did not reasonably apprehend that the threat would be carried out;

iv) That it was not the threat that induced the accused to commit the crime charged;

v) That, when free from the duress, the accused voluntarily exposed himself or herself to its application;

vi) That the accused could safely have prevented the execution of the threat; or

vii) That the circumstances were such that a person of ordinary firmness would not have been likely to yield to the threat in the way the accused did (R v Hurley [1967] VR 526. See also *R v Darrington* [1980] VR 353; *R v Dawson* [1978] VR 536; *R v Emery* (1978) 18 A Crim R 49; *R v Zaharias* (2001) 122 A Crim R 586; *R v Japaljarri* (2002) 134 A Crim R 261).

Someone was Threatened with Harm if Crime Was Not Committed

32. The first way the prosecution can prove that the accused was not acting under duress is by establishing that no-one was threatened with serious harm if the accused failed to commit the crime charged (*R v Hurley* [1967] VR 526).

33. This can be done by proving either:

- That no threat was made (*R v Zaharias* (2001) 122 A Crim R 586; *R v Dawson* [1978] VR 536);
- That the threats made were not of a sufficient magnitude (*R v Gibb* [1983] 2 VR 155; *R v Hurley* [1967] VR 526; *R v Harding* [1976] VR 129); or
- That the demand made was not to commit the offence charged (*R v Dawson* [1978] VR 536; *R v Lorenz* (1998) 146 FLR 369).

A Threat Must Have Been Made

34. It is not sufficient that the accused felt fear. A threat must have been made (see, e.g., *R v Darrington* [1980] VR 353; *R v Japaljarri* (2002) 134 A Crim R 261).

35. The threat may have been made by words or actions (including actual violence) (see, e.g., *R v Emery* (1978) 18 A Crim R 49; *R v Harding* [1976] VR 129 per Murphy J).

36. A threat may also be implied from the threatener's behaviour, conduct and character. For example, in *DPP v Lynch*, the third party was known to be a "ruthless gunman … whom it would be perilous to defy or disobey and who … gave his instructions in a manner which indicated … that he would tolerate no disobedience". This was held to be sufficient to raise the issue of duress for the jury on the basis of an implied threat, without any need for the third party to make a threat explicit (*Director of Public Prosecutions (Northern Ireland) v Lynch* [1975] AC 653, 704-705).

37. Similarly, in *R v Rowan* [2024] HCA 9, the High Court held that "evidence of pervasive violence, intimidation, control and sexual abuse … raised a reasonable possibility that any express or implicit demand … carried with it the implication that serious violence and more severe sexual abuse would be inflicted … if [the accused] refused" (at [62]).

The Threat Must Have Been of Sufficient Magnitude

38. In some cases it seems to have been suggested that the threat must have been of death or serious personal violence (see, e.g. *R v Smyth* [1963] VR 737; *R v Hurley* [1967] VR 526; *R v Darrington* [1980] VR 353; *R v Japaljarri* (2002) 134 A Crim R 261; *Martin v The Queen* (2010) 202 A Crim R 97, 104).

39. Alternatively, other cases have referred only to 'physical harm' or 'domestic violence' without any further quantification (see *R v Dawson* [1978] VR 536; *R v Runjanjic* (1991) 56 SASR 114).

40. In assessing the magnitude of the threat, the court must take into account the whole of the circumstances giving rise to the threat. Where the threat arises from a continuing relationship of violence and control, the threat should not be minimised by reference to the least serious past acts of violence (see *Rowan v The King* [2022] VSCA 236, [159]–[160] (Kyrou and Niall JJA)).

41. However, it has also been suggested that a threat of imprisonment may be sufficient (*R v Harding* [1976] VR 129 (Murphy J)).

42. While it is not clear whether duress can be constituted by threats of damage to property (*R v Harding* [1976] VR 129 (Murphy J)), such threats are unlikely to be of suitable severity (*Director of Public Prosecutions (Northern Ireland) v Lynch* [1975] AC 653). There are no known Victorian cases in which it has been suggested that the accused acted under duress due to a threat to property.

43. The defence is not limited to threats made against the accused him or herself. The defence may be made out if the accused acted to avoid threatened death or harm to another person (see, e.g. *R v Hurley* [1967] VR 526; *R v Harding* [1976] VR 129 (Murphy J); *Attorney-General v Whelan* [1934] IR 518; *R v Abusafiah* (1991) 24 NSWLR 531).

The Demand Must Have Been to Commit the Offence Charged

44. The demand must have been to commit the offence charged. Duress will not be a defence if the accused committed a different offence due to his or her fear of the threatener (*R v Dawson* [1978] VR 536; *R v Lorenz* (1998) 146 FLR 369; c.f. *R v Rowan* [2024] HCA 9, [102]-[104] per Edelman J).

45. Where there is an ever-present threat, this part of the duress test may be satisfied where the nature of the threat coerces the accused to perform whatever offences the threatener demands from time to time. This might also be framed as a conclusion that the ever-present threat gave rise to an unstated implied demand that the accused perform the relevant offence, otherwise the accused would be subject to the threatened harm. This kind of analysis is particularly relevant in circumstances of family violence (see *Rowan v The King* [2022] VSCA 236, [169], [174]. See also *R v Rowan* [2024] HCA 9, [62]).

46. However, in *R v Rowan* [2024] HCA 9, Edelman J held at [97]-[111] that the defence of duress does not require the threatener to issue a demand or direction. Instead, any demand or direction is only relevant to the question whether a reasonable person in the accused's position would have had no reasonable alternative other than to commit the offence charged. This conceptual approach to the issue of demand or direction was not adopted by the plurality, who resolved the case on the basis that a threat need not be express.

Threat Must Be Present and Continuing, Imminent and Impending

47. The second way the prosecution can prove that the accused was not acting under duress is by establishing that the threat was not present and continuing, imminent and impending (*R v Hurley* [1967] VR 526).

48. While the coercion must be immediate, the threat need not be of immediate harm (*R v Hurley* [1967] VR 526; *R v Emery* (1978) 18 A Crim R 49).

49. This component of duress does not require that the threat be made immediately before the crime is committed. Instead, the requirement is that the threat remain operative and effective at the time of the offending (*R v Rowan* [2024] HCA 9, [40]).

50. Thus, while the threat must be effective at the moment the crime is committed, the carrying out of the threat may be delayed because of particular circumstances (*R v Dawson* [1978] VR 536).

51. While the threat need not be of immediate harm, it is not clear whether it must at least be of imminent harm – or whether threats to be carried out in the future will suffice so long as the accused's will is overborne by the threats at the time that he or she commits the criminal act (*R v Harding* [1976] VR 129 per Murphy J).

52. An ongoing threat, such as may arise in circumstances of family violence, may be present, continuing, imminent and impending (see *Rowan v The King* [2022] VSCA 236, [176]-[177]).

53. Where the offences were alleged to have been committed over a period spanning months or years, it is not realistic to expect the defence to identify a threat made at any particular time during that period (*Rowan v The King* [2022] VSCA 236, [176]).

54. The threatener need not be present when the offence is committed, as long as the threat remains present and continuing, imminent and impending (*R v Hurley* [1967] VR 526; *R v Emery* (1978) 18 A Crim R 49).

55. Thus, where the threat is to take a hostage's life if the accused does not commit the offence, the defence of duress may be raised even if the kidnappers were not present when the offence was committed (see, e.g., *R v Hurley* [1967] VR 526).

Accused Reasonably Feared the Threat Would Be Carried Out

56. The third way the prosecution can prove that the accused was not acting under duress is by establishing that the accused did not reasonably apprehend that the threat would be carried out (*R v Hurley* [1967] VR 526; *R v Emery* (1978) 18 A Crim R 49).

57. This can be done by proving that:

    - The accused did not fear that the threat would be carried out; or
    - That the accused did not have reasonable grounds for that fear (see, e.g. *R v Emery* (1978) 18 A Crim R 49).

The Threat Induced the Accused to Commit the Crime

58. The fourth way the prosecution can prove that the accused was not acting under duress is by establishing that it was not the threat that induced the accused to commit the crime charged (*R v Hurley* [1967] VR 526).

59. While the threat must have directly provoked the commission of the crime with which the accused is charged, it need not have completely overborne the accused's will (*R v Dawson* [1978] VR 536).

60. The crime must only have been committed because of the duress. The defence will not be available if the crime was committed for other reasons as well (*R v Zaharias* (2001) 122 A Crim R 586; *R v Abusafiah* (1991) 24 NSWLR 531; *R v Hurley* [1967] VR 526; *R v Dawson* [1978] VR 536. See also *Warren v The Queen* (1996) 88 A Crim R 78).

61. In considering whether the threat induced the accused to commit the crime, the jury should consider the nature of the threats made, and the accused's knowledge of the character and reputation of the person making them (see, e.g. *R v Abusafiah* (1991) 24 NSWLR 531).

62. Where it is alleged that the accused was acting to protect a third party, it will be for the jury to determine whether he or she was acting under duress. In making this determination, the jury may take into account factors such as the strength of the accused's attachment to the third party (see, e.g. *R v Hurley* [1967] VR 526).

Voluntary Exposure to Duress

63. The fifth way the prosecution can prove that the accused was not acting under duress is by establishing that, when free from the duress, the accused voluntarily exposed himself or herself to its application (*R v Hurley* [1967] VR 526).

64. This will be the case if the accused voluntarily joined or associated with a criminal organisation, or became a party to a criminal enterprise knowing of its criminal purpose. In such circumstances the accused cannot rely upon the defence of duress in respect of any offence committed in response to coercion arising out of his or her association with the organisation, or his or her participation in the criminal enterprise (*R v Hurley* [1967] VR 526).

65. The accused must have joined the enterprise or organisation voluntarily. The defence will remain available if he or she was coerced into joining the enterprise or organisation (*R v Hurley* [1967] VR 526. See also *R v Emery* (1978) 18 A Crim R 49).

Safe Escape

66. The sixth way the prosecution can prove that the accused was not acting under duress is by establishing that the accused could safely have prevented the execution of the threat (*R v Hurley* [1967] VR 526).

67. This will be the case if the accused did not avail him or herself of any reasonable opportunity to escape or avoid the threatened conduct being performed (*R v Dawson* [1978] VR 536; *R v Goldman (No 5)* [2004] VSC 292; *R v Hurley* [1967] VR 526; *R v Darrington* [1980] VR 353).

68. For the defence to be precluded on this ground, the opportunity to escape must have been capable of being performed with reasonable safety. The accused need not avail him or herself of the opportunity to escape if it was not reasonable in light of the threats made (*R v Dawson* [1978] VR 536; *R v Hudson* [1971] 2 QB 202; *R v Smyth* [1963] VR 737).

69. If escaping from the immediate presence of the person making the threat would not have rendered the threat ineffective, reliance on the defence will not be precluded because the accused failed to escape. For example, if the threat was to cause death or serious injury at some time in the near future, failing to take advantage of an opportunity to escape would not preclude reliance on the defence (*R v Abusafiah* (1991) 24 NSWLR 531).

70. The question of whether or not a safe means of escape was available to the accused is to be determined according to an objective standard, using the perspective of the reasonable person (*R v Goldman (No 5)* [2004] VSC 292; *R v Besim* [2004] VSC 168).

71. When considering the perspective of the reasonable person, the circumstances in which the accused found him or herself are relevant and should be taken into account (*R v Goldman (No 5)* [2004] VSC 292).

72. Where the carrying out of the threat can be prevented by reporting the matter to the authorities, a failure to do so may preclude the accused from relying upon the defence (see, e.g. *R v Dawson* [1978] VR 536).

73. However, if the accused failed to report the situation to the police on the grounds that he or she reasonably believed police protection to be ineffective against the threatener, the defence of duress might still succeed.

74. Evidence of battered woman syndrome may be relied upon to explain why a woman of ordinary firmness did not escape the threatening situation by seeking police protection, including why the accused did not consider it was possible to escape the effect of the threat (*R v Runjanjic* (1991) 56 SASR 114; *Rowan v The King* [2022] VSCA 236, [187] (Kyrou and Niall JJA)). See "Duress and Battered Woman Syndrome" below.

Person of Ordinary Firmness Would Have Been Likely to Yield

75. The seventh way the prosecution can prove that the accused was not acting under duress is by establishing that the circumstances were such that a person of ordinary firmness would not have been likely to yield to the threat in the way the accused did (*R v Hurley* [1967] VR 526; *R v Zahariás* (2001) 122 A Crim R 586; *R v Dawson* [1978] VR 536).

76. This "objective test" restricts the defence of duress to circumstances in which the accused can be viewed objectively as having acted to avoid serious harm (*R v Hurley* [1967] VR 526).

77. What is involved in the objective test is an evaluation of the behaviour of the accused by reference to a standard of reasonableness, not a prediction as to the way in which particular individuals may behave. The law requires the accused to have the self-control reasonably expected of the ordinary citizen in his or her situation (*R v Abusafiah* (1991) 24 NSWLR 531).

78. The question is whether the accused could not reasonably have been expected to resist in the circumstances (*R v Abusafiah* (1991) 24 NSWLR 531).

79. For the purpose of this limb of duress, the ordinary person is taken to have some of the accused's characteristics, including age, gender, history and relationship with the threatener and placed in the same objective circumstances as the accused, including any circumstances of family violence. It includes the accused's knowledge of the threatener's personality and behaviour. It is not clear, however, what other characteristics are attributed to the ordinary person (*Rowan v The King* [2022] VSCA 236, [73], [180] (Kyrou and Niall JJA)).

80. In *Rowan v The King*, Kyrou and Niall JJA rejected an argument that the ordinary person should have the accused's 'maturity', in the broad sense of including aspects of the accused's personality. Any consideration of 'maturity' is limited to the accused's age. Further, it is not appropriate to attribute all of the accused's personal characteristics, as this would unacceptably dilute the objective test (*Rowan v The King* [2022] VSCA 236, [73], [179]).

81. Similarly, features such as a history of sexual abuse of the accused by someone other than the threatener, or intellectual disability of the accused, are not imputed to the ordinary person (*Rowan v The King* [2022] VSCA 236, [180]).

82. In considering the objective test, the jury should consider the nature of the threats made, and the accused's knowledge of the character and reputation of the person making them (see *R v Abusafiah* (1991) 24 NSWLR 531; *Rowan v The King* [2022] VSCA 236, [72] (Kyrou and Niall JJA)).

83. Where the threat is not against the accused personally (e.g. where the accused's family is threatened), the jury must determine whether a threat of that nature would be likely to coerce or compel a person of ordinary firmness of character to yield by committing the crime in question (*R v Abusafiah* (1991) 24 NSWLR 531).

84. While traditionally the test was framed as whether or not the person of ordinary firmness "would" have been likely to yield (*R v Hurley* [1967] VR 526), in Victoria it is permissible to use "could" or "might" instead (*R v Zaharias* (2001) 122 A Crim R 586; *R v Lanciana* (1996) 84 A Crim R 268).

Duress and Battered Woman Syndrome

85. Battered woman syndrome is not a defence in its own right (*R v Lorenz* (1998) 146 FLR 369).

86. However, evidence that an accused suffered from the psychological condition of battered woman syndrome may be relevant to the defence of duress (*R v Lorenz* (1998) 146 FLR 369).

87. Specifically, evidence of the existence of this syndrome may be used:

- To explain why the accused's will was overborne; and
- To argue that a woman of ordinary firmness, if placed in the same position as that of the accused, would have committed the acts constituting the offence with which the accused was charged (*R v Runjanjic* (1991) 56 SASR 114; *Rowan v The King* [2022] VSCA 236, [74] (Kyrou and Niall JJA). See also *Rice v McDonald* (2000) 113 A Crim R 75).

When to Charge the Jury about Duress

88. The need for a direction on duress will depend on whether the defence has indicated that duress is in issue or whether there are substantial and compelling reasons for directing on duress in the absence of any request (*Jury Directions Act 2015* ss 14 - 16).

89. If a duress direction is requested, it is only if the judge is satisfied that there is no evidence that raises a reasonable possibility that the elements of duress exist that the judge would have good reason to decline to give the requested direction (*R v Rowan* [2024] HCA 9, [33]).

90. Duress may be left to the jury even if the accused's primary defence is that he or she did not commit the relevant conduct. The inconsistency between duress and denial of offending is a matter for the jury to assess (*Rowan v The King* [2022] VSCA 236, [79], [157]).

91. At common law, the judge was required to direct the jury about duress if the evidence is such that it might lead a reasonable jury to decide that the accused committed the relevant act under duress (*R v Evans (No 1)* [1976] VR 517; *R v Harding* [1976] VR 129).

92. The question was whether, on the version of events most favourable to the accused that is suggested by the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the accused was not acting under duress (*Taiapa v R* (2009) 240 CLR 95. See also *Martin v R* (2010) 28 VR 579; *Rowan v The King* [2022] VSCA 236, [84]).

93. The issue of duress may be raised at any time during the trial (*R v Zaharias* (2001) 122 A Crim R 586).

94. While duress is not a defence to murder at common law, the judge must instruct the jury about duress in a murder trial if manslaughter is available as an alternative verdict, and the evidence is such that it might lead a reasonable jury to decide that the accused committed the relevant act under duress (*R v Evans (No 1)* [1976] VR 517; *R v Harding* [1976] VR 129).

Content of the Charge

95. There is no single formulation that must be followed when charging a jury about duress. What is required is instructions expressed with sufficient clarity that the jury could be left in no doubt with respect to the principles that they must apply to the task before them (*R v Zaharias* (2001) 122 A Crim R 586).

96. While the elements of duress were identified in *R v Hurley* [1967] VR 526, the case does not prescribe any particular form of jury direction, or require the judge to direct the jury by reference to 8 elements (*R v Rowan* [2024] HCA 9, [36]. See also *R v Emery* (1978) 18 A Crim R 49)

97. For example, where the crime charged is not murder or any other excepted crime, no reference to the exclusion of such crimes should ordinarily be made (*R v Emery* (1978) 18 A Crim R 49).

98. It is essential that the facts are related to the relevant issues (*R v Emery* (1978) 18 A Crim R 49).

99. Judges should take care to instruct the jury in the context of the evidence and issues raised in the trial (*R v Zaharias* (2001) 122 A Crim R 586). The question of duress should be placed in its factual setting, and considerations that may assist the jury to reach its conclusion should be identified (*R v Goldman (No 5)* [2004] VSC 292; *R v Emery* (1978) 18 A Crim R 49).

100. While not a misdirection, the jury should not be told to examine the evidence relating to duress with great care and scrutiny (due to the ease with which it can be invented). The question whether an accused's claim that he or she was acting under duress is plausible enough to raise a reasonable doubt is exactly the kind of matter which juries are well-equipped to deal with, without the need for any special direction (*R v Goldman* [2007] VSCA 25).

Charging About the Onus of Proof

101. It should be made clear that the accused does not have to establish that he or she acted under duress. It is for the prosecution to negate duress beyond reasonable doubt (*R v Zaharias* (2001) 122 A Crim R 586; *R v Emery* (1978) 18 A Crim R 49; *R v Abusafiah* (1991) 24 NSWLR 531; *Rowan v The King* [2022] VSCA 236, [81] (Kyrou and Niall JJA)).

102. The jury may be directed about the onus of proof in any of the following ways:

- The prosecution must prove, beyond reasonable doubt, that the accused did not act under duress;
- The prosecution must establish that there is no reasonable possibility that the accused acted under duress; or
- The prosecution must eliminate any reasonable possibility that the accused acted under duress (*R v Lanciana* (1996) 84 A Crim R 268; *R v Zaharias* (2001) 122 A Crim R 586).

103. It is desirable to tell the jury that it is always difficult to give directions upon the issue of duress in a way which completely avoids any suggestion that the accused must prove the defence. However, the jury must always keep it in mind that it is the prosecution which must eliminate any reasonable possibility that the accused acted under duress (*R v Abusafiah* (1991) 24 NSWLR 531).

104. Judges may refer to duress as a "defence", so long as the true incidence of the burden of proof is made clear (*R v Lanciana* (1996) 84 A Crim R 268).

105. A judge should not use the wording of Smith J's judgment in *R v Hurley* [1967] VR 526 when directing the jury, as it may cause the jury to incorrectly believe that the onus of proving the relevant matters is on the accused (*R v Emery* (1978) 18 A Crim R 49).

106. The judge should not say that the prosecution has "merely" to prove, beyond reasonable doubt, that the accused did not act under duress. The use of the word "merely" is unnecessary and misplaced (*R v Williams* [1998] 4 VR 301).

Charging About the Objective Test

107. The judge should clearly explain to the jury that for duress to fail due to the objective test, the prosecution must establish that there is no reasonable possibility that a person of ordinary firmness of mind and will could have been compelled by the threat in the way the accused was (*R v Lanciana* (1996) 84 A Crim R 268),

108. The judge should explain that, when determining this issue, the jury should have regard not only to the nature of the threat and its proportion to the crime committed, but also to any circumstances known to the accused concerning the person making the threat, which may reasonably have affected the ordinary person's reaction to it (*R v Abusafiah* (1991) 24 NSWLR 531; *R v Goldman (No 5)* [2004] VSC 292).

109. It is important that the directions in relation to the objective test are consistent. For example, if the charge refers to threats which "could" compel a person of ordinary firmness to act in a certain way, subsequent references should be stated in the same terms to avoid confusion (*R v Lanciana* (1996) 84 A Crim R 268)

110. Judges should avoid use of the term "the average person". The usual formulation is "the person of ordinary firmness of mind and will". That is a much wider concept than the "average person", and includes a greater range of differing temperaments (*R v Abusafiah* (1991) 24 NSWLR 531).

111. Where the threat is directed to another person, the judge should explain that duress may operate if such a threat would be likely to compel the person of ordinary firmness of character to yield by committing the crime in question (*R v Abusafiah* (1991) 24 NSWLR 531).

Charging About Opportunities to Escape

112. The question for the jury to determine in relation to the issue of escape is whether a person in the accused's circumstances, and acting reasonably, would have taken one of the opportunities available to render the threat ineffective (*R v Goldman (No 5)* [2004] VSC 292).

113. When directing the jury about this issue, they should be told to have regard to all of the circumstances and any risks associated with any course of action which would have rendered the threat ineffective (*R v Goldman (No 5)* [2004] VSC 292).

114. The jury must consider whether such a course of action was reasonably safe, or whether it was likely to expose the accused to the very danger from which he or she was seeking to escape (*R v Goldman (No 5)* [2004] VSC 292).

115. In deciding whether a reasonable person in the accused's position would have availed themselves of the opportunity to escape, the jury should also take into account the fact that the circumstances may not have provided the accused with time to give calm and measured consideration to the course of conduct that was open to him or her (*R v Goldman (No 5)* [2004] VSC 292).

116. As there is no legal "obligation" on the accused to escape, it would be preferable for the judge to avoid use of the term "obligation" in the charge (*R v Abusafiah* (1991) 24 NSWLR 531).

Charging About the Use of the Evidence for Other Purposes

117. In some cases it may be necessary to direct the jury that evidence raised to support the defence of duress may also be used when determining whether or not the elements of the offence have been met (*R v Darrington* [1980] VR 353; *R v Harding* [1976] VR 129; *R v Evans (No 1)* [1976] VR 517).

118. A direction on the use of evidence of coercion for this purpose may be required even where a direction on duress is not (*R v Darrington* [1980] VR 353).

119. Where evidence of coercion can be used both for the purposes of proving duress, as well as due to its evidentiary significance for proving another matter, it is important that clear instructions be given so that the jury does not confuse the two issues (*R v Darrington* [1980] VR 353).

Duress and Marital Coercion

120. In cases where a married woman is charged with an offence other than treason or murder, and she raises evidence that her actions (or inaction) were the result of coercion by her husband, the judge may also need to instruct the jury about the statutory defence of marital coercion (*Crimes Act 1958* s 336(2)).

Use of Evidence of Duress to Disprove Elements of the Offence

121. Evidence which is relevant to the issue of duress may also be relevant to the determination of the elements. For example, the fact that the accused was threatened may help to explain the acts that he or she performed, and thus may influence the inferences the jury are willing to draw on the issue of *mens rea* (see, e.g. *R v Darrington* [1980] VR 353; *R v Harding* [1976] VR 129; *R v Goldman (No 4)* (2004) 147 A Crim R 472).

122. In such cases the judge should:

- Direct the jury about the relevance the evidence has to any of the elements of the offence; and
- Direct the jury that, if they accept that one of the elements of the offence has not been proven because of that evidence, they must acquit the accused, even if all of the elements of the defence of duress have not be met (*R v Hurley* [1967] VR 526).

Last updated: 17 April 2024

8.11.1 Charge: Common Law Duress

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This charge should be given if there is evidence from which a jury might infer that the accused was acting under duress when s/he:

Committed an offence *other than homicide before 1 November 2014;* or

Committed a *homicide* offence other than murder[1213] before *23 November 2005.*

[1213] While it is clear that duress cannot be a defence to the actual killer, it is unclear whether duress is available as a defence to people who aid, abet, counsel or procure murder. See 8.11 Common Law Duress for a discussion of this issue.

The charge should be given immediately after directing the jury about the relevant offence.

Introduction

In this case the defence alleged that NOA was acting under duress when s/he [*insert relevant act*]. I therefore need to give you some directions about "duress".[1214]

The defence of duress was introduced into the law a long time ago as a concession to human frailty. It is based on the recognition that sometimes people of ordinary firmness of character will commit crimes to avoid a threatened harm. While their actions may not be justified, the law excuses them from responsibility given the circumstances.

This means that, even if you are satisfied that the prosecution has proven all of the elements of [*insert offence*] beyond reasonable doubt, NOA will not be guilty of that offence if s/he acted under duress.

Because the prosecution must prove the accused's guilt, it is for the prosecution to prove, beyond reasonable doubt, that NOA was not acting under duress. It is not for NOA to prove that s/he did act under duress.

Unfortunately, it is always difficult to give directions about duress in a way which completely avoids any suggestion that it is a matter for the accused to prove. However, that is not the case. It is very important that you keep in mind at all times that it is the prosecution who must eliminate any reasonable possibility that the accused acted under duress.

So before you can find the accused guilty of [*insert offence*], you must be satisfied, beyond reasonable doubt, that the prosecution has proven all of the elements of the offence and has negated the defence of duress.

Elements of Duress

There are seven ways in which the prosecution can negate the defence of duress. I will list them for you, and then examine each one in detail.[1215]

First, the prosecution can prove that no-one was threatened with death or serious injury if the accused failed to [*describe relevant offence*].

Second, the prosecution can prove that any threat that had been made was not present and continuing, imminent and impending when the offence was committed.

Third, the prosecution can prove that the accused did not reasonably apprehend that the threat would be carried out.

Fourth, the prosecution can prove that it was not the threat that induced the accused to commit the offence charged.

Fifth, the prosecution can prove that, when free from the duress, the accused voluntarily exposed himself/herself to its application.

Sixth, the prosecution can prove that the accused could safely have prevented the execution of the threat.

[1214] This charge only addresses the defence of duress. It is possible that the evidence in question may also have relevance to the determination of the elements (see, e.g. *R v Darrington* [1980] VR 353; *R v Harding* [1976] VR 129).

[1215] If any of these methods of negating duress are not relevant in the circumstances of the case, they should be deleted and the charge modified accordingly.

Seventh, the prosecution can prove that the circumstances were such that a person of ordinary firmness of character would not have been likely to yield to the threat in the way the accused did.

If the prosecution can prove any of these matters beyond reasonable doubt, then they will have negated the defence of duress. In such circumstances, if you are also satisfied that the prosecution has proven, beyond reasonable doubt, all of the elements of [*describe offence*], then s/he will be guilty of that offence.

I will now examine each of these matters in more detail.

Threat of Serious Harm

The first way the prosecution can negate the defence of duress is by proving that no-one was threatened with death or serious injury if NOA failed to [*describe relevant offence*].[1216]

The prosecution alleged that that was the case here. [*Summarise prosecution arguments and evidence. The charge should clearly identify whether the argument is (i) that* no threat *was made; (ii) that the threat was* not of death or serious injury*; and/or (iii) that the demand was not to commit the* offence charged.]

The defence denied this, arguing [*summarise defence evidence and/or arguments*].

Present, Continuing, Imminent and Impending Threat

The second way the prosecution can negate the defence of duress is by proving that any threat that had been made was not present and continuing, imminent and impending when NOA committed the offence.

In other words, if the prosecution can prove that the threat had ended by the time the offence was committed, or that nobody was in imminent danger at that time, the defence of duress will fail.

[*If the alleged threat was to commit harm in the future, add the following shaded section.*]

This does not mean that the threat must have been to harm [*identify threatened party*] immediately if NOA did not commit the offence. The defence of duress does not fail simply because the threat was to harm [him/her/someone else] in the near future. The issue here is whether the threat – whatever its nature – was still effective at the time the crime was committed.

[*If the threatener may not have been present at the time the offence was committed, add the following shaded section.*]

This does not mean that the person who made the threat must have been present when the offence was committed. The issue is whether the threat was still present and continuing at that time. Threats can still be present and continuing, even if the person who made them is not physically present.

The prosecution alleged that in this case, even if a threat had been made, it was not present and continuing, imminent and impending at the time the offence was committed. [*Summarise prosecution evidence and/or arguments.*] The defence denied this, arguing [*summarise defence evidence and/or arguments*].

Reasonable Apprehension

The third way the prosecution can negate the defence of duress is by proving that NOA did not reasonably apprehend that the threat would be carried out.

[1216] While not clear, it is possible that threats of lesser harm (e.g. imprisonment) may also be sufficient (see 8.11 Common Law Duress). If the alleged threat was of such a nature, the charge should be modified accordingly.

This requires the prosecution to prove that NOA did not reasonably fear that [*identify threatener*] would actually [*identify threat*] if s/he did not [*describe offence*].

The prosecution alleged that that was the case here. [*Summarise prosecution arguments and evidence. The charge should clearly identify whether the argument is (i) that the accused* did not actually fear *that the threat would be carried out; and/or (ii) that the accused* did not have reasonable grounds *for that fear*.]

The defence denied this, arguing [*summarise defence evidence and/or arguments*].

Threat Induced the Crime

The fourth way the prosecution can negate the defence of duress is by proving that it was not the threat that induced the accused to commit the offence charged.

This will be the case if the prosecution can prove that NOA committed that offence for any reason other than to avoid the threat being carried out. To have acted under duress, NOA must only have committed the crime because of the threat.

In this case the prosecution alleged that it was not any threats made by [*identify threatener*] that caused NOA to [*describe offence*]. They argued that s/he committed that offence because [*summarise prosecution arguments and evidence*]. The defence denied this, arguing [*summarise defence arguments and evidence*].

[*Where the accused's knowledge of the threatener's reputation may have influenced his or her response, add the following shaded section*.]

In determining whether NOA's actions were induced by the alleged threat, you should consider the nature of the threats made, as well as NOA's knowledge of the character and reputation of [*identify threatener*].

Voluntary Exposure to Duress

The fifth way the prosecution can negate the defence of duress is by proving that, when free from the duress, NOA voluntarily exposed himself/herself to its application.

This will be the case if, for example, the accused voluntarily joined or associated with a criminal organisation, or became party to a criminal enterprise knowing of its criminal purpose. In such circumstances, the accused cannot rely on duress as a defence to any offences s/he commits in response to threats arising out of his/her association with the organisation, or his/her participation in the criminal enterprise. Because s/he voluntarily put him/herself in a position where such threats could be made, s/he is held responsible for the consequences.

[*If the accused may have been coerced into joining the relevant organisation or enterprise, or may not have known of its criminal purpose, add the following shaded section*.]

It is important to note that the accused must have voluntarily exposed himself/herself to the duress for the defence to be negated on this basis. This will not be the case if s/he [was coerced into joining the criminal organisation or enterprise in the first place/did not know that the organisation or enterprise s/he was joining had a criminal purpose].

In this case the prosecution alleged that NOA voluntarily exposed himself/herself to duress by [*summarise prosecution arguments and evidence*]. The defence denied this, arguing [*summarise defence arguments and evidence*].

Safe Escape

The sixth way the prosecution can negate the defence of duress is by proving that NOA could safely have prevented the execution of the threat.

In this case, the prosecution alleged that NOA could have done so by [*describe the actions the accused could have taken to prevent the threat, e.g.* "escaping when…" or "reporting the matter to the police"].

For the prosecution to succeed on this basis, it is not enough to prove that NOA could have [*describe action*]. The prosecution must prove that if NOA had done so, the threat would not have been carried out.

They alleged that that was the case here. [*Summarise prosecution arguments and evidence*.] The defence denied this, arguing [*insert defence arguments and evidence*].

In determining whether NOA could safely have prevented the execution of the threat, you should consider what the reasonable person would have done in those circumstances. If you find that a person in those circumstances, and acting reasonably, would have [*describe action*], and by doing so would have prevented the threat being carried out, then the defence of duress will fail.

In making this determination, you should have regard to all of the circumstances, including any risks associated with the proposed course of action. A person is only required to pursue an opportunity if s/he can do so with reasonable safety.

You should also take into account the fact that the circumstances may not have provided the accused time to give calm and measured consideration to the course of conduct that was open to him/her.

Person of Ordinary Firmness Would Not Have Yielded

The seventh way the prosecution can negate the defence of duress is by proving that the circumstances were such that a person of ordinary firmness of character would not have been likely to yield to the threat in the way the accused did.

For this to be the case, the prosecution must prove that a person with the ordinary powers of self-control of an [*describe accused's age and sex, e.g.* "adult male"], who was placed in the same situation as NOA, would not have been likely to give in to the threats by committing [*describe offence*].

In determining this issue, you should consider the nature of the threats and the proportionality of those threats to the crime committed. You should also take into account anything that NOA knew about [*identify threatener*], which may have affected the ordinary person's reactions to the threat.

In this case the prosecution alleged that, in the circumstances, a person of ordinary firmness of character would not have been likely to yield to the threat in the way NOA did. [*Summarise prosecution arguments and evidence*]. The defence denied this, arguing [*summarise defence argument and evidence*].

Summary

To summarise, even if you decide that all of the elements of [*insert offence*] have been proven beyond reasonable doubt, you may find that NOA was not guilty of that offence because s/he was acting under duress.

Before you can find NOA guilty of [*insert offence*], you must therefore be satisfied not only that all of the elements have been met, but also that the prosecution has proven, beyond reasonable doubt, at least one of the following seven matters:

One – that no-one was threatened with death or serious injury if NOA failed to [*describe relevant offence*].

Two – that when that offence was committed, any threat that had been made was not present and continuing, imminent and impending.

Three – that NOA did not reasonably apprehend that the threat would be carried out.

Four – that it was not the threat that induced NOA to commit the offence charged.

Five – that, when free from the duress, NOA voluntarily exposed himself/herself to its application.

Six – that NOA could safely have prevented the execution of the threat; or

Seven – that the circumstances were such that a person of ordinary firmness of character would not have been likely to yield to the threat in the way NOA did.

If the prosecution cannot prove at least one of these matters beyond reasonable doubt, then you must find NOA not guilty of [*insert offence*].

Last updated: 1 November 2014

8.12 Provocation

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Introduction

1. Prior to 23 November 2005, provocation was a partial defence to murder in Victoria. According to the common law, if the prosecution could prove that the accused had committed all the other elements of murder, but could not disprove the reasonable possibility that s/he had acted while "provoked", s/he should be convicted of manslaughter rather than murder (see, e.g. *Masciantonio v R* (1994) 183 CLR 58).
2. On 23 November 2005, provocation was abolished as a partial defence to murder for offences alleged to have been committed on or after that date. However, it remains available as a partial defence to offences alleged to have been committed prior to that date (*Crimes Act 1958* s 3B, s 603).
3. Where an offence is alleged to have been committed between two dates, one before and one on or after 23 November 2005, the offence is to be treated as if it was alleged to have been committed prior to that date. Provocation will therefore be available as a partial defence in such cases (*Crimes Act 1958* s 603(2)).

Elements of Provocation

4. There are three ways the prosecution can disprove provocation. They can prove that:

    i) The deceased did not act provocatively;

    ii) The accused did not kill the deceased while deprived of self-control by his/her provocative conduct (the "subjective test"); or

    iii) The deceased's conduct was not capable of causing an ordinary person to lose self-control and to act in the way in which the accused did (the "objective test").

Provocative Conduct of the Deceased

5. The first way for the prosecution to disprove provocation is to prove that the deceased did not act in a way that was capable of provoking the accused's response.
6. The jury does not have to be satisfied of what the deceased actually said or did, and so there is no requirement for "proof" of that conduct. If it is reasonably possible that conduct capable of constituting provocation might have occurred, then the prosecution will have failed to disprove this aspect of provocation (see *R v Thorpe* (No 2) [1999] 2 VR 719).

Conduct Capable of Constituting Provocation

7. Conduct that may be "provocative" at law is defined by reference to its possible impact on the accused. Conduct is only provocative if it is capable of causing the accused to lose control, and as a result form and act upon an intention to kill or really seriously injure the deceased (*Masciantonio v R* (1994) 183 CLR 58).
8. Issues have arisen in relation to the following types of conduct:

    - Third party conduct;

- Conduct mistakenly attributed to the deceased;
- Conduct committed in the absence of the accused;
- "Mere words";
- Self-induced provocation;
- Historic conduct.

Third-party conduct

9. Ordinarily, the accused's loss of self-control must have resulted from the provocative conduct of the deceased (*Masciantonio v R* (1994) 183 CLR 58).

10. The defence will fail if the provocative conduct emanated from a third-party rather than the deceased – unless the deceased in some way adopted, assented to, participated in, or otherwise associated himself or herself with that conduct (*R v Abebe* (2000) 1 VR 429).

11. Where the jury needs to determine if the deceased somehow associated him or herself with the conduct of a third-party, they should generally *not* be directed by reference to the principles of concert or aiding and abetting. The introduction of those concepts in this context will add unnecessarily to the complexity of the direction (*R v Abebe* (2000) 1 VR 429).

Conduct mistakenly attributed to the deceased

12. There is one situation in which provocation can be raised even though the provocative conduct did not emanate from the deceased – where the accused mistakenly believed the deceased to have committed that conduct (*R v Abebe* (2000) 1 VR 429; *R v Kenny* [1983] 2 VR 470; *R v Voukelatos* [1990] VR 1).

13. It remains unsettled whether that belief needs to have been reasonable. In the absence of appellate consideration, it has been held that such a qualification should not be added (*R v Abebe* (2000) 1 VR 429).

Conduct in the absence of the accused

14. Historically, the partial defence of provocation was not available if the provocative conduct was not committed in the presence of the accused (*R v Arden* [1975] VR 449; *R v Quartly* (1986) 11 NSWLR 332).

15. The correctness of this requirement was doubted by Hayne and McHugh JJ in the special leave application *Davis v R* (1998) 73 ALJR 139. However, as the matter has not since been reconsidered, it is unclear whether conduct committed in the accused's absence is now capable of sustaining the partial defence of provocation.

16. While it may be necessary for the provocative conduct to have been committed in the accused's presence, there is no requirement that the conduct be primarily directed at the accused (*R v Terry* [1964] VR 248).

Mere words

17. While originally it was thought that provocation would not be available if the provocative conduct consisted of "mere words", it has been held that there is no absolute rule against words alone founding a case of provocation. The existence of such an absolute rule would draw an arbitrary distinction between words and conduct which is insupportable in logic (*Moffa v R* (1977) 138 CLR 601).

18. Whether or not a judge should leave provocation to the jury when the provocative conduct consisted of words alone will depend upon the nature of the words. For example, it has been held that provocation need not be left to the jury where the words are "merely insulting, hurtful and offensive", as the objective test could never be established in such a case (*R v Kumar* (2002) 5 VR 193; *R v Leonboyer* [2001] VSCA 149).

19. By contrast, where the words can be characterised as "violently provocative", they will be capable in law of establishing provocation, and the defence may be left to the jury (*Holmes v DPP* [1946] AC 588; *Moffa v R* (1977) 138 CLR 601).

20. The reference in this phrase to "violently" is an indicator of degree rather than content. There is no requirement that the provocative words threaten violence (*R v Kumar* (2002) 5 VR 193 [Eames at 59]).

Self-induced provocation

21. Provocation will not be available as a partial defence if:

    - The deceased's provocative conduct was provoked by the accused's words or conduct; and
    - The deceased's provocative conduct did not go beyond the reasonably predictable response of a person in his or her position (*R v Hartwick & Ors* (2005) 14 VR 125; *R v Allwood* (1975) 18 A Crim R 120; *R v Borthwick* CCA Vic 18/3/1991).[1217]

22. Where the accused deliberately incites the provocation, acting with premeditation or actual foresight, the accused cannot be said to act as a result of a loss of self-control. In such circumstances the accused had the necessary pre-existing mental state for murder, at a time before the victim's allegedly provocative actions occurred (*R v Yasso (No.2)* (2004) 10 VR 466).

Historic conduct

23. The partial defence of provocation cannot be raised solely on the basis of the victim's historic conduct. If the provocation is not alleged to be found in conduct that is to some degree proximate to the response, then there must be some "triggering event" that is proximate to the loss of self-control (*Masciantonio v R* (1994) 183 CLR 58; *R v Osland* [1998] 2 VR 636; *Osland v R* (1998) 197 CLR 316).

24. The law does not identify any specific period within which the response must occur (*Parker v R* (1962) 111 CLR 610. See also *Pollock v R* (2010) 242 CLR 233).

25. While purely historic conduct cannot be relied upon as the ultimate provocative event, it remains relevant to the assessment of the "triggering event", and to both the subjective and objective elements of the defence.

Subjective Test

26. The second way for the prosecution to disprove provocation is to prove that the accused did not kill the deceased while deprived of self-control by the deceased's provocative conduct. There are two parts to this "subjective test":

    i) The accused must have killed the deceased while deprived of self-control; and

    ii) The accused's loss of self-control must have been caused by the deceased's provocative conduct.

Killing While Deprived of Self-Control

Loss of self control

27. The "central idea" of the law of provocation is that of a sudden and temporary loss of self-control, resulting from the provocative conduct of the deceased (*Masciantonio v R* (1994) 183 CLR 58. See also *Pollock v R* (2010) 242 CLR 233).

[1217] Note, however, in *R v Thorpe* [1999] 1 VR 326 and *R v Yasso (No.2)*(2004) 10 VR 466, Charles JA considered that it was not settled that provocation is excluded where the provocative conduct is "self–induced," in the sense considered above.

28. The loss of self-control should not have been so extreme that the accused acted involuntary, or was incapable of forming an intention to kill or really seriously injure the victim. In such cases the accused should be acquitted, rather than being convicted of manslaughter (*Parker v R* (1962) 111 CLR 610; *Masciantonio v R* (1994) 183 CLR 58. See also 8.8 Automatism).

29. Instead, the loss of self-control must have been a loss of control over the accused's desire for retribution against the deceased (*Masciantonio v R* (1994) 183 CLR 58). The accused's "reason" should have been negated or suspended (*Parker v R* (1962) 111 CLR 610).

30. While this will usually occur due to the effects of anger or resentment, the defence may equally be raised where the loss of self-control is the consequence of fear or panic (*Van Den Hoek v R* (1986) 161 CLR 158; *R v Ivanovic* [2005] VSCA 238; *R v Osland* [1998] 2 VR 636).

31. The requirement that the provocative conduct cause the accused to lose self-control excludes from the scope of the defence an accused who seizes upon such conduct as a convenient excuse for carrying out a previously existing purpose, or who acts upon an old grudge (*Parker v R* (1964) 111 CLR 665. See also *Pollock v R* (2010) 242 CLR 233).

32. A person who kills in order to give effect to a prior understanding or arrangement with respect to the victim's death therefore cannot rely upon provocation (*Osland v R* (1998) 197 CLR 316).

"Heat of passion"

33. The defence of provocation is only available where the "loss of control" is associated with an altered (generally heightened) emotional state, which has historically been referred to as the "heat of passion" (*Johnson v R* (1976) 136 CLR 619).

Acting while deprived of self control

34. The accused must have killed the deceased while deprived of self control by the provocative conduct. The defence will fail if the accused had regained control by the time s/he killed the deceased (*Masciantonio v R* (1994) 183 CLR 58. See also *Pollock v R* (2010) 242 CLR 233).

35. If the accused was intoxicated at the time of the killing, this may be relevant to the question of whether s/he acted without self-control in response to the provocative conduct (*R v McCullagh (No 3)* [2007] VSCA 293).

Delayed response

36. There is no independent requirement that there be no "cooling-off period". The existence of an opportunity to "cool-off" between the provocative conduct and the accused's response does not mean that the defence will fail (*Moffa v R* (1977) 138 CLR 601, *R v Kumar* (2002) 5 VR 193; *Pollock v R* (2010) 242 CLR 233).

37. However, a delay between provocation and response can be an important consideration in determining whether the act was:

    - Caused by the provocative conduct, rather than caused by motives of revenge or punishment; and
    - Done at a time when the accused was in a state of temporary loss of self-control (*Pollock v R* (2010) 242 CLR 233. See also *Johnson v R* (1976) 136 CLR 619).

38. This issue will generally not turn on a precise counting of the time over which the relevant episode extended. The jury should consider the entire incident, including any events which took place during the interval between the provocative conduct and the response (*Parker v R* (1962) 111 CLR 610. See also *Pollock v R* (2010) 242 CLR 233).

39. A person who kills his or her violent partner in response to long-term abuse is not prevented from raising the partial defence of provocation simply because his or her reaction may be considered to be "delayed" or "slow-burning" (*R v Osland* [1998] 2 VR 636; *R v Thornton (No.2)* [1996] 1 WLR 1174).

40. However, for the defence to be successful there must be a "triggering event" that caused a sudden and temporary loss of self-control at the time of the killing. The mere fact of long-term abuse is not sufficient (*R v Osland* [1998] 2 VR 636, *Osland v R* (1998) 197 CLR 316).

41. The "triggering" incident may be a relatively minor act of abuse, but it cannot be a trivial incident. A history of abuse does not create a blank cheque to plan and execute homicide, protected by the law of provocation (*Osland v R* (1998) 197 CLR 316).

42. In cases of long-term abuse, evidence of the abuse, and of "battered-woman syndrome", may be relevant to the jury's consideration of the effect that otherwise apparently minor incidents may have had on the accused (*R v Osland* [1998] 2 VR 636; *R v Thornton (No.2)* [1996] 1 WLR 1174).

43. Such evidence may also be relevant when determining the gravity of the provocative conduct (see below) (*R v Osland* [1998] 2 VR 636; *Osland v R* (1998) 197 CLR 316).

Objective test

44. The third way for the prosecution to disprove provocation is to prove that the deceased's conduct was not capable of causing an ordinary person to lose self-control and to act in the way in which the accused did.

45. In considering this "objective test", there are two questions the jury must determine:

    i) What was the gravity of the provocation?

    ii) Was the provocation of such gravity that it could cause an ordinary person to lose self-control and act like the accused?

What was the gravity of the provocation?

46. The first part of the objective test requires the jury to assess the gravity of the provocative conduct. In making this assessment, the jury must take into account any relevant personal characteristics of the accused, as well as his or her circumstances (*Stingel v R* (1990) 171 CLR 312; *Masciantonio v R* (1994) 183 CLR 58; *R v Kuster* (2008) 21 VR 407).

47. Depending on the case, the relevant circumstances and characteristics of the accused may include his or her age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history (*Masciantonio v R* (1994) 183 CLR 58; *R v Abebe* (2000) 1 VR 429; *R v Curzon* (2000) 1 VR 416; *R v Thorpe (No 2)* [1999] 2 VR 719; *R v Leonboyer* [2001] VSCA 149; *R v Kumar* (2002) 5 VR 193; *R v McCullagh (No 3)* [2007] VSCA 293).

48. The jury may also take into account any mental instability or weakness of the accused (*Stingel v R* (1990) 171 CLR 312), but should not take into account his or her "exceptional excitability or pugnacity or ill-temper" (*DPP v Camplin* [1978] AC 705).

49. The relevant circumstances may include the history between the accused and the deceased (*R v Kumar* (2002) 5 VR 193; *Osland v R* (1998) 197 CLR 316), or between the accused and third-parties (*Green v R* (1997) 191 CLR 334).

50. The characteristics or attributes of an accused that may be taken into account when assessing the gravity of the provocation reflect features which are of a permanent, rather than a temporary or transient, nature (*R v McCullagh (No 3)* [2007] VSCA 293).

51. However, such permanent characteristics or attributes will not always be relevant to an assessment of the gravity of the provocative conduct. To be relevant, those characteristics or attributes must bear upon an *objective* assessment of the gravity of the particular provocative conduct. For example, the accused's mental instability would be relevant if the provocative conduct consisted of insults that the accused was mad, but would probably not be relevant if the provocation was completely unrelated to his or her mental condition (*Stingel v R* (1990) 171 CLR 312; *R v McCullagh (No 3)* [2007] VSCA 293).

52. Where the accused is temporarily intoxicated, and the provocative conduct does not relate to that intoxication, his/her intoxication will not be relevant to an assessment of the gravity of the provocation (*R v McCullagh (No 3)* [2007] VSCA 293).

53. The judge should identify all of the accused's characteristics and circumstances relevant to the jury's assessment of the gravity of the provocation, and describe any relevant background evidence, such as evidence of the relationship and history between the accused and the deceased, relationships with third parties and cultural matters (*R v Kuster* (2008) 21 VR 407).

54. In assessing the gravity of provocative conduct, the judge (and jury) should take care not to unduly narrow the circumstances that should be taken into account (See *R v Conway* (2004) 149 A Crim R 206; *R v Kumar* (2002) 5 VR 193).

55. As the jury are *required* to take the accused's personal circumstances into account in assessing the gravity of the provocative conduct, it will be a misdirection to suggest that the jury is "entitled" to consider those circumstances (*R v Curzon* (2000) 1 VR 416).

Could the ordinary person have lost control?

56. Having assessed the gravity of the provocation, the jury must then determine whether provocation of that level of gravity could have caused an "ordinary person" to lose self-control and act in the way the accused did (*Masciantonio v R* (1994) 183 CLR 58).

57. The "ordinary person" is not the "reasonable man" of the law of negligence (and of earlier provocation cases). He or she is a person capable of losing his or her self-control to the extent of intentionally wounding or killing another, when there is no need to do so for his or her own protection (*Stingel v R* (1990) 171 CLR 312. See also *Johnson v R* (1976) 136 CLR 619; *Masciantonio v R* (1994) 183 CLR 58; *R v Abebe* (2000) 1 VR 429).

58. While all of the accused's relevant characteristics and circumstances must be taken into account in assessing the gravity of the provocation (see above), the only factor that may be relevant when determining how the ordinary person could have reacted to provocation of that gravity is the accused's age (in the sense of immaturity) (*Masciantonio v R* (1994) 183 CLR 58; *Stingel v R* (1990) 171 CLR 312).

59. Thus, for an adult accused, the standard the jury must apply is simply the "power of self-control of the ordinary person". When the accused is a youth, the standard will be "the power of self control of an ordinary person of the accused's age" (*Masciantonio v R* (1994) 183 CLR 58; *Stingel v R* (1990) 171 CLR 312; *R v Thorpe (No 2)* [1999] 2 VR 719).

60. The law does not fix a point at which youth ceases to be relevant to the determination of the objective standard. The age of the accused should be incorporated into the test wherever it is open to the jury to consider that the accused is immature by reason of youthfulness (*Stingel v R* (1990) 171 CLR 312).

61. Gender, senility, intoxication, medical condition and ethnic background have all been expressly identified as factors that should *not* be brought into consideration in the determination of this standard. This reflects the principle of equality before the law (*Stingel v R* (1990) 171 CLR 312; *R v Curzon* (2000) 1 VR 416; *R v O'Neill* [1982] VR 150; *R v Gojanovic (No 2)* [2007] VSCA 153; *R v McCullagh (No 3)* [2007] VSCA 293).

62. Equally, the reduction of an offender's capacity for self control by mental illness, or by any other considerations, will not be relevant to this aspect of the test (*R v Conway* (2004) 149 A Crim R 206).

63. It should be made clear to the jury that the critical feature or attribute of the ordinary person against which the accused's conduct is to be compared is his or her normal or ordinary powers of self-control (*Masciantonio v R* (1994) 183 CLR 58; *R v Margach* [2007] VSCA 110; *R v McCullagh (No 3)* [2007] VSCA 293).

64. Jurors should not be directed to place themselves in "the accused's shoes as the embodiment of the ordinary person" to determine the possible effect of the provocation upon the ordinary person's power of self-control. Such an instruction risks jurors substituting their own subjective standards for the objective standard of the test (*Stingel v R* (1990) 171 CLR 312).

65. The judge should also not refer to whether an "ordinary person of the accused's characteristics" could have lost control, as most of the accused's characteristics are only relevant to determining the gravity of the provocation (*R v Kuster* (2008) 21 VR 407).

The Ordinary Person "Could" Have Lost Control

66. The objective test is whether the provocative conduct *could* have caused an ordinary person to lose self-control to the extent that the accused did. The jury need not be satisfied that this result would necessarily, or even probably, have followed (*Stingel v R* (1990) 171 CLR 312; *Masciantonio v R* (1994) 183 CLR 58).

67. In this context "could" and "might" are synonymous. In directing a jury, it is acceptable to use "might" rather than "could" (preferably saying that "might" in this context means the same thing as "could") (*Osland v R* (1998) 197 CLR 316; *Stingel v R* (1990) 171 CLR 312; *R v Thorpe (No 2)* [1999] 2 VR 719).

68. It may, in fact, be preferable to use "might" rather than "could", as there is less chance of a judge accidentally transposing the words "would" and "might" than there is in relation to the similar-sounding words "would" and "could". In addition, there is less chance that the jury will mishear what the judge says (see, e.g. *R v Thorpe (No 2)* [1999] 2 VR 719).

69. The onus of proof is on the prosecution to disprove this element (see below). As the corollary of "could" is "would not" (rather than "could not"), this means that the prosecution must prove that an ordinary person *would not* have lost self-control and acted in the way the accused did (*Masciantonio v R* (1994) 183 CLR 58*, R v Thorpe (No 2)* [1999] 2 VR 719).

70. Given the risk of confusion between the terms "could", "might" and "would", and the difficulties with the onus of proof in this area (see below), it can be helpful for a judge to explicitly direct the jury that for the prosecution to disprove that something "might" or "could" have happened, it must prove that it "would not" have happened (see, e.g. *R v Abebe* (2000) 1 VR 429).

Could the Ordinary Person have "Done What the Accused Did"

71. The objective test requires the jury to determine whether the provocative conduct could have caused an ordinary person to lose self-control and "act in the way in which the accused did" (*Masciantonio v R* (1994) 183 CLR 58; *R v McCullagh (No 3)* [2007] VSCA 293; *Pollock v R* (2010) 242 CLR 233).

72. The phrase "act in the way in which the accused did" refers to the nature and extent – the kind and degree – of the reaction which the provocative conduct could have caused in an ordinary person. It does not refer to the precise physical form which that reaction might take, or the duration of the reaction (*Masciantonio v R* (1994) 183 CLR 58; *R v Barrett* (2007) 16 VR 240; *R v McCullagh (No 3)* [2007] VSCA 293; *Pollock v R* (2010) 242 CLR 233).

73. Where it is alleged that the accused intentionally murdered the deceased, the jury will therefore need to determine whether the ordinary person could have formed an intention to kill or really seriously injure the victim in response to provocation of that gravity, and whether he or she could have acted upon that intention (*Masciantonio v R* (1994) 183 CLR 58).

74. Where it is alleged that the accused recklessly murdered the deceased, the jury will need to determine whether the ordinary person could have acted with knowledge that someone would probably die or be really seriously injured.[1218]

[1218] While provocation is generally discussed in the context of intentional killings, the defence may be raised where reckless murder is in issue (*R v Cufley* (1983) 10 A Crim R 39).

75. The jury does not need to focus on matters such as whether the ordinary person could have adopted the means used by the accused to carry out his or her intention, or whether the ordinary person would have regained composure earlier than the accused did, or would have inflicted a lesser number of wounds (*Masciantonio v R* (1994) 183 CLR 58; *R v Barrett* (2007) 16 VR 240. See also *Pollock v R* (2010) 242 CLR 233).

76. Care should be taken to avoid leading the jury to consider that the test involves assessing whether the ordinary person might have responded exactly as the accused did (*R v McKeown* [2006] VSCA 74; *R v Gojanovic (No 2)* [2007] VSCA 153).

Proportionality

77. There is no independent requirement that the retaliation should be proportionate to the provocation. Rather, that question is absorbed into the test directed to the effect of the provocation upon the ordinary person (*Johnson v R* (1976) 136 CLR 619; *Masciantonio v R* (1994) 183 CLR 58; *R v McCullagh (No 3)* [2007] VSCA 293; *R v Kuster* (2008) 21 VR 407).

78. It is the function of the ordinary person test to determine the degree of provocation necessary to provide a defence to murder. It is accepted that there must be a high degree of provocation (*Masciantonio v R* (1994) 183 CLR 58).

79. Thus, while the jury can be instructed to take into account the mode and extent of retaliation in applying the ordinary person test, it will be wrong to identify proportionality as a specific matter for defence counsel to establish, or for the prosecution to negative (*Johnson v R* (1976) 136 CLR 619; *R v Ivanovic* [2005] VSCA 238; *R v McKeown* [2006] VSCA 74*; R v Margach* [2007] VSCA 110*; R v Barrett* (2007) 16 VR 240; *R v Gojanovic (No 2)*[2007] VSCA 153; *R v Hill* [2007] VSCA 261; *R v McCullagh (No 3)* [2007] VSCA 293).

80. Although it will not be a misdirection to refer to proportionality if it is made clear that it is not an essential or additional part of the test for provocation, it is generally undesirable to make a separate reference to proportionality when describing the elements of provocation (*R v McCullagh (No 3)* [2007] VSCA 293).

Onus of Proof

81. Once provocation is put in issue, the onus is on the prosecution to disprove at least one of its elements beyond reasonable doubt. If they fail to do so, the accused will be entitled to be acquitted of murder but convicted of manslaughter (as long as all the elements of murder have been satisfied) (*Johnson v R* (1976) 136 CLR 619; *Moffa v R* (1977) 138 CLR 601; *R v Thorpe (No 2)* [1999] 2 VR 719; *R v Anderson* (1997) 94 A Crim R 335).

82. There are a number of ways in which a judge can express the onus of proof:

    - S/he can direct the jury that they may only convict the accused of murder if the prosecution can *disprove one of the elements* of provocation beyond reasonable doubt; or
    - S/he can direct the jury that they must acquit the accused of murder if they find that there is a *reasonable possibility* that the killing was provoked (i.e. that both of the elements of provocation have been established); or
    - S/he can direct the jury that they must acquit the accused of murder if they find that the conclusion that the killing was provoked (i.e. that both of the elements of provocation have been established) is *reasonably open on the evidence* (see, e.g. *Moffa v R* (1977) 138 CLR 601; *R v Thorpe (No 2)* [1999] 2 VR 719; *R v Anderson* (1997) 94 A Crim R 335).

83. The courts have acknowledged the notorious difficulty of explaining the law of provocation to the jury, and relating it to the facts, without inadvertently suggesting that an onus, however limited, lies on the accused (*Moffa v R* (1977) 138 CLR 601; *R v Thorpe (No 2)* [1999] 2 VR 719).

84. It has therefore been suggested that it may be wise to tell the jury that:

- It is always difficult to give directions about provocation in a way which completely avoids any suggestion that the accused has to prove something;
- Any such suggestion is completely wrong; and
- Provocation is something which the prosecution must exclude beyond reasonable doubt (*R v Thorpe (No 2)* [1999] 2 VR 719).

Judge Must Relate the Law to the Facts

85. The judge must explain to the jury how the issue of provocation has arisen on the facts, and how it might be excluded (*Pollock v R* (2010) 242 CLR 233).
86. Where different versions of the facts have been alleged, the judge must explain how provocation arises on each version, and how it might be excluded on each (*Pollock v R* (2010) 242 CLR 233).
87. Care must be taken to identify the real issues in the case, and to relate the directions of law to those issues (*Pollock v R* (2010) 242 CLR 233).

When to Charge the Jury about Provocation

88. The judge must direct the jury about provocation if the defence identify that provocation is in issue or if there are substantial and compelling reasons for giving a direction on provocation in the absence of any request (*Jury Directions Act 2015* ss 11 – 16). See Directions under Jury Directions Act 2015.
89. At common law, the judge was required to leave provocation to the jury if there was material in the evidence which was "capable of constituting provocation" (*Stingel v R* (1990) 171 CLR 312; *Masciantonio v R* (1994) 183 CLR 58).
90. More precisely, the trial judge was required to leave provocation to the jury if:
    - On the version of events most favourable to the accused on the evidence
    - A jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense (*Stingel v R* (1990) 171 CLR 312; *Masciantonio v R* (1994) 183 CLR 58).
91. These requirements took into account the fact that:
    - The ultimate burden of disproving provocation lies on the prosecution; and
    - It is the jury, not the judge, who must be satisfied beyond reasonable doubt of the absence of provocation (*Stingel v R* (1990) 171 CLR 312).
92. At common law, it was acknowledged that there were no clear objective criteria for the judge to apply when determining this issue (*R v Kumar* (2002) 5 VR 193).
93. However, it is clear that in deciding whether provocation should be left to the jury, the trial judge was applying a legal test. S/he was not passing judgment on the morality of the conduct (*R v Conway* (2004) 149 A Crim R 206).
94. The judge's assessment was made by reference to the full legal test for provocation (see above). This is the meaning of the phrase "unprovoked in the relevant sense" (*R v Parsons* (2000) 1 VR 161).
95. At common law, judges needed to be alive to the danger, in considering the objective test, that s/he would substitute his/her own assessment of the facts for the view of the facts most favourable to the accused (*R v Kumar* (2002) 5 VR 193).

Obligation to leave provocation to jury

96. The common law stated that trial judges should lean towards leaving provocation to the jury if s/he could. S/he should be reluctant to withdraw from the jury any issue that should properly be left to them (*Masciantonio v R* (1994) 183 CLR 58; *R v Tuncay* [1998] 2 VR 19; *R v Kuster* (2008) 21 VR 407).

97. This tendency to leave provocation to the jury also reflects:

    - An appreciation of the undesirable consequences of the erroneous exclusion of provocation (i.e. the necessity for a retrial); and
    - Respect for the capacity of juries to evaluate the issues raised by the partial defence (*R v Conway* (2004) 149 A Crim R 206; *R v Kumar* (2002) 5 VR 193).[1219]

98. A trial judge was encouraged to be particularly cautious about withdrawing provocation from the jury where there was evidence of provocative conduct and loss of self control, and the objective test was the only real issue (*Masciantonio v R* (1994) 183 CLR 58; *R v Kumar* (2002) 5 VR 193. See also the application of the test in *R v Yasso (No 2)* (2004) 10 VR 466).

99. These principles must be examined in light of *Jury Directions Act 2015* Part 3, and the increased focus on the importance of forensic decision making of counsel.

The judge's duty was independent of defence counsel's attitude

100. At common law, if provocation was open on the evidence, the trial judge was required to leave it to the jury, no matter what course is followed by defence counsel, and regardless of whether it was actually raised during the trial (*Pollock v R* (2010) 242 CLR 233; *R v Thorpe* [1999] 1 VR 326; *Masciantonio v R* (1994) 183 CLR 58; *Pemble v R* (1971) 124 CLR 107; *R v Hopper* [1915] 2 KB 431).

101. It did not matter if the judge or defence counsel perceived that the accused would suffer a forensic disadvantage if provocation was left to the jury. If the partial defence is open on the evidence, the judge was required to charge the jury (*R v Thorpe* [1999] 1 VR 326).

102. This principle is heavily qualified by Part 3 of the *Jury Directions Act 2015*. Under the Act, judges must not give a direction that has not been sought unless there are substantial and compelling reasons to do so. This test raised the bar compared to the common law position on when directions on defences not sought are required. See Directions under Jury Directions Act 2015.

Last updated: 29 June 2015

8.12.1 Charge: Provocation

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This charge should only be given if:

i) It is alleged that the accused committed murder prior to *23 November 2005*; and

ii) Provocation is open on the evidence (see 8.12 Provocation for guidance).

The charge should be given immediately after directing the jury about the other elements of murder, or where self defence is in issue, after directing the jury on self defence.

[1219] It has been stated that a judge who takes the issue away from the jury assumes a "grave responsibility" (*Masciantonio v R* (1994) 183 CLR 58 per McHugh J; *R v Conway* (2004) 149 A Crim R 206; *R v Kumar* (2002) 5 VR 193).

Introduction

In this case there is evidence that raises the issue of provocation. I must therefore give you some directions about this form of lawful excuse.

The concept of provocation was introduced into the law a long time ago as a concession to human frailty. It is based on the recognition that in certain provocative situations, a person of ordinary self-control can lose control over their emotions and commit the extraordinary act of intentionally killing the person responsible for the provocation.

You only need to consider provocation if you are satisfied that the prosecution has proven all of the other elements of murder beyond reasonable doubt [and you are satisfied that NOA was not acting in self defence].

According to the law, even if the prosecution has proven all of these matters, the accused will be guilty of manslaughter, and not murder, unless the prosecution can prove, beyond reasonable doubt, that the accused was not acting under provocation.

There are three ways in which the prosecution can do this. I will list them for you, and then explain each one in more detail.

First, the prosecution can prove that the deceased did not act provocatively.[1220]

Secondly, the prosecution can prove that the accused did not kill the deceased while deprived of self-control by the deceased's provocative conduct.

Thirdly, the prosecution can prove that the deceased's conduct would not have caused an ordinary person to lose self-control and act in the way the accused did.

The prosecution does not have to prove all of these matters. The prosecution will disprove provocation if it proves any one of them beyond reasonable doubt. In such a case, if you have also found that all the other elements of murder have been proven, you should convict the accused of murder.

However, if the prosecution cannot prove at least one of these matters, then you must not convict the accused of murder. You should instead convict him/her of manslaughter.

Onus of Proof

I want to emphasise that it is not for the accused to prove that s/he was provoked, but for the prosecution to prove that s/he was not.

Unfortunately, it is sometimes difficult to give directions about provocation in a way which completely avoids any suggestion that the accused has to prove something. If anything I say suggests to you that the accused must prove some aspect of this defence, disregard that suggestion. It is for the prosecution to prove that the accused was not provoked.

I will now explain the ways in which the prosecution can prove this in more detail.

Provocative Conduct

The first way in which the prosecution can prove that the accused was not provoked in law is by proving that the deceased did not act provocatively.

[1220] If the provocative conduct did not emanate from the deceased, but it is alleged that the accused mistakenly believed that it did, this charge will need to be modified accordingly.

While this aspect of provocation relates to what the deceased did and said, you must determine whether his/her conduct was provocative by considering its possible impact on the accused. The deceased's conduct will have been provocative if it was capable of causing the accused to lose self-control, and as a result to form an intention to kill or really seriously injure the deceased, and to act upon that intention.

If the prosecution can prove that NOV did not say or do anything that could have caused NOA to lose self-control in this way, and to this extent, then they will have proven that NOA was not provoked in law.[1221]

[*If the deceased may be implicated in the provocative conduct of a third-party, add the following shaded section*.]

In determining whether NOV acted provocatively, you must of course focus on NOV's own conduct. However, in this case you may also need to take into consideration the evidence you have heard of NO3P's[1222] conduct.

NO3P's conduct will be relevant if you find that it is reasonably possible that NOV [adopted/assented to/participated in/associated himself/herself with] that conduct. In such circumstances, for the purpose of this issue you can treat NO3P's conduct as if it was NOV's own conduct.

In determining whether NOV acted provocatively in the sense I have described, you must consider all the evidence of what NOV said and did [at the time of his/her final encounter with NOA].[1223]

You must also take into account any evidence which shows what this conduct might have meant to NOA. Such evidence places the incident in the context necessary for you to determine the effect that conduct was capable of having on NOA.

In this case there was evidence [*describe evidence of any words or conduct by NOV (or a relevant third party) which may be relied upon as provocation*].[1224]

The evidence relevant to the possible impact of NOV's conduct on NOA was [*describe relevant background evidence and/or arguments, including evidence of the relationship and history between the accused and the deceased, relationships with third-parties and cultural matters*].

[*If "self-induced" provocation is in issue, add the following shaded section*.]

You have heard evidence of NOA's conduct prior to NOV saying and doing the things that I have described. [*Identify evidence relating to the accused's provocative conduct.*] This evidence is relevant because the law says that NOV will not have acted provocatively if his/her conduct was itself provoked by the accused's conduct, and the deceased's response did not go beyond the reasonably predictable response of a person in his/her position.

[1221] If it is possible that the deceased did not commit the provocative conduct, but the accused mistakenly believed that s/he did, this section will need to be modified. See 8.12 Provocation for further information.

[1222] Name of Third Party.

[1223] If relevant, refer also to third parties whose conduct was "adopted" etc. by the deceased.

[1224] Strictly, only evidence capable of constituting provocation should be summarised here. Evidence of "historic conduct", or conduct in the absence of the accused, should be summarised as background evidence. Where relevant, describe any evidence that NOV "adopted" etc. a third party's conduct.

Remember, it is for the prosecution to prove that NOA was not provoked. If you are satisfied beyond reasonable doubt that NOV did not say or do anything that could have provoked NOA to lose self control, and as a result to form and act upon an intention to kill or seriously injure NOV, then NOA will not have been provoked in law. If you are also satisfied that all the other elements of murder have been proven, you should convict NOA of murder.

However, if you consider there is a reasonable possibility that NOV did act provocatively in the sense I have described, then provocation will remain an issue, and you will need to consider the next matter.

Killing While Deprived of Self Control

The second way in which the prosecution can prove that the accused was not provoked is by proving that s/he did not kill the deceased while deprived of self-control by the deceased's provocative conduct.[1225] This aspect of provocation relates to the accused's state of mind.

The prosecution can disprove this element of provocation by proving beyond reasonable doubt that the accused did not lose self control at all. That is, s/he retained full control over his/her emotions when s/he formed and acted upon the intention to kill or seriously injure the deceased.

[*If there is evidence suggesting a "cooling off period", add the following shaded section*.]

Even if you find that the deceased's conduct might have caused the accused to lose self-control, the prosecution can disprove this element of provocation by proving that, at the time s/he killed the deceased, the accused had regained self-control.

In this case, it is possible that this happened in the alleged period between NOV [*describe provocative conduct*] and his/her death. [*Describe evidence of delay between provocation and killing.*]

However, the mere fact that there may have been a delay between the deceased's provocative conduct and the accused's response does not mean that provocation will have been disproved. The accused may still have been out of control despite such a delay.

Such a delay will, however, clearly be relevant to your determination of whether NOA was out of control when s/he killed NOV. It is possible that you will find that s/he had "cooled off" during that period of time, and was no longer deprived of self-control. Alternatively, you may find that s/he remained out of control for the entire period. This is a question of fact for you to determine.

In considering whether NOA might have killed NOV while deprived of self-control by NOV's provocative conduct, you must take into account all of the evidence you considered when determining whether or not NOV had acted provocatively. This includes the evidence of NOV's conduct, and the evidence concerning the possible impact of that conduct on NOA. The evidence of particular significance to NOA's loss of self-control was [*identify evidence of particular relevance to this issue, including any direct evidence of loss of control at the time of the killing*].

If, upon consideration of all of the evidence, you are satisfied that NOA did not kill NOV while deprived of self-control by NOV's provocative conduct, then the prosecution will have disproven provocation. If you are also satisfied that all the elements of murder have been proven, you should convict NOA of that offence.

[1225] If there is an issue about the accused's mistaken belief about the victim's conduct, this aspect of the charge will require further elaboration.

Objective Element

The third way in which the prosecution can prove that the accused was not provoked is by proving that the deceased's conduct would not have caused an ordinary person to lose self-control and act in the way the accused did. This reflects the minimum standard of self-control the law requires of us all.

There are two stages to determining whether the ordinary person would not have lost self-control and acted in the way the accused did. First, you must assess the gravity or seriousness of the deceased's conduct. Then you need to determine whether provocation of that gravity would not have caused an ordinary person to lose self-control and act like the accused.

Gravity of the Provocation

The law says that you must assess the gravity of the deceased's conduct from the viewpoint of the accused. That is, you have to take into account NOA's personal characteristics and circumstances, such as his/her age, sex and race, when determining how grave that conduct was. This is because conduct which might not be insulting or hurtful to one person might be extremely insulting or hurtful to another because of such matters.

In this case, the characteristics and circumstances that you must take into account when assessing the gravity of NOV's conduct include [*insert details of the accused's relevant characteristics and circumstances, such as his/her age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history*].

Ordinary Person

Having assessed the gravity of the deceased's conduct, you must then determine whether provocation of that gravity might have caused an ordinary person to lose self-control and act in the way the accused did.

By "act in the way the accused did", I mean form an intention to kill or really seriously injure the deceased, and act on that intention.[1226] You do not need to be concerned with whether or not the ordinary person might have responded in precisely the way that you find the accused did.

The prosecution will therefore disprove provocation if it proves that provocation of that gravity would not have caused an ordinary person to lose self-control and act in the way the accused did. It is important to note that what the prosecution must prove here is that the ordinary person "would not" have lost self-control and acted in that way. They will not have proven this if you find that the ordinary person "could" or "might" have acted like the accused.

Person with ordinary powers of self control

In deciding whether this has been proven, you need to consider how the ordinary person, with ordinary powers of self-control, might have responded to NOV's conduct. You must determine whether provocation of that gravity could have led such a person to form an intention to kill or really seriously injure NOV, and to act upon that intention.

It is for you to determine how the ordinary person, with "ordinary powers of self control", might have acted in such circumstances. You must determine how a hypothetical ordinary, sober person, who represents a standard that applies to the whole community, might have reacted to provocation of that gravity.

[*If the case involves an adult accused, add the following shaded section*.]

[1226] This aspect of the charge will need to be amended if provocation is used in relation to reckless murder rather than intentional murder.

Unlike your assessment of the gravity of the deceased's conduct, in making this determination you must not take the accused's personal characteristics or circumstances into account. You must simply determine how the ordinary person, with a normal adult's powers of self-control, might have acted.

[*If the case involves a youthful accused, add the following shaded section*.]

Unlike your assessment of the gravity of the deceased's conduct, in making this determination the only one of the accused's characteristics or circumstances you may take into account is his/her age. You must determine how the ordinary [*insert the accused's age at the time of the offence*] year-old, with the powers of self-control of a person with the maturity or immaturity that you consider goes with that age, might have acted.

In this case [*insert relevant arguments and/or evidence*].

If the prosecution can prove that the ordinary person would not have responded to provocation that was as grave as that committed by NOV, by losing self control and forming and acting upon the intention I have described, then the prosecution will have disproven provocation.

Summary

To summarise, if you decide that all the other elements of murder have been proven beyond reasonable doubt, you must find NOA not guilty of murder and guilty of manslaughter instead, unless the prosecution prove that s/he was not acting under provocation.

There are three ways in which the prosecution can prove this:

- One – by proving that NOV did not act provocatively;
- Two – by proving that NOA did not kill NOV while deprived of self-control by NOV's provocative conduct; or
- Three – by proving that NOV's conduct would not have caused an ordinary person to lose self-control and act in the way NOA did.

If you find that the prosecution has proven any of these matters beyond reasonable doubt, and has also proven all the other elements of murder, then you must convict the accused of murder.

However, if you find that all the other elements of murder have been proven, but you are not satisfied that the prosecution has proven at least one of these three matters beyond reasonable doubt, then you must convict the accused of manslaughter.

Last updated: 12 December 2007

8.12.2 Checklist: Provocation

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This checklist can be used in a Murder trial if provocation has been left to the jury. See 8.12 Provocation for guidance on when provocation should be left to the jury.

In addition to proving all of the other elements of murder, the prosecution must also prove that the accused did not act under provocation.

This requires the prosecution to prove, beyond reasonable doubt, that when the accused killed the deceased, either:

1. The deceased did not act provocatively; or
2. The accused did not kill the deceased while deprived of self-control by the deceased's provocative conduct; or
3. The deceased's conduct would not have caused an ordinary person to lose self-control and act in the way the accused did.

Provocative Conduct

1. Has the prosecution proven that the deceased did not say or do anything that *could* have caused the accused to lose self control, and as a result to form an intention to kill or really seriously injure the deceased, and to act upon that intention?

Consider – Taking into account all of the circumstances, is there no reasonable possibility that the deceased said or did anything capable of provoking the accused in the way and to the degree described?

If Yes, then the accused is guilty of Murder (as long as you are satisfied that the prosecution has also proven all of the other elements of Murder beyond reasonable doubt)

If No, then go to Question 2

Killing While Deprived of Self Control

2. Has the prosecution proven that the accused did not kill the deceased while deprived of self-control by the deceased's conduct?

*Consider – **What was the accused's state of mind when s/he killed the deceased?***

If Yes, then the accused is guilty of Murder (as long as you are satisfied that the prosecution has also proven all of the elements of that offence beyond reasonable doubt)

If No, then go to Question 3

Conduct Would Have Caused an Ordinary Person to Lose Self-Control

3. Has the prosecution proven that the deceased's conduct would not have caused an ordinary person to lose self-control and act in the way the accused did?

Consider – How grave was the provocation from the viewpoint of the accused? How might a person with ordinary powers of self control have reacted to provocation of this gravity?

If Yes, then the accused is guilty of Murder (as long as you are satisfied that the prosecution has also proven all of the elements of that offence beyond reasonable doubt)

If No, then the accused acted under provocation and is not guilty of Murder, but is guilty of Manslaughter (as long as you are satisfied that the prosecution has proven all the other elements of Murder beyond reasonable doubt)

Last updated: 12 December 2007

8.13 Suicide Pact

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Partial Defence to Murder

1. When the accused is charged with murder, the jury may return a verdict of manslaughter by suicide pact where they are satisfied that:
    - The prosecution has proven all of the elements of murder beyond reasonable doubt; and

- The defence has proven, on the balance of probabilities, that the accused caused the death pursuant to a suicide pact (*Crimes Act 1958* s 6B(1)).

2. Unlike other forms of manslaughter, the maximum penalty for manslaughter by suicide pact is 10 years' imprisonment (*Crimes Act 1958* s 6B(1A)).

Elements

3. There are three matters the defence must prove on the balance of probabilities to establish this partial defence:

   i) There was an agreement between the accused and the deceased to seek the death of all parties to the agreement (a "suicide pact");

   ii) The accused's acts that caused the death of the deceased were committed in pursuance of the suicide pact; and

   iii) At the time he or she caused the death, the accused had the settled intention of dying pursuant to the agreement (*Crimes Act 1958* s 6B(4)).

4. An agreement which has as its object the death of all of the parties to it will be a suicide pact, regardless of whether each party to the agreement is to take his or her own life (*Crimes Act 1958* s 6B(4)).

5. The accused must prove the existence of an actual suicide pact. It is not sufficient to prove that the accused held an honest and reasonable belief in the existence of a suicide pact (*R v Iannazzone* [1983] 1 VR 649).

6. Passively allowing another person to commit suicide or hasten his or her own death does not give rise to a suicide pact (*H Ltd v J* (2010) 107 SASR 352).

Onus of Proof

7. The accused bears the onus of establishing, on the balance of probabilities, that he or she killed the deceased pursuant to the suicide pact. If the accused fails to establish this matter, then the appropriate verdict will be guilty of murder (*Crimes Act 1958* s 6B(1). See also *R v Sciretta* [1977] VR 139).

Liability of Third Parties

8. The existence of a suicide pact does not affect the criminal liability of a person who is a party to the homicide, but is *not* a party to the suicide pact (*Crimes Act 1958* s 6B(3)).

Related Offences

9. Suicide itself is no longer a crime (*Crimes Act 1958* s 6A).

10. *Crimes Act 1958* s 6B(2) creates three specialised suicide–related offences, which may be relevant where the accused's actions did not directly cause the death of the deceased:

    - Inciting another person to commit suicide where the other person does so, or attempts to do so;
    - Aiding and abetting another person to commit suicide where the other person does so, or attempts to do so; and
    - Committing either of the above offences pursuant to a suicide pact ('being a party to a suicide pact').

Last updated: 14 December 2010

8.13.1 Charge: Suicide Pact

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This direction is designed to be given after charging the jury on murder.

In this case, the defence has argued that NOA killed NOV under a suicide pact. I must therefore give you some directions about this partial defence.

The law states that a person who kills another person as part of a suicide pact should not be convicted of murder. He or she should be convicted of manslaughter instead.

You only need to consider the question of whether or not NOA killed NOV as part of a suicide pact if you are satisfied that the prosecution has proven all the elements of murder beyond reasonable doubt. If you are not satisfied that is the case, then you must not convict him/her of either murder or manslaughter.

Reverse Onus Direction

This is one of those rare situations in which a matter must be proved by the defence. It is defence counsel who must establish that NOA killed NOV as part of a suicide pact. If they cannot prove that was the case, then as long as you are satisfied that the prosecution has proven all the elements of murder, you should convict NOA of murder.

However, unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – the defence only needs to prove this matter on what is called the "balance of probabilities". This is a much lower standard than that required of the prosecution when proving an offence. It only requires the defence to prove that it is more probable than not that NOA killed NOV as part of a suicide pact.

Elements of A Suicide Pact

In order to prove that NOA killed NOV as part of a suicide pact, there are three matters that the defence must establish on the balance of probabilities.

First, they must establish that there was a "suicide pact" between NOA and NOV. The law defines a "suicide pact" as an agreement between two or more people to seek the death of all parties to the agreement.

[*Summarise any evidence and/or arguments relating to the existence of a suicide pact*.]

Second, the defence must establish that [*identify act alleged to have caused NOV's death*] was done in the course of carrying out the suicide pact.

[*Summarise any relevant evidence and/or arguments relating to whether the relevant act was committed pursuant to the suicide pact*.]

Third, the defence must establish that at the time s/he caused NOV's death, NOA had the settled intention of dying in accordance with the agreement.

[*Summarise any evidence and/or arguments relating to the accused's mental state.*]

If the defence establishes all three of those matters on the balance of probabilities, then the accused must be acquitted of murder and convicted of manslaughter.

Last updated: 14 December 2010

8.14 Powers of Arrest

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Introduction

1. A person is arrested when police make it plain to him or her that he or she is not free to leave (*R v Lavery* (1978) 19 SASR 515).
2. The *Crimes Act 1958* contains several provisions empowering police officers to make arrests in various circumstances.
3. In addition, other legislation provides additional bases for arrests without warrant (see, e.g. *Bail Act 1977* s 24). These other bases for arrest without warrant are beyond the scope of this commentary.
4. While powers of arrest are now governed by statute in Victoria, the common law still dictates the requirements of a lawful arrest (*Slaveski v State of Victoria & Ors* [2010] VSC 441; *Crimes (Powers of Arrest) Act 1972*).
5. Unless stated otherwise, all statutory references are to sections of the *Crimes Act 1958*.

To Which Crimes are Police powers of Arrest Available as a Defence?

6. Police powers of arrest provide a lawful excuse for what would otherwise be an unlawful application of force. The defence is therefore most likely to arise in relation to offences such as:
   (a) assault (*Slaveski v State of Victoria & Ors* [2010] VSC 441); and
   (b) false Imprisonment (*Biddle v State of Victoria & Ors* [2015] VSC 275).

General powers of arrest without warrant (s 458)

7. Section 458 provides three situations in which any person (including a police officer) may arrest a person without a warrant.

Accused finds a person committing an offence (s 458(1)(a))

8. The first situation applies where:
   (a) a person (including a police officer) found the other person committing an indictable or summary offence; and
   (b) a person (including a police officer) believed on reasonable grounds that apprehension was necessary for one or more of the prescribed reasons (s 458(1)(a)).
9. A person (including a police officer) finds a person committing an offence including when a person (including a police officer) finds a person:

   > doing any act or so behaving or conducting himself or in such circumstances that the person finding him believes on reasonable grounds that the person so found is guilty of an offence (s 462).

10. "Finds committing" is intended to be given an extended meaning to encompass circumstances beyond actually finding an offender engaged in the relevant act (*De Moor v Davies* [1999] VSC 416).
11. Section 462 extends the point of discovery of the commission of the offence to encompass:
    (a) the actual perpetration of the offence;
    (b) finding a person behaving or conducting him or herself so as to create a reasonable belief of guilt; or
    (c) finding a person in such circumstances so as to create a reasonable belief of guilt (*De Moor v Davies* [1999] VSC 416; *Lynch v Hargrave* [1971] VR 99; *Lunt v Bramley* [1959] VR 313).
12. The prescribed reasons are:

    > (i) to ensure the attendance of the offender before a court of competent jurisdiction;
    > (ii) to preserve public order;

(iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or
(iv) for the safety or welfare of members of the public or of the offender (s 458(1)(a).

Accused instructed by an authorised police officer (s 458(1)(b))

13. The second situation under s 458 applies where a person (including a police officer) was instructed to apprehend a person by a police officer who had the power to apprehend that person.

Arrested escaping from custody or evading arrest (s 458(1)(c))

14. The third situation under s 458 applies where a person (including a police officer) believed on reasonable grounds that the other person was:

    (a) escaping from legal custody; or

    (b) aiding and abetting another person to escape from legal custody; or

    (c) avoiding apprehension by some person with authority to apprehend the person.

Duration of arrest under s 458

15. A person who has been apprehended under s 458 may only be held as long as the reason for their apprehension continues. If the reason ceases to exist, the arrested person must be released (s 458(3)).

Police–specific powers of arrest without warrant (s 459)

16. Section 459 provides powers that only apply to police or protective services officers. Under section 459 a person is lawfully arrested if a person (including a police officer):

    (a) is a police or protective services officer; and

    (b) believed on reasonable grounds that the other person has committed:

        i) an indictable offence in Victoria; or

        ii) an offence elsewhere which would be an indictable offence in Victoria.

17. A protective services officer exercising this power must hand the person into the custody of a police officer as soon as practicable (s 459(2)).

18. A protective services officer can only exercise this power in relation to a person who is at or in the vicinity of a "designated place" as defined in the Victoria Police Act 2013 (s 459(3)).

19. Where an arrest is made under a belief held on reasonable grounds, the apprehension does not cease to be lawful if it later turns out the person arrested did not commit the offence alleged against him (s 461).

Reasonable grounds

20. "Reasonable grounds" requires the existence of facts which are sufficient to induce that state of mind (e.g. belief, suspicion) in a reasonable person (*George v Rockett* (1990) 170 CLR 104; *Walsh v Loughnan* [1991] 2 VR 351).

21. The person (including a police officer) must believe that the person being arrested has committed an indictable offence and this belief must be based on facts that would induce that state of mind in a reasonable person (*Slaveski v State of Victoria & Ors* [2010] VSC 441).

Belief

22. Belief has been distinguished from suspicion (*George v Rockett* (1990) 170 CLR 104). The facts grounding a suspicion may be insufficient to ground a belief (*Walsh v Loughnan* [1991] 2 VR 351).

23. Belief is a more certain state of mind than suspicion and involves an inclination of the mind towards assenting to, rather than rejecting, a proposition (*George v Rockett* (1990) 170 CLR 104).

24. Suspicion is a positive feeling of actual apprehension of mistrust, amounting to a slight opinion, but without sufficient evidence. Suspicion is not enough to justify an arrest without warrant (*Slaveski v State of Victoria & Ors* [2010] VSC 441).

25. The information upon which the arrester forms their belief depends on all of the circumstances that prevailed at the relevant time, including what the arrester saw, heard or did.

26. The person (including a police officer) must have believed that a particular indictable offence occurred, and not simply any indictable offence generally (*R v Vollmer* [1996] 1 VR 95).

Use of Force

27. Section 462A authorises a person to use force to effect or assist in effecting the lawful arrest of a person committing or suspected of committing an offence (s 462A).

28. The force used must not be disproportionate to the objective as the person believed on reasonable grounds to be necessary (s 462A).

29. Section 462A of the *Crimes Act* does not confer a power of arrest, it merely provides that proportionate force may be used to effect an arrest. The lawful power of arrest must be derived from either section 458 or section 459 (*Slaveski v State of Victoria & Ors* [2010] VSC 441).

30. The right to use force is a corollary of the right to effect an arrest, as without such a right, a power of arrest would be ineffective (*R v Turner* [1962] VR 30).

31. The right to use force only authorises using the amount of force reasonably necessary to carry out the arrest. The force must not be disproportionate to the "evil to be prevented" (*R v Turner* [1962] VR 30).

32. The level of force that is reasonable is to be determined objectively.

Arrest with Warrant

33. In addition to the various bases for arrest without warrant, Victorian law provides a range of bases for a court to issue a warrant to arrest (see, e.g. *Criminal Procedure Act 2009* s 12; *Evidence Act 2008* s 194).

34. Where there is an arrest with warrant, the person must comply with any conditions on the warrant, along with the common law elements of lawful arrest described below.

Common Law Elements of Lawful Arrest

35. While the powers of arrest are largely governed by statute, the common law still dictates the process of a lawful arrest (*Slaveski v State of Victoria & Ors* [2010] VSC 441).

36. These procedural requirements are:

    (a) The other person was deprived of his or her liberty;

    (b) The accused informed the other person that he or she was under arrest; and

    (c) The accused informed the other person of the reason for the arrest.

Deprivation of Liberty

37. There is no requirement that the other person be seized or subjected to physical force. There may be an arrest by mere words (*Alderson v Booth* [1969] 2 QB 216).

38. There will be a sufficient deprivation of liberty if the other person submits to the arrester's control after the arrester has indicated his or her intention to effect the arrest (*Slaveski v State of Victoria & Ors* [2010] VSC 441).

39. If the other person does not comply, the deprivation of liberty must be formalised by the accused touching the other person (*Sandon v Jervis* (1859) 120 ER 760).

Communication of arrest

40. A person (including a police officer) must do everything that a reasonable person in the circumstances would do to inform the person being arrested that they are under arrest (*R v Stafford* (1976) 13 SASR 392; *Hull v Nuske* (1974) 8 SASR 587).

41. The person being arrested must comprehend that they are acting under compulsion and not voluntarily (*Alderson v Booth* [1969] 2 QB 216; *R v O'Donoghue* (1988) 34 A Crim R 397).

42. The question of whether it was clear to the person being arrested that they were under compulsion is a question of fact dependant on the circumstances of the case (*R v Inwood* [1973] 2 All ER 645).

Communication of reason for arrest

43. A person (including a police officer) must inform the person being arrested, at the time of the arrest, of the offence or facts constituting an offence, for which they are being arrested (*Christie v Leachinsky* [1947] AC 573; *Adams v Kennedy* (2000) 49 NSWLR 78; *R v Tipping* [2019] SASCFC 41).

44. The reason given must be the true reason. A person cannot keep the reason for arrest to himself or herself, or give a reason which is not the true reason (*Christie v Leachinsky* [1947] AC 573).

45. An arrest for the mere purpose of questioning is unlawful (*Bales v Parmenter* (1935) SR (NSW) 182).

46. The reason for arrest does not need to be communicated using technical or precise language (*Christie v Leachinsky* [1947] AC 573).

47. In certain circumstances, the accused will be excused from immediately informing the person being arrested, for example:

    - if the other person resists arrest or absconds (*Christie v Leachinsky* [1947] AC 573);
    - if the circumstances of the arrest are such that the offence or reason for arrest is apparent to the other person (*Christie v Leachinsky* [1947] AC 573); or
    - if the other person is unable to understand the reason because of disability, intoxication or lack of English language skills, as long as the accused does all that a reasonable person would do in such circumstances (*Tims v John Lewis & Co Ltd* [1952] AC 676).

48. In these circumstances, a person (including a police officer) must inform the person being arrested of the reason for the arrest at the earliest reasonable opportunity (*Christie v Leachinsky* [1947] AC 573).

49. In assessing the second exception described above, the focus must be on the circumstances of the arrest itself, rather than the subjective knowledge of the arrested person. The prosecution must show that, in the circumstance, the other person must have known the reason for the arrest (*State of NSW v Delly* (2007) 70 NSWLR 125).

Last updated: 17 May 2019

8.14.1 Charge: Arrest when Person Found Committing an Offence

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[*This charge is designed to be given as part of the "without lawful excuse" element in* 7.4.17.1 Charge: False Imprisonment *or* 7.4.8.1 Charge: Assault – Application of Force *where there is evidence from which a jury might infer that the accused was acting in accordance with* Crimes Act 1958 *s 458(1)(a) to perform a lawful arrest. Where lawful arrest is raised in relation to other offences, it should be adapted as required.*

If the basis for the lawful arrest relates to Crimes Act 1958 *s 459, see* 8.14.2 Charge: Police arrest due to an indictable offence *or* 8.14.3 Charge: Protective Services Officer arrest due to an indictable offence.

If the basis for the lawful arrest relates to Crimes Act 1958 s *458(1)(b) or (c), this charge must be modified accordingly*.]

Lawful excuse

This element relates to the argument that NOA was performing a lawful arrest when s/he [*insert relevant act*].

To explain this element, I'm first going to give you some background on the power of police to arrest a person, and then explain the legal components of a lawful arrest.

Background

As a free and democratic society, all people are protected from arbitrary arrest and detention. The law gives all people, police and non-police alike, certain powers to arrest a person in order to prevent crime, these powers can only be exercised in limited and defined circumstances.

An arrest occurs when a person has made it plain to another person that the other person is no longer a free person. As part of this, the first person must inform the other person that the other person is arrested and the reason for the arrest. This is often done by saying something like "Mr Smith, I am arresting you because you are committing" and then identifying the crime in question.

It is not always necessary to spell this out. In some cases, it may be obvious from the circumstances why the person is being arrested. It is also not necessary to immediately inform the other person if that other person makes it impractical to do so, such as by running away. When informing the other person, a person does not need to use technical or precise language. The focus is on whether the other person has been adequately informed of the reason for the arrest.

As I said, an arrest involves making it plain that the other person is not free to go. If someone gives the impression that the other person is free to refuse a request, or free to leave, then there is no arrest. In other words, whether there is an arrest may depend on the words and actions of those involved, and the surrounding circumstances.

One limit on the power to arrest a person is that there must be a valid reason for the arrest. A desire to question a person is not a valid reason.

Components of lawful arrest

I'm now going to explain the components of a lawful arrest.

The accused will have lawfully arrested NOC if:

- NOA found NOC committing an offence; and
- NOA believed on reasonable grounds that arrest was necessary for a lawful reason; and
- NOA, where possible, informed NOC that [he/she] was under arrest; and
- NOA, where possible, informed NOC of the reason for the arrest; and
- any force the accused used was proportionate.

To prove that NOA was acting without lawful excuse, the prosecution must disprove at least one of these five components of a lawful arrest.

The prosecution argues that the [*identify component numbers, e.g.* "first and third"] components of a lawful excuse did not exist. I will now explain those components in more detail.

Note: The judge should only direct on those parts of a lawful arrest which are in issue.

Found committing an offence

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt that NOA did not find NOC committing an offence.

The law gives a wide meaning to the idea of finding a person committing an offence. It covers the situation where the accused sees a person committing an offence. It also covers the situation where the accused finds a person [acting/behaving/in circumstances] so as to create a reasonable belief that the person committed an offence.

The prosecution argues that NOA did not find NOC committing an offence. The defence dispute this and say that NOA did find NOC committing [*identify relevant offence*].

[*Summarise evidence and arguments relating to circumstances in which NOC was found when NOA effected the arrest.*]

Belief on reasonable grounds that arrest was necessary

The [*insert number*] way in which the prosecution can prove that the accused was not performing a lawful arrest is to prove, beyond reasonable doubt, that the accused did not believe on reasonable grounds that arrest was necessary for a lawful reason.

This component looks at the basis for the arrest. The basis must be lawful and the accused must have believed on reasonable grounds that it was necessary to arrest NOC on that basis.

For this purpose, an arrest is lawful if it is necessary:

- to ensure the person attends before a court; or
- to preserve public order; or
- to prevent the continuation or repetition of the offence or the commission of a further offence; or
- for the safety or welfare of members of the public or of the other person.

There is an important difference between a belief and a suspicion. The accused must have actually believed that NOC had committed an indictable offence. A state of mind such as "I think s/he might have committed an offence" or "I suspect s/he has committed an offence" is not sufficient. A belief means thinking something is true, even if there is still some uncertainty. A belief is a more certain state of mind than a suspicion, but does not depend on concrete proof.

There must also be reasonable grounds for that belief. This means that the accused must have known facts which would be sufficient to cause a reasonable person to also believe that the other person had committed an offence.

This means you are looking both at what NOA believed, and whether there was a reasonable basis for NOA to believe arrest was necessary for this purpose.

The prosecution argues that [*identify relevant prosecution evidence and arguments*]. The defence respond by saying [*identify relevant defence evidence and arguments*].

If you are satisfied NOA did not believe it was necessary to arrest NOC to [*identify relevant lawful purposes of arrest*] or that NOA did not have a reasonable basis for that belief, then you must find that NOA was not performing a lawful arrest.

Communication of arrest

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt, that NOA did not communicate to NOC that [he/she] was being arrested.

NOA must have done everything a reasonable person in the circumstances would have done to inform NOC that [he/she] was under arrest. NOC must have understood that the [he/she] was acting under compulsion and not voluntarily.

[*If there is evidence to suggest that the accused was prevented in any way from communicating to the other person that they were under arrest, add the following shaded section.*]

In certain circumstances, a person will be excused from immediately informing the other person that they are under arrest. These circumstances include:

- if the other person resists arrest or runs away;
- if the circumstances of the arrest are such that it is apparent to the other person that they are under arrest;
- if the other person is unable to understand that they are under arrest because of disability, intoxication or lack of English language skills, as long as the accused does all that a reasonable person would do in such circumstances

In these circumstances, the other person must be informed that they are under arrest at the earliest reasonable opportunity.

[*Summarise evidence and arguments about whether NOA communicated that the arrestee was under arrest.*]

Communication of reason for arrest

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt, that NOA did not communicate the reason for the arrest.

The accused did not need to use precise or technical language. It is sufficient if NOA informed NOC of the facts constituting the alleged offence.

[*If there is evidence to suggest that the accused was prevented in any way from communicating the reason for the arrest, add the following shaded section.*]

In certain circumstances, a person will be excused from immediately informing the other person that they are under arrest. These circumstances include:

- if the other person resists arrest or runs away;
- if the circumstances of the arrest are such that it is apparent to the other person that they are under arrest;
- if the other person is unable to understand that they are under arrest because of disability, intoxication or lack of English language skills, as long as the accused does all that a reasonable person would do in such circumstances

In these circumstances, the other person must be informed that they are under arrest at the earliest reasonable opportunity.

[*Summarise relevant evidence and arguments.*]

Use of force not disproportionate to objective of arrest

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt, that NOA used excessive force.

The right to use force for the purpose of an arrest only authorises using the amount of force reasonably necessary to carry out the arrest. The force must not be disproportionate to the objective of the arrest.

For this component, you must look at whether the force used was disproportionate objectively. That is, you decide whether the force used was proportionate. You are not deciding whether NOA thought the force used was proportionate.

[*Summarise evidence and arguments about force used to effect arrest*.]

Relate law to the evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, for this element, the prosecution must prove that NOA was not exercising a lawful power of arrest. Based on the evidence, this means the prosecution must prove that NOA did not:

[*Identify only those matters that are in issue:*

- find NOC committing an offence;
- believe on reasonable grounds that arrest was necessary for a lawful reason;
- inform NOC that he or she was under arrest;
- inform NOC of the reason for the arrest; or
- only use force that was proportionate to the objective of the arrest.]

Unless you find that the prosecution has disproved one or more of these matters beyond reasonable doubt, you must find NOA not guilty of [*insert offence*].

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused acted without lawful excuse by showing that he/she was not performing a lawful arrest. NOA does not need to prove that [he/she] was performing a lawful arrest.

Last updated: 17 May 2019

8.14.2 Charge: Police Arrest Due to an Indictable Offence

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[*This charge is designed to be given as part of the "without lawful excuse" element in* 7.4.17.1 Charge: False Imprisonment *or* 7.4.8.1 Charge: Assault – Application of Force *where there is evidence from which a jury might infer that the accused was acting in accordance with* Crimes Act 1958 *s 459 to perform a lawful arrest. Where lawful arrest is raised in relation to other offences, it should be adapted as required.*

If the case involves a protective services officer, see 8.14.3 Charge: Protective services officer arrest due to an indictable offence.

If the basis for the lawful arrest relates to Crimes Act 1958 *s 458, see* 8.14.1 Charge: Arrest when person found committing an offence.]

Lawful excuse

This element relates to the argument that NOA was performing a lawful arrest when s/he [*insert relevant act*].

To explain this element, I'm first going to give you some background on the power of police to arrest a person, and then explain the legal components of a lawful arrest.

Background

As a free and democratic society, all people are protected from arbitrary arrest and detention. While the law gives police certain powers as part of their role, including the power to arrest a person, that power can only be exercised in limited and defined circumstances.

An arrest occurs when a police officer has made it plain to another person that the other person is no longer a free person. As part of this, the police officer must inform the other person that the person is arrested and the reason for the arrest. This is often done by saying something like "Mr Smith, I am arresting you on suspicion of committing" and then identifying the crime in question.

It is not always necessary to spell this out. In some cases, it may be obvious from the circumstances why the person is being arrested, such as if the person is in the process of committing an offence. It is also not necessary to immediately inform the other person if that other person makes it impractical to do so, such as by running away. When informing the other person, the police officer does not need to use technical or precise language. The focus is on whether the other person has been adequately informed of the reason for the arrest.

As I said, an arrest involves making it plain that the other person is not free to go. If a police officer gives the impression that the other person is free to refuse a request, or free to leave, then there is no arrest. In other words, whether there is an arrest may depend on the words and actions of those involved, and the surrounding circumstances.

One limit on the power to arrest a person is that there must be a valid reason for the arrest. A desire to question a person is not a valid reason.

Components of lawful arrest

I'm now going to explain the components of a lawful arrest.

The accused will have lawfully arrested NOC if:

- NOA was a police officer;
- NOA believed on reasonable grounds that the other person has committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria;
- NOA, where possible, informed NOC that [he/she] was under arrest;
- NOA, where possible, informed NOC of the reason for the arrest; and
- any force the accused used was proportionate.

To prove that NOA was acting without lawful excuse, the prosecution must disprove at least one of these five components of a lawful arrest.

The prosecution argues that the [*identify component numbers, e.g. "*first and third"] components of a lawful excuse did not exist. I will now explain those components in more detail.

Note: The judge should only direct on those parts of a lawful arrest which are in issue.

Police Officer

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt that NOA is not a police officer.

[*Summarise evidence and arguments relating to whether NOA was a police officer*].

Belief on reasonable grounds that complainant has committed an indictable offence

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt, that NOA did not believe on reasonable grounds that NOC committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria].

This component looks at the reason for the arrest. You are looking both at what NOA believed, and whether he/she had a reasonable basis for that belief.

There is an important difference between a belief and a suspicion. The accused must have actually believed that NOC had committed an indictable offence. A state of mind such as "I think s/he might have committed an offence" or "I suspect s/he has committed an offence" is not sufficient. A belief means thinking something is true, even if there is still some uncertainty. A belief is a more certain state of mind than a suspicion, but does not depend on concrete proof.

There must also be reasonable grounds for that belief. This means that the accused must have known facts which would be sufficient to cause a reasonable person to also believe that the other person had committed an offence.

Finally, the accused must have believed that the other person had committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria]. A general belief that the other person had done something wrong is not enough. The accused must have believed on reasonable grounds that the other person had committed a specific offence, such as [*identify relevant offences*]. I direct you as a matter of law that [*identify relevant offences*] are [Victorian indictable offences/offences that would be indictable offences if committed in Victoria].

[*If relevant, add the following shaded section on arrest for a collateral purpose*.]

When you are considering this issue, you must look at NOA's real reason for the arrest. You have heard the prosecutor argue that [*refer to prosecution case on collateral reason for arrest*]. If you are satisfied beyond reasonable doubt that NOA only arrested NOC because [*insert collateral reason*], and later invented the explanation that NOC was [*identify relevant offence*], then the prosecution have proved that NOA did not believe, at the time of the arrest, that NOC had committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria].

[*Summarise evidence and arguments about whether NOA believed on reasonable grounds that NOC committed an indictable offence in Victoria/an offence elsewhere that would be an indictable offence in Victoria*].

If you are satisfied NOA did not believe NOC had committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria] or that NOA did not have a reasonable basis for that belief, then you must find that NOA was not performing a lawful arrest.

Communication of arrest

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt, that NOA did not communicate to NOC that [he/she] was being arrested.

NOA must have done everything a reasonable person in the circumstances would have done to inform NOC that [he/she] was under arrest. NOC must have understood that the [he/she] was acting under compulsion and not voluntarily.

[*If there is evidence to suggest that the accused was prevented in any way from communicating to the other person that they were under arrest, add the following shaded section.*]

In certain circumstances, a police officer will be excused from immediately informing the other

person that they are under arrest. These circumstances include:

- if the other person resists arrest or runs away;
- if the circumstances of the arrest are such that it is apparent to the other person that they are under arrest;
- if the other person is unable to understand that they are under arrest because of disability, intoxication or lack of English language skills, as long as the police officer does all that a reasonable person would do in such circumstances.

In these circumstances, the other person must be informed that they are under arrest at the earliest reasonable opportunity.

[*Summarise evidence and arguments about whether NOA communicated that the arrestee was under arrest*.]

Communication of reason for arrest

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt, that NOA did not communicate the reason for the arrest.

The accused did not need to use precise or technical language. It is sufficient if NOA informed NOC of the facts constituting the alleged offence.

[*If there is evidence to suggest that the accused was prevented in any way from communicating the reason for the arrest, add the following shaded section.*]

In certain circumstances, a police officer will be excused from immediately informing the other person of the reason for the arrest. These circumstances include:

- if the other person resists arrest or runs away
- if the circumstances of the arrest are such that the offence or reason for arrest is apparent to the other person;
- if the other person is unable to understand the reason because of disability, intoxication or lack of English language skills, as long as the police officer does all that a reasonable person would do in such circumstances.

In these circumstances, the other person must be informed of the reason for the arrest at the earliest reasonable opportunity.

[*Summarise relevant evidence and arguments.*]

Use of force not disproportionate to objective of arrest

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt, that NOA used excessive force.

The right to use force for the purpose of an arrest only authorises using the amount of force reasonably necessary to carry out the arrest. The force must not be disproportionate to the objective of the arrest.

For this component, you must look at whether the force used was disproportionate objectively. That is, you decide whether the force used was proportionate. You are not deciding whether NOA thought the force used was proportionate.

[*Summarise evidence and arguments about force used to effect arrest*.]

Relate law to the evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, for this element, the prosecution must prove that NOA was not exercising a lawful power of arrest. Based on the evidence, this means the prosecution must prove that NOA:

[*Identify only those matters that are in issue:*

- was not a police officer;
- did not believe on reasonable grounds that NOC had committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria];
- did not inform NOC that he or she was under arrest;
- did not inform NOC of the reason for the arrest; or
- did not only use force that was proportionate to the objective of the arrest.]

Unless you find that the prosecution has disproved one or more of these matters beyond reasonable doubt, you must find NOA not guilty of [*insert offence*].

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused acted without lawful excuse by showing that he/she was not performing a lawful arrest. NOA does not need to prove that [he/she] was performing a lawful arrest.

Last updated: 17 May 2019

8.14.3 Charge: Protective Services Officer Arrest Due to an Indictable Offence

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[*This charge is designed to be given as part of the "without lawful excuse" element in* 7.4.17.1 Charge: False Imprisonment *or* 7.4.8.1 Charge: Assault – Application of Force *where there is evidence from which a jury might infer that the accused was acting in accordance with Crimes Act 1958 s 459 to perform a lawful arrest. Where lawful arrest is raised in relation to other offences, it should be adapted as required.*

If the case involves a police officer, see 8.14.1 Charge: Police arrest due to an indictable offence*.*

If the basis for the lawful arrest relates to Crimes Act 1958 s 458, see 8.14.2 Charge: Arrest when person found committing an offence.]

Lawful excuse

This element relates to the argument that NOA was performing a lawful arrest when s/he [*insert relevant act*].

To explain this element, I'm first going to give you some background on the power of protective services officers to arrest a person, and then explain the legal components of a lawful arrest.

Background

As a free and democratic society, all people are protected from arbitrary arrest and detention. While the law gives protective services officers certain powers as part of their role, including the power to arrest a person, that power can only be exercised in limited and defined circumstances.

An arrest occurs when a protective services officer has made it plain to another person that the other person is no longer a free person. As part of this, the protective services officer must inform the other person that the person is arrested and the reason for the arrest. This is often done by saying something like "Mr Smith, I am arresting you on suspicion of committing" and then identifying the crime in question.

It is not always necessary to spell this out. In some cases, it may be obvious from the circumstances why the person is being arrested, such as if the person is in the process of committing an offence. It is also not necessary to immediately inform the other person if that other person makes it impractical to do so, such as by running away. When informing the other person, the protective services officer does not need to use technical or precise language. The focus is on whether the other person has been adequately informed of the reason for the arrest.

As I said, an arrest involves making it plain that the other person is not free to go. If a protective services officer gives the impression that the other person is free to refuse a request, or free to leave, then there is no arrest. In other words, whether there is an arrest may depend on the words and actions of those involved, and the surrounding circumstances.

One limit on the power to arrest a person is that there must be a valid reason for the arrest. A desire to question a person is not a valid reason.

Components of lawful arrest

I'm now going to explain the components of a lawful arrest.

The accused will have lawfully arrested NOC if:

- NOA was a protective services officer;
- NOA delivered NOC to the custody of a police officer as soon as practicable;
- NOC was at or in the vicinity of a designated place;
- NOA believed on reasonable grounds that the other person has committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria];
- NOA, where possible, informed NOC that [he/she] was under arrest;
- NOA, where possible, informed NOC of the reason for the arrest; and
- any force the accused used was proportionate.

To prove that NOA was acting without lawful excuse, the prosecution must disprove at least one of these seven components of a lawful arrest.

The prosecution argues that the [*identify component numbers, e.g.* "first and third"] components of a lawful excuse did not exist. I will now explain those components in more detail.

Note: The judge should only direct on those parts of a lawful arrest which are in issue.

Protective Services Officer

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt that NOA is not a protective services officer.

[*Summarise evidence and arguments relating to whether NOA was a protective services officer.*]

Delivery to police officer

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove that NOA did not deliver NOC to the custody of a police officer as soon as practicable.

[*Summarise evidence and arguments about whether NOC was delivered to the custody of a police officer as soon as practicable.*]

Designated place

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove that NOC was not at or in the vicinity of a "designated place".

The law states that protective services officers can only exercise powers of arrest at certain designated places. In this case, the relevant designated place is [*identify relevant evidence concerning a designated place*].

The prosecution argues that NOC was not at or in the vicinity of [*identify designated place*].

[*Summarise evidence and arguments about whether NOC was at or in the vicinity of a designated place.*]

Belief on reasonable grounds that complainant has committed an indictable offence

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt, that NOA did not believe on reasonable grounds that NOC committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria].

This component looks at the reason for the arrest. You are looking both at what NOA believed, and whether he/she had a reasonable basis for that belief.

There is an important difference between a belief and a suspicion. The accused must have actually believed that NOC had committed an indictable offence. A state of mind such as "I think s/he might have committed an offence" or "I suspect s/he has committed an offence" is not sufficient. A belief means thinking something is true, even if there is still some uncertainty. A belief is a more certain state of mind than a suspicion, but does not depend on concrete proof.

There must also be reasonable grounds for that belief. This means that the accused must have known facts which would be sufficient to cause a reasonable person to also believe that the other person had committed an offence.

Finally, the accused must have believed that the other person had committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria]. A general belief that the other person had done something wrong is not enough. The accused must have believed on reasonable grounds that the other person had committed a specific offence, such as [*identify relevant offences*]. I direct you as a matter of law that [*identify relevant offences*] are [Victorian indictable offences/offences that would be indictable offences if committed in Victoria].

[*If relevant, add the following shaded section on arrest for a collateral purpose.*]

When you are considering this issue, you must look at NOA's real reason for the arrest. You have heard the prosecutor argue that [*refer to prosecution case on collateral reason for arrest*]. If you are satisfied beyond reasonable doubt that NOA only arrested NOC because [*insert collateral reason*], and later invented the explanation that NOC was [*identify relevant offence*], then the prosecution have proved that NOA did not believe, at the time of the arrest, that NOC had committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria].

[*Summarise evidence and arguments about whether NOA believed on reasonable grounds that NOC committed an indictable offence in Victoria/an offence elsewhere that would be an indictable offence in Victoria.*]

If you are satisfied NOA did not believe NOC had committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria] or that NOA did not have a reasonable basis for that belief, then you must find that NOA was not performing a lawful arrest.

Communication of arrest

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt, that NOA did not communicate to NOC that [he/she] was being arrested.

NOA must have done everything a reasonable person in the circumstances would have done to inform NOC that [he/she] was under arrest. NOC must have understood that the [he/she] was acting under compulsion and not voluntarily.

[*If there is evidence to suggest that the accused was prevented in any way from communicating to the other person that they were under arrest, add the following shaded section.*]

In certain circumstances, a protective services officer will be excused from immediately informing the NOC that they are under arrest. These circumstances include:

- if the other person resists arrest or runs away;
- if the circumstances of the arrest are such that it is apparent to the other person that they are under arrest;
- if the other person is unable to understand that they are under arrest because of disability, intoxication or lack of English language skills, as long as the protective services officer does all that a reasonable person would do in such circumstances

In these circumstances, the other person must be informed that they are under arrest at the earliest reasonable opportunity.

[*Summarise evidence and arguments about whether NOA communicated that the arrestee was under arrest.*]

Communication of reason for arrest

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt, that NOA did not communicate the reason for the arrest.

The accused did not need to use precise or technical language. It is sufficient if NOA informed NOC of the facts constituting the alleged offence.

[*If there is evidence to suggest that the accused was prevented in any way from communicating the reason for the arrest, add the following shaded section.*]

In certain circumstances, a protective services officer will be excused from immediately informing the other person of the reason for the arrest. These circumstances include:

- if the other person resists arrest or runs away;
- if the circumstances of the arrest are such that the offence or reason for arrest is apparent to the other person;
- if the other person is unable to understand the reason because of disability, intoxication or lack of English language skills, as long as the protective services officer does all that a reasonable person would do in such circumstances

In these circumstances, the other person must be informed of the reason for the arrest at the earliest reasonable opportunity.

[*Summarise relevant evidence and arguments.*]

Use of force not disproportionate to objective of arrest

The [*insert number*] way in which the prosecution can prove that NOA was not performing a lawful arrest is to prove, beyond reasonable doubt, that NOA used excessive force.

The right to use force for the purpose of an arrest only authorises using the amount of force reasonably necessary to carry out the arrest. The force must not be disproportionate to the objective of the arrest.

For this component, you must look at whether the force used was disproportionate objectively. That is, you decide whether the force used was proportionate. You are not deciding whether NOA thought the force used was proportionate.

[*Summarise evidence and arguments about force used to effect arrest*.]

Relate law to the evidence

[*If not previously done, apply the law to the relevant evidence here.*]

Summary

To summarise, for this element, the prosecution must prove that NOA was not exercising a lawful power of arrest. Based on the evidence, this means the prosecution must prove that NOA:

[*Identify only those matters that are in issue:*

- was not a protective services officer;
- did not deliver NOC to the custody of a police officer as soon as practicable;
- did not arrest NOC at or in the vicinity of a designated place;
- did not believe on reasonable grounds that NOC had committed an [indictable offence in Victoria/offence elsewhere which would be an indictable offence in Victoria];
- did not inform NOC that he or she was under arrest;
- did not inform NOC of the reason for the arrest; or
- did not only use force that was proportionate to the objective of the arrest.]

Unless you find that the prosecution has disproved one or more of these matters beyond reasonable doubt, you must find NOA not guilty of [*insert offence*].

Remember, it is for the prosecution to prove, beyond reasonable doubt, that the accused acted without lawful excuse by showing that he/she was not performing a lawful arrest. NOA does not need to prove that [he/she] was performing a lawful arrest.

Last updated: 17 May 2019

8.15 Police Search and Seizure Powers without a Warrant

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Introduction

1. Police officers' powers of search and seizure in relation to persons, goods and land are circumscribed in the absence of an authorising warrant.

2. Interferences with one's person or possessions are presumed to be a grave infringement of elementary common law rights and may engage the doctrine of trespass to person or goods. The mere fact that a person is a police officer does not justify such an interference (*Trobrudge v Hardy* [1955] 94 CLR 147, 152).
3. Similarly, police officers are subject to the law regarding trespass to land and require authority or consent to enter private premises (*Mackay v Abrahams* [1916] VLR 681, 684; *Plenty v Dillon* (1991) 171 CLR 635, [4]).
4. One statutory exception to this principle is found in s 459A of the *Crimes Act 1958*, which authorises entry onto private premises for the purpose of arresting a person in accordance with ss 458 or 459 of the *Crimes Act 1958*, where the police officer believes on reasonable grounds the person has committed a serious indictable offence or has escaped from legal custody. See 8.14 Powers of arrest, for information on these provisions.
5. Police search and seizure powers generally arise in three circumstances:
    - Search incidental to an arrest;
    - Search and seizure of stolen goods;
    - Specific statutory powers.
6. Recent cases have also considered whether there is a broader power to conduct investigative searches in relation to serious offences.
7. Where it arises as an issue, the lawfulness of a search will need to be determined before the possible exclusion of the evidence under *Evidence Act 2008* s 138 is considered. It is only if the court decides that the search was unlawful that s 138 may be engaged (*McElroy & Wallace v The Queen* [2018] 55 VR 450, [116]).

Search and seizure incidental to an arrest

8. Police officers are authorised to search persons and premises when executing an arrest and to seize material for evidentiary purposes (*Field v Sullivan* [1923] VLR 12; *Reeves (a Pseudonym) v The Queen* [2017] VSCA 291).
9. Articles may only be seized for evidentiary purposes (*Reeves (a Pseudonym) v The Queen* [2017] VSCA 291, [30]). The officer must believe that the item constitutes material evidence relevant to the same crime for which the arrest is being carried out (*McElroy & Wallace v The Queen* [2018] 55 VR 450, [110]).
10. If an officer enters premises for the purposes of arresting someone and subsequently arrests a different person, goods may only be seized from those premises that will be used for evidence regarding the crime for which the second person is arrested (*McElroy & Wallace v The Queen* [2018] 55 VR 450, [110]).
11. The arrest and seizure of goods must be sufficiently close in time so as to be regarded as 'incidental to, and part of, the same operation as the arrest' (*Field v Sullivan* [1923] VLR 70, 81). This may permit seizures that occur later on the same day as the arrest (*Reeves (a Pseudonym) v The Queen* [2017] VSCA 291, [30]).
12. This temporal relationship does not require that the arrest and seizure occur simultaneously. The law recognises the 'physical exigencies' of police operations (*Field v Sullivan* [1923] VLR 70, 81).

What is permitted when searching a person under arrest?

13. A police officer has a common law duty to take reasonable measures to prevent a person in custody from harming themselves or others or destroying or disposing of evidence. This often involves a search of the person's clothes and body. Such a search is called a 'safety and evidence search' (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987); *Director of Public Prosecutions v Tupper* (2018) 55 VR 720, [35]).

14. What amounts to a reasonable method of discharging this duty will turn on the circumstances of the case and should ordinarily involve the person being informed of the reasons for the search (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987)).

15. In certain circumstances, this common law power may involve requiring the person to remove some or all of their clothes (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987)).

16. Officers conducting such searches must weigh the affront to a person's dignity against the desirability of preserving and protecting evidence and persons (*Director of Public Prosecutions v Tupper* (2018) 55 VR 720, [37]).

17. The common law power to conduct a safety and evidence search does not permit forensic procedures. Police officers who wish to take a sample from a person, conduct a procedure on the person or make a physical examination of the person must comply with the requirements imposed by *Crimes Act 1958* ss 464R, 464U and 464Y.

Seizure of stolen goods

18. Police officers are entitled to seize stolen goods from a person provided the seizure occurs without force, violence or otherwise unlawful conduct (*Dalton v McNaughton* (1903) 29 VLR 144, 151).

19. This does not include a power to search a person or premises for stolen goods. The police officers must be able to identify and reach the goods without trespass to land or individuals (*Laurens & Anor v Willers* [2002] WASCA 183, [45]).

Statutory powers independent of an arrest

20. Police officers are empowered under s 82 of the *Drugs, Poisons and Controlled Substances Act 1981* to search a person or vehicle in a public space provided the police officer has reasonable grounds for suspecting that the person possesses a drug of dependence or psychoactive substance or that any such substance are in the vehicle.

21. The test for establishing that the suspicion is based on reasonable grounds has two elements. First, the suspicion must have actually been held. The second element is objective – The circumstances must have been of a kind that would raise a suspicion in the mind of a reasonable person. A suspicion is a 'positive or actual apprehension or mistrust' that requires more than a 'mere idle wondering' (*Murray, Hale and Olsen (Pseudonyms) v The Queen* [2017] VSCA 236, [62] citing *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, [4]).

22. Section 82 should be construed as balancing the need for an effective criminal justice system against the desirability of protecting individuals from arbitrary interferences with their person and property (*Murray, Hale and Olsen (Pseudonyms) v The Queen* [2017] VSCA 236, [62]).

23. Section 82 is not restricted to circumstances in which a warrant cannot be acquired under s 81. Section 81(7) expressly provides that the section has no bearing on the powers conferred by s 82.

24. There is authority, though obiter, to suggest that s 82 powers could possibly extend to confiscating a person's vehicle for the purposes of a later search to be conducted at a police station. Whether this obiter will be confirmed is a question for future determination (*GA, MM and PJ v The Queen* [2012] VSCA 44, [13]).

25. Police officers have a broad power to enter premises if they believe on reasonable grounds that a person has assaulted or threatened to assault a family member or is in contravention of a family violence intervention order, family violence safety notice or a personal safety intervention order (*Family Violence Protection Act 2008* s 157; *Personal Safety Intervention Orders Act 2010* s 114).

26. There is also a limited power for a police officer, authorised by another officer of inspector rank or higher, to enter private premises and search for stolen goods. This power can only be exercised if the person occupying the premises has been convicted in the last five years of handling stolen goods or has been sentenced to imprisonment for another dishonesty offence, or if a person has been convicted in the last five years of handling stolen goods has been in occupation of the premises within the past 12 months (*Crimes Act 1958* s 92(2)).
27. Other statutory powers include:
    - A power to search where there are reasonable grounds to suspect the person has weapons in their possession (*Control of Weapons Act 1990* s 10);
    - A power to search for firearms where there are reasonable grounds to suspect the person is committing or about to commit a Firearms Act offence and that he or she has a firearm or ammunition in their possession (*Firearms Act 1996* s 149);
    - A power to search any person on court premises (*Court Security Act 1980* s 3).[1227]

The chance discovery principle

28. Search warrants authorise police officers to enter and search private premises in order to seize goods listed in the warrant.
29. The common law extends these powers to the seizure of goods unlisted in the warrant that serve as evidence of serious offences (*Siddique v Martin* (2016) 51 VR 564 577, [32]; *McElroy & Wallace v The Queen* [2018] 55 VR 450, [114]).
30. This is known as the 'chance discovery' rule (*Siddique v Martin* (2016) 51 VR 564 577, [24]).
31. Goods seized under the chance discovery rule must be 'adventitiously found' in the execution of a search warrant. The rule does not confer independent rights of entry or search (*R v Applebee* (1995) 79 A Crim R 554, 8; *Siddique v Martin* (2016) 51 VR 564 577, [24]).
32. Goods may only be seized in this manner if a police officer holds a reasonable belief that the goods constitute evidence of a serious offence (*Siddique v Martin* (2016) 51 VR 564 577, [22])
33. Once all items listed in a warrant have been seized, the powers conferred by that warrant expire and no further goods may be seized, even if officers believe they are evidence of a serious offence (*Siddique v Martin* (2016) 51 VR 564 577, [24]).
34. Goods seized in this manner are said to have been seized under the warrant that authorised the relevant entry and search (*Siddique v Martin* (2016) 51 VR 564 577, [34]).
35. The scope of this common law power is situational and is to be characterised and delimited with reference to the relevant warrant (*Siddique v Martin* (2016) 51 VR 564 577, [32]).

General common law powers of search and seizure

36. Historically, Victorian cases stated that there were no common law powers of search and seizure beyond those conferred incidental to an arrest, a search warrant or in instances of seizing stolen goods (*Levine v O'Keefe* [1930] VLR 70, 72).
37. Investigating breaches of the peace or threats to breach the peace did not suffice to justify police interference with persons, goods or land in the absence of statutory authority (*Kuru v New South Wales* (2008) 236 CLR 1, [47]).

[1227] For other statutory search powers, see *Gambling Regulation Act 2003* s 2.5.38; *Graffiti Prevention Act 2007* s 13; *Radiation Act 2005* s 74.

38. Similarly, there was no power for seizure solely on the basis of a reasonable belief that goods could form material evidence of a crime (*Ozzie Discount Software (Aust) Pty Ltd v Muling* (1996) 86 A Crim R 387, 395).

39. However, recent Victorian judgments have entertained discussions that suggest that the law may be straying from this approach.

40. Osborn J in obiter in *Goldberg v Brown* suggested that the UK decision of *Ghani v Jones* [1970] 1 QB 693 was applicable in Victoria (*Goldberg v Brown* [2003] VSC 104, [4]).

41. In *Ghani v Jones*, Lord Denning MR found that an assessment of the lawfulness of a seizure disconnected from an arrest requires the weighing up of the freedom and privacy of an individual against the public interest in repressing crime. His Honour identified five requirements that govern a lawful seizure of goods in these circumstances:

    i) Officers must believe on reasonable grounds that an offence has occurred that is of such gravity that it is of first importance that the offenders be brought to justice.

    ii) Officers must believe on reasonable grounds that the articles to be seized constitute material evidence to prove the commission of the serious offence.

    iii) The person in possession of the article being seized must be someone whom the officers believe on reasonable grounds is implicated in the crime.

    iv) The police are not permitted to retain the seized articles for longer than is reasonably necessary to complete their investigations or to create a copy of it.

    v) These requirements must be assessed at the time of the seizure and are unaffected by any subsequent events (*Ghani v Jones* [1970] 1 QB 693, 708–709).

42. These principles represent the outer limits of police powers of seizure considered in the United Kingdom and do not permit police offers to interfere with one's person or property simply to see if they have committed a crime (*Ghani v Jones* [1970] 1 QB 693, 707).

43. In *Siddique v Martin* (2016) 51 VR 564, the Crown argued that *Ghani v Jones* [1970] 1 QB 693 was good law in Victoria. While the Supreme Court noted that it was 'prepared to assume' in favour of the Crown, it was not necessary to decide the point as the case concerned the operation of the chance discovery rule when exercising a search warrant (at 574).

44. The most recent consideration of the principles can be found *McElroy & Wallace v The Queen* [2018] 55 VR 450. The Court acknowledged that the factual matrix before it mirrored the circumstances in which the *Ghani v Jones* principles might apply. However, as the Crown did not offer evidence for the proposition that the Court should follow *Ghani v Jones* [1970] 1 QB 693, the Court declined to rule on the matter (at [111]). Instead, the seizure was presumed to be unlawful given the lack of warrant or arrest connected to the evidentiary purpose of the seized goods (at [117]).

Ghani v Jones outside of Victoria

45. Outside Victoria there have been conflicting decisions on whether courts should adopt the *Ghani v Jones* approach (*Laurens v Willers* [2002] WASCA 183; *Challenge Plastics Pty Ltd v Collector of Customs* (1993) 42 FCR 397 (at [44]); c.f. *GH Photography Pty Ltd v McGarrigle* [1974] 2 NSWLR 635; *Rowell v Larter* (1986) 6 NSWLR 21; *Tye v Commissioner of Police* (1995) 84 A Crim R 147; *Island Way Pty Ltd v Redmond* [1990] 1 Qd R 431).

Last updated: 28 August 2019

9 Commonwealth Offences

9.1 Commonwealth Drug Offences

9.1.1 Trafficking Controlled Drugs

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Trafficking Offence Provisions

1. Division 302 of the *Criminal Code* (Cth) establishes three trafficking offences:
    - Section 302.2: trafficking commercial quantities of controlled drugs
    - Section 302.3: trafficking marketable quantities of controlled drugs
    - Section 302.4: trafficking controlled drugs
2. For information on importation or exportation of controlled drugs, see 9.1.2 Importing/Exporting Border Controlled Drugs and Plants.
3. Unless stated otherwise, all references in this topic are to sections of the *Criminal Code.*

Relationship with State Legislation

4. Trafficking offences also exist under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('*Drugs Act*'). For detail on these offences see 7.6.1 Trafficking in a Drug of Dependence.
5. State and Territory law operates concurrently with Division 302 (s 300.4; *Buckman v R* [2013] NSWCCA 258; see generally *Momcilovic v R* (2011) 245 CLR 1).

Commencement Information and Amendments

6. These three trafficking offences were inserted into the *Criminal Code* by the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth). Each of the provisions commenced operation 6 December 2005.
7. Commencing 20 February 2010, s 302.6(a) was amended to provide that a purchaser of a serious drug is not liable as a joint offender under s 11.2A (*Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) s 3 sch 4 item 12).
8. Commencing 28 May 2013, the following amendments relating to Division 302 came into force:
    - The list of controlled drugs was removed from Division 314 and proscribed under the Criminal Code Regulations 2002 (Cth) sch 3 (*Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) s 3 sch 1 item 19; Criminal Code Amendment Regulation 2013 (No. 1) 2013 (Cth) r 4 sch 1 item 3).
    - The inclusion of a 'drug analogue' as a controlled drug was removed from Division 314 and is now proscribed under s 301.9 (*Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) s 3 sch 1 item 16). In conjunction with this move, the new category of 'primary analogue' was created.

Overview of Elements

9. For all offences under Division 302, the following elements must be proved beyond reasonable doubt:
    - The person intentionally traffics in a substance;

- The substance is a controlled drug; and
- The persons is reckless as to the substance being a controlled drug (ss 302.2(1)–(2), 302.3(1)–(2) and s 302.4(1)–(2)).

10. Where the accused has been charged with trafficking a commercial or marketable quantity, the prosecution must also prove that:
    - The person trafficked a 'commercial quantity' (s 302.2(1)(c)); or
    - The person trafficked a 'marketable quantity' (s 302.3(1)(c)).
11. Absolute liability applies to these quantity requirements (ss 302.2(3), 302.3(3)). However, there is a partial defence where the accused makes a mistake as to the quantity of controlled drug they are trafficking (see below [92]–[97]).

The person 'traffics' in a substance and does so 'intentionally'

12. A person 'traffics' a substance if they do any of the following:
    (a) Sell the substance;
    (b) Prepare the substance for supply with the intention of selling any of it or believing that another person intends to sell any of it;
    (c) Transport the substance with the intention of selling any of it or believing that another person intends to sell any of it;
    (d) Guard or conceal the substance with the intention of selling any of it or assisting another person to sell any of it; or
    (e) Possess the substance with the intention of selling any of it (s 302.1(1)(a)–(e)).
13. This definition is exhaustive and excludes the common law meaning of 'trafficks' (*Pantazis v The Queen* (2012) 268 FLR 121).
14. *Giretti* trafficking cannot be used to establish trafficking under Division 302. This is because the conceptual basis of *Giretti* trafficking is that the definition of 'traffick' in the *Drugs Act* is inclusive *(Pantazis v The Queen* (2012) 268 FLR 121). The definition of 'traffics' under the *Criminal Code* focuses on 'specific finite acts' whereas 'trafficks' in the ordinary sense and in the *Drugs Act* encompasses continuous activity *(Pantazis v The Queen* (2012) 268 FLR 121; see also 7.6.1 Trafficking in a Drug of Dependence).

A. Sells the substance

15. 'Sell' includes:
    - Barter or exchange
    - Agreeing to sell (s 300.2).
16. In contrast to the definition of 'trafficks' under the *Drugs Act*, the *Criminal Code* definition of 'sell' does not include 'offer for sale' (*Pantazis v The Queen* (2012) 268 FLR 121).
17. As the terms 'barter' and 'exchange' suggest an element of trade for value, 'traffics' does not include 'gratuitous supply'. The *Criminal Code* treats gratuitous supply, and possession with intent to gratuitously supply, as an offence of possession (*Buckman v the Queen* (2013) 280 FLR 219).
18. In addition to the physical act of selling a substance, an accused must 'intend' to sell the substance (s 5.6). A person intends to engage in conduct if he or she means to engage in that conduct (s 5.2). Therefore the accused must have 'meant' to sell the substance.
19. Under the common law, agreeing to sell requires the prosecution to prove the defendant:
    (a) Made a genuine agreement to sell a controlled drug to another person;

(b) Intended to make the agreement; and

(c) Intended the agreement or offer to be regarded as genuine by the person to whom it is made (see *R v Peirce* [1996] 2 VR 215; *Gauci v Driscoll* [1985] VR 428; *R v Addison* (1993) 70 A Crim R 213 (NSW CCA); see also 7.6.1 Trafficking in a Drug of Dependence).

B. Prepare the substance for supply with the intention of selling any of it or believing that another person intends to sell any of it

20. 'Preparing a substance for supply' includes:

    (a) Packaging the substance; or

    (b) Separating the substance into discrete units (s 302.1(2)).

21. 'Supply' includes:

    (a) Supply, whether or not by way of sale;

    (b) Agreeing to supply (s 300.2).

22. Two fault elements are required to make out this form of trafficking.

23. First, the accused must 'intend' to prepare the substance for supply. Therefore, the prosecution must prove accused 'meant' to prepare the substance and 'meant' the preparation be for supply (ss 5.2, 5.6).

24. Second, the accused must have had the intention of selling, or belief that another person intends to sell the substance prepared for supply (s 302.1(1)(b)).

25. If the accused has prepared a 'trafficable quantity' of the substance for supply, then they are taken to have the necessary intention or belief concerning the sale of the substance (s 302.5(1)(a)).

26. Schedule 3 of the *Criminal Code Regulations 2002* (Cth) specifies the 'trafficable quantity' of each listed drug (s 301.12 item(1)(a)).

27. For drug analogues of listed controlled drug, a trafficable quantity is the smallest trafficable quantity listed in *Criminal Code Regulations 2005* (Cth) Schedule 3 for the drugs for which it is an analogue (s 301.12 item 2). In addition, where a drug is made a controlled drug by an Emergency Determination, the Minister may specify the trafficable quantity in the determination (s 301.12 item 1(b)).

28. If a trafficable quantity is involved, then the legal onus is on the accused to prove, on the balance of probabilities, that he or she did not have the necessary intention or belief concerning the sale of the substance (ss 13.5, 302.5(2)).

29. If a trafficable quantity is not involved, the onus is on the prosecution to prove, beyond reasonable doubt, that the accused did have the necessary intention or belief concerning the sale of the substance (ss 13.1(1), 13.2(1)).

30. The prosecution need only prove the accused had a general intention to sell the drug in the future. It is not necessary to prove the accused had a specific buyer in mind (see *Reardon v Baker* [1987] VR 887).

C. Transport the substance with the intention of selling any of it or believing that another person intends to sell any of it

31. 'Transports' is defined as including delivery (s 300.2). Otherwise, 'transports' has its ordinary meaning.

32. Two fault elements are required to make out this form of trafficking.

33. First, the accused must 'intend' to transport the substance. Therefore, the prosecution must prove accused 'meant' to transport the substance (ss 5.2, 5.6).

34. Second, the accused must have had the intention of selling any of the substance or belief that another person intended to sell any of it (s 302.1(1)(c)).

35. If the accused has transported a 'trafficable quantity' of a substance, then the person is presumed to have the necessary intention or belief concerning the sale of the substance (s 302.5(1)(a)). See above [26]–[30] for details on the operation of this presumption.

D. Guards or conceals the substance with the intention of selling any of it or assisting another person to sell any of it

36. To 'conceal' a substance includes to conceal or disguise:

    (a) the nature, source or location of the substance;

    (b) any movement of the substance;

    (c) the rights of any person with respect to the substance;

    (d) the identity of any owner of the substance (s 300.2).

37. Two fault elements are required to make out this form of trafficking.

38. First, the accused must 'intend' to guard or conceal the substance. Therefore, the prosecution must prove the accused 'meant' to guard or conceal the substance (ss 5.2, 5.6).

39. Second, the accused must have had the intention of selling any of the substance or assisting another person to sell any of it (s 302.1(1)(d)).

40. If the accused has guarded or concealed a 'trafficable quantity' of a substance, then they are presumed to have the necessary intention or belief concerning the sale of the substance (s 302.5(1)(a)). See above [26]–[30] for details on the operation of this presumption.

E. Possesses the substance with the intention of selling any of it

41. 'Possession' is defined in the *Criminal Code* to include the following:

    (a) Receiving or obtaining possession of the substance;

    (b) Having control over the disposition of the substance (whether or not the thing is in the custody of the person);

    (c) Having joint possession of the substance (s 300.2).

42. At common law, a person has in their possession whatever is, to their knowledge, physically in their custody or under their physical control (see *DPP v Brooks* [1974] AC 862, 866; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Maio* [1989] VR 281; *R v Mateiasevici* [1999] 3 VR 185). Custody for any length of time is sufficient (*R v Boyce* (1976) 15 SASR 40).

43. Providing the jury with an extensive definition of the concept of possession at common law is not always necessary. The jury should be told only so much of the law as is necessary, having regard to the issues at trial (*see R v Clarke and Johnstone* [1986] VR 643; *R v Mateiasevici* [1999] 3 VR 185; *R v Bandiera and Licastro* [1999] 3 VR 103; *R v Tran* [2007] VSCA 19).

44. The burden of proving possession rests upon the prosecution (see *Momcilovic v R* (2011) 245 CLR 1).

45. Two fault elements are required to make out this form of trafficking.

46. First, the accused must 'intend' to possess the substance. Therefore, the prosecution must prove the accused 'meant' to possess the substance (ss 5.2, 5.6).

47. For this element, the prosecution must prove that the accused knew that he or she has the substance under his/her custody or control. Knowledge of the nature of the substance is covered by the third element (see *R v Boyesen* [1982] AC 768; *Campbell v R* (2008) 73 NSWLR 272).

48. This approach differs from the common law, the earlier provisions under the *Customs Act 1901* (Cth) and the Victorian *Drugs Act*, which required awareness of the nature of the substance as part of proof of possession. Cases on other provisions and on the common law must therefore be read with caution (see below [57]–[58]; c.f. *He Kaw Teh v R* (1985) 157 CLR 523; *Momcilovic v R* 245 CLR 1; *R v Mario* [1989] VR 281).

49. Second, the accused must have possessed the substance with the intention of selling any of the substance (s 302.1(1)(e)).

50. If the accused possessed a 'trafficable quantity' of a substance, then the person is presumed to have the necessary intention or belief concerning the sale of the substance (s 302.5(1)(a)). See above [26]–[30] for details on the operation of this presumption.

The substance is a 'controlled drug'

51. A controlled drug is defined exhaustively as a substance (other than a growing plant) which is either:

    (a) Listed by a regulation as a controlled drug;

    (b) A drug analogue of a listed controlled drug; or

    (c) Determined by the Minister as a controlled drug under s 301.13 (s 301.1(1)).

A. Listed by a regulation as a controlled drug

52. A 'listed' controlled drug is one listed by a regulation made for the purposes of s 301.1(1)(a) (s 300.2).

53. The current 'listed' controlled drugs for the purposes of s 301.1(1)(a) are found in the *Criminal Code Regulations 2002* (Cth) Schedule 3 column 1 (*Criminal Code Regulations 2002* (Cth) r 5A). This Schedule commenced operation 28 May 2013.

B. A 'drug analogue' of a 'listed' a controlled drug

54. Drug analogues of listed controlled drugs are defined in the same manner as drug analogues of listed border controlled drugs (see 9.1.2 Importing/Exporting Border Controlled Drugs and Plants, [44]–[45]).

C. Determined by the Minister as a controlled drug

55. The Minister may determine that a substance is a controlled drug via an Emergency Determination (s 301.13(1)(a)).[1228]

56. The process, effect and conditions of an Emergency Determinations of controlled drugs are the same as for Emergency Determinations of border controlled drugs and border controlled plants (see 9.1.2 Importing/Exporting Border Controlled Drugs and Plants, [41]–[43]).

[1228] This system of emergency determination replaces the previous system of listing additional drugs as controlled drugs temporarily through interim regulations (which were for a maximum period 12 months) or urgently through emergency determinations (which for a maximum period of 56 days). These changes came into force 28 May 2013 under the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth).

The person was reckless as to the substance being a controlled drug

57. The prosecution must prove that the accused was reckless as to the substance being a controlled drug (ss 302.2(2), 302.3(2), 302.4(2)).

58. See 9.1.2 Importing/Exporting Border Controlled Drugs and Plants, [46]–[54] for information on this element. As noted, there is limited caselaw on the operation of this element and judges should seek submissions from parties in cases where the element is in issue.

Commercial or Marketable Quantity

59. Where a person is prosecuted under ss 302.2 or 302.3 with trafficking a commercial or marketable quantity, the prosecution must prove that the quantity trafficked is a commercial or marketable quantity (ss 302.2(1)(c), 302.3(1)(c)).

60. For controlled drugs, commercial and marketable quantity are defined under ss 301.10 and 301.11 (see 9.1.2 Importing/Exporting Border Controlled Drugs and Plants, [54]–[58]. For drug analogues of controlled drugs, the relevant quantities are defined under item 2 of ss 301.10, 301.11).

61. The list of commercial quantities of controlled drugs is found in *Criminal Code Regulations 2002* (Cth) Schedule 3 column 2 (*Criminal Code Regulations 2002* (Cth) r 5A(2)).

62. The list of marketable quantities of controlled drugs is found in *Criminal Code Regulations 2002* (Cth) Schedule 3 column 3 (*Criminal Code Regulations 2002* (Cth) r 5A(3)).

63. For guidance as to how to determine quantity in specific circumstances, see below [65]–[82].

Fault element as to quantity

64. While absolute liability applies to the quantity requirements (ss 302.2(3), 302.3(3)), s 313.4 creates a partial defence in relation to mistake as to quantity (see below [92]–[97]).

Provisions Relevant to Determining Quantity

65. The following provisions may be relevant in determining if the quantity requirements are satisfied:

- Combining different parcels on the same occasion – s 311.1
- Combining parcels from multiple offences – s 311.8
- Combining parcels from organised commercial activity – s 311.2
- Calculating quantity of drugs in mixtures – s 312.1
- Calculating quantity of several drugs in mixtures – s 312.2

A. Combining quantities of drugs

66. If on the same occasion, a person traffics in different parcels of controlled drugs, the person may be charged with a single offence against Part 9.1 in respect of all or any of those different parcels (s 311.1(1)(a)).

67. See 9.1.2 Importing/Exporting Border Controlled Drugs and Plants, [62]–[65].

B. Combining parcels from multiple offences

68. The prosecution may prove a Division 302 trafficking offence by proving:

    (a) The defendant committed offences against Division 302 on different occasions;

(b) Each offence was committed within 7 days from another offence; and

(c) In total, the relevant quantity of a controlled drug or combination of drugs was trafficked during the commission of the offences (s 311.8).

69. For general rules on combining parcels from multiple offences see 9.1.2 Importing/Exporting Border Controlled Drugs and Plants, [66]–[69].

70. This provision differs from *Giretti* trafficking under the Victorian *Drugs Act*. Instead of allowing a charge based on a course of conduct, s 311.8 requires proof multiple offences against Division 302. This provision provides a narrower basis for aggregating quantities than allowed under Victorian law where trafficking is alleged on a *Giretti* basis, as each offence must be separately proved (*Pantazis v The Queen* (2012) 268 FLR 121).

71. Where different kinds of controlled drug are trafficked, see below [80]–[82].

C. Combining quantities from organised commercial activities

72. A commercial or marketable quantity can be made out if the prosecution proves:

(a) The defendant was engaged in an organised commercial activity that involved repeated trafficking in controlled drugs, and

(b) The relevant quantity of a controlled drug or combination of drugs was trafficked in the course of that activity (s 311.2(1)).

73. The prosecution does not need to specify the exact dates of trafficking or quantity of drug trafficked on each occasion (s 311.2(2)).

74. Where the prosecution seeks to rely on this provision to aggregate quantities, the presumption that a person intends to sell or intends another to sell a quantity over a trafficable quantity does not apply. The prosecution must actually prove that the defendant was involved in the organised commercial activity and had the requisite commercial intention (s 311.2(3); compare s 302.5)

75. Unlike s 311.8, which allows prosecutors to combine parcels of drugs trafficked on separate occasions, there is no time restriction over which the organised commercial activity takes place.

76. Where different kinds of controlled drug are trafficked, see below [80]–[82] (s 311.2 Note 1).

77. This provision only assists in proving the relevant quantity of controlled drug has been trafficked (*Pantazis v The Queen* (2012) 268 FLR 121). It therefore, differs from *Giretti* Trafficking under the Victorian *Drugs Act* (see above [70]).

D. Calculating quantities of drugs in mixtures

78. When a controlled drug is within a mixture, the prosecution must prove the mixture contains the relevant quantity of the controlled drug in pure form (s 312.1(1)(a)).[1229]

79. This approach differs from the approach under the Victorian *Drugs Act* where minimum quantities of mixtures are provided in addition to minimum quantities of pure drugs.

[1229] Section 312.1(1)(b) purports to provide another means by which the prosecution can prove the quantity requirement, however it refers to division 314 which is now repealed (effective 28 May 2013).

E. Calculating quantities where different kinds of drugs are involved

80. If the accused is charged with a single offence involving trafficking in more than one kind of controlled drug, then the quantity of drugs is a trafficable, marketable or commercial quantity if the sum of the requisite fractions of the trafficable, marketable or commercial quantity of each of those drugs is equal to or greater than one (s 312.2(2)).

81. See 9.1.2 Importing/Exporting Border Controlled Drugs and Plants, [80] for an example of the calculation of the requite fraction.

82. When a controlled drug is within a mixture of substances, the requisite fraction is calculated on the basis of the quantity of the controlled drug in pure form (s 312.2(4)(a)).[1230]

Defences

83. Two defences under Division 313 apply to all trafficking offences in Division 302:

    - Conduct justified or excused by or under a law (s 313.1);
    - Reasonable belief that conduct justified or excused by or under a law (s 313.2).

84. The defendant bears the evidential burden of proof in relation to these defences (ss 13.3(3), 313.1 Note 1, 313.2 Note). To satisfy the burden the defendant must adduce or point to evidence that suggests a reasonable possibility that the conduct was justified or excused (for s 313.1) or they had a reasonable belief the conduct was justified or excused (for s 313.2) (s 13.3(6)).

A. Conduct justified or excused by or under a law

85. The trafficking offences do not apply in relation to conduct engaged in a State or Territory and justified or excused by or under a law of the State or Territory (s 313.1).

86. In addition, no criminal responsibility exists if the person's conduct was justified or excused by or under another Commonwealth law (s 313.1 Note 2).

B. Reasonable belief that conduct justified or excused by or under a law

87. No criminal responsibility exists if:

    (a) At the time of the conduct constituting the offence, the person was under a mistaken but reasonable belief that the conduct was justified or excused by or under a law of the Commonwealth or of a State or Territory; and

    (b) Had the conduct been so justified or excused – the conduct would not have constituted the offence (s 313.2).

88. See 9.1.2 Importing/Exporting of Border Controlled Drugs and Plants, [90]–[95].

Alternative Verdicts

89. Three alternative verdicts under Division 313 apply to all trafficking offences in Division 302:

    - Proof of alternative offence (s 313.3);
    - Mistake as to quantity of drug (s 313.4); and

[1230] Section 312.2(4)(b) purports to provide another means by which the requisite fraction can be calculated, however it refers to division 314 which is now repealed (effective 28 May 2013).

- Mistake as to identity of drug (s 313.5).

A. Proof of alternative offence

90. If the jury is not satisfied that the defendant is guilty of the alleged offence but is satisfied, beyond reasonable doubt, that the defendant is guilty of another offence against Part 9.1, they may find the defendant not guilty of the alleged offence but guilty of the other offence (s 313.3).

91. See 9.1.2 Importing/Exporting of Border Controlled Drugs and Plants, [96]–[97].

B. Mistake as to quantity of the drug

92. A partial defence in relation to mistake of quantity is available where the defendant is charged with an offence involving a commercial or marketable quantity of a controlled drug and:

    (a) The defendant proves that, at the time of the alleged offence, he or she was under a mistaken belief about the quantity of the drug;

    (b) If the mistaken belief had been correct, the defendant would have been guilty of another offence against Part 9.1; and

    (c) The maximum penalty for the other offence is less than the maximum penalty for the alleged offence (s 313.4(2)(a)–(c)).

93. If the three conditions set out in s 313.4(2)(a)–(c) are met, the jury may find the defendant not guilty of the alleged offence (s 313.4(2)(d)) and guilty of the other offence (s 313.3(2)(e)).

94. The defendant bears a legal burden in relation to the mistaken belief element under s 313.4(2)(a) (s 13.4(b)). The defendant must prove these matters on the balance of probabilities (s 13.5).

95. The effect of this defence is to allow the accused to be convicted of a less serious offence where they intended to traffic in a lesser quantity (*Luong v DPP (Cth)* (2013) 46 VR 780).

96. There is no requirement that the belief be reasonable (see s 313.4). However, whether the belief was reasonable will likely be relevant to determining whether the accused actually held the belief (see, in the context of sexual offences, *DPP v Morgan* [1976] AC 182; *R v Ev Costa* 2/4/1997 CA Vic; *R v Saragozza* [1984] VR 187; *R v Zilm* (2006) 14 VR 11).

97. There is no specific requirement that the defendant considered the exact quantity of drug they were trafficking (see generally s 313.4). However, it is necessary for the defendant to show they actually formed a belief as to quantity (s 313.4(2)(a)).

C. Mistake as to identity of the drug

98. This defence applies if:

    (a) The defendant proves that, at the time of the alleged offence, he or she was under a mistaken belief about the identity of the drug;

    (b) If the mistaken belief had been correct, the defendant would have been guilty of another offence against Part 9.1; and

    (c) The maximum penalty for the other offence is less than the maximum penalty for the alleged offence (ss 313.5(2)(a)–(c)).

99. Where this defence is relied upon, the court will need to consider whether the quantity of drug the accused believed that he or she was trafficking, rather than the drug they were actually trafficking, was commercial or marketable.

100. For example, if a person is accused of trafficking 11kg of Oxycodone (commercial quantity of 5kg), but believed that he was trafficking in Opium (commercial quantity of 20kg), then if the accused can prove that belief on the balance of probabilities, then the jury may find the accused not guilty of trafficking a commercial quantity of a controlled drug and guilty of trafficking a marketable quantity of controlled drug (Opium – marketable quantity of 10kg).

101. The partial defences of mistake of quantity and mistake of identity may both operate where a person believes that they are trafficking in a reduced quantity of a different drug to that which is proved. If established on the balance of probabilities, then the accused may be convicted on the basis of their mistaken belief(s).

Last updated: 23 March 2015

9.1.1.1 Charge: Trafficking Marketable or Commercial Quantities of Controlled Drugs

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This charge may be used when the accused is charged with the following:

i) Trafficking commercial quantities controlled drugs under s 302.2.

ii) Trafficking marketable quantities controlled drugs under s 302.3.

This charge is designed for use where it is alleged the accused trafficked a commercial or marketable quantity by selling a controlled drug. It must be adapted if the prosecution argues the accused trafficked a controlled drug in one of the other ways listed in 302.1.

The Elements

I must now direct you about the offence of trafficking a [commercial/marketable] quantity of a controlled drug.

To prove this crime, the prosecution must prove the following four elements beyond reasonable doubt:

One – the accused intentionally trafficked in a substance.

Two – the substance trafficked was a controlled drug.

Three – the accused was reckless as to the substance trafficked being a controlled drug.

Four – the accused trafficked a [commercial/marketable] quantity of the controlled drug.

I will now explain each of these elements in more detail.

Traffics

The first element that the prosecution must prove is that the accused intentionally trafficked in a substance.

The prosecution has argued that NOA trafficked by selling the substance. In order for this form of trafficking be made out, the prosecution must prove two matters beyond reasonable doubt:

First, the prosecution must prove the accused sold the substance. NOA will have sold the substance if the prosecution proves there was an exchange or agreement to sell. Money does not necessarily have to change hands but giving something away for free does not constitute selling.

Second, the prosecution must prove the accused intended to sell the substance. This means that the accused meant to sell the substance. For this element, you are not required to consider if the accused knew of the nature of the substance. That is the third element.

Intention is a state of mind. To determine the accused's state of mind, the prosecution invites you to draw an inference as to the accused's state of mind from certain facts. You will remember what I told you earlier about drawing inferences.[1231]

[*Set out the facts and discuss relevant evidence or arguments.*]

Controlled drug

The second element the prosecution must prove is that the substance trafficked was a controlled drug.

You have heard evidence from [*identify relevant witness*] that the substance that the accused is alleged to have sold was [*identify relevant controlled drug*]. I direct you as a matter of law that [*identify relevant controlled drug*] is a controlled drug.

The defence has argued that [*identify relevant defence evidence and arguments regarding whether the substance is a controlled drug*].

If you are not satisfied that the substance that the accused is alleged to have sold was [*identify relevant controlled drug*], then you must find the accused not guilty.

[*If the substance is trafficked in a mixture, add the following shaded section.*]

You will remember the evidence that the substance that the accused is alleged to have sold was a mixture of [*identify relevant controlled drug*] and [*identify other substance*]. Provided you are satisfied that the substance contained [*identify relevant controlled drug*], then you may find this element proved.

Recklessness

Warning! As noted in 9.1.1 Trafficking Controlled Drugs, there is very little guidance on the operation of this element. Judges are encouraged to discuss this part of the direction with counsel and seek submissions.

The third element that the prosecution must prove is that the accused was reckless as to the substance trafficked being a controlled drug.

I have already directed you that, as a matter of law, [*insert relevant substance*] is a controlled drug.

This element looks at what NOA knew or believed about the substance s/he is alleged to have sold. The prosecution will prove this element if you are satisfied that NOA knew or believed that the substance was [*insert relevant substance*].

This element will also be established if the prosecution has proved that NOA was aware of a substantial risk that the substance was [*insert relevant substance*] and that in the circumstances as s/he knew them to be, it was unjustifiable to risk trafficking the substance. Whether taking such a risk is unjustifiable is a question of fact for you to determine.

[*If it would be open to the jury to find that the accused knew, believed or was aware of a substantial risk that the substance was a different controlled drug, add the following shaded section.*]

A third way the prosecution can prove this element is to show that NOA knew, believed or was aware of a substantial risk that the substance was a different controlled drug, such as [*insert any relevant examples*]. This element is made out if you are satisfied NOA was reckless as to whether the substance was a controlled drug of any kind.

[1231] Where the prosecution seeks to rely on Kural reasoning to establish the accused's state of mind, this charge will need to be adapted to incorporate this. See *Bahri Kural v R* (1987) 162 CLR 502; *Smith & Afford v R* (2017) 259 CLR 291; [2017] HCA 19.

[*Discuss relevant evidence or arguments.*]

Quantity

The fourth element that the prosecution must prove is that NOA trafficked a [commercial/marketable] quantity of a controlled drug.

I direct you as a matter of law that [*specify relevant quantity*] is a [commercial/marketable] quantity of [*identify relevant controlled drug*]. The prosecution does not have to prove that the accused knew of the weight of the substance, or knew that [*specify relevant quantity*] is a [commercial/marketable] quantity of [*identify relevant controlled drug*]. So, if you are satisfied that NOA trafficked [*identify relevant quantity and controlled drug alleged*], then you may find this element proved.

[*If a number of parcels are trafficked on a single occasion, add the following shaded section.*]

You have heard evidence that the [*identify relevant controlled drug*] was contained in [*identify number of parcels*] separate parcels. If you are satisfied that all of these parcels were trafficked on the one occasion, then you can combine the weight of [*identify relevant controlled drug*] in each of these parcels, to determine whether NOA trafficked a [commercial/marketable] quantity of [*identify relevant controlled drug*].

[*If the accused trafficked drugs at different times, add the following shaded section.*]

In this case, the prosecution alleges that NOA trafficked [*identify relevant controlled drug*] on [*identify number of occasions*] occasions. In determining whether NOA trafficked a [commercial/marketable] quantity, you may add together the quantities trafficked on these different occasions if you are satisfied the prosecution has proved two matters beyond reasonable doubt. First, that NOA trafficked [*identify relevant controlled drug*] on different occasions. This requires you to be satisfied that the first three elements have been proved beyond reasonable doubt by the prosecution in relation to each alleged occasion of trafficking. Second, that each of these proved trafficking occasions occurred within seven days of at least one other proved trafficking occasion.

I have given you a document, [*identify relevant document*] which lists the different times when NOA is alleged to have trafficked a controlled drug, and the quantity s/he is alleged to have trafficked. You will see that each of these occasions are no more than seven days apart. If the prosecution has proved that NOA trafficked a controlled drug on each occasion alleged, then you may add the quantity trafficked on each occasion together. However, if there is one or more occasion where you are not satisfied beyond reasonable doubt that NOA trafficked a controlled drug, you must strike those occasions from the list. You can then only add the quantities trafficked on the remaining occasions together where the remaining occasions occur within seven days of another offence, which you found proved. [*Judges may wish to explain this point using an example from the case, based on the dates of trafficking and explain the consequences if the jury finds a particular occasion not proved.*]

[*If the accused is alleged to be in a business of trafficking, add the following shaded section.*]

In this case, the prosecution alleged that NOA was involved in an organised commercial activity that involved repeated trafficking of controlled drugs. If you satisfied that NOA trafficked [*identify relevant controlled drug*] on multiple occasions as part this business, and that over the course of this business a [commercial/marketable] quantity was trafficked, you can find the accused guilty of trafficking a [commercial/marketable] quantity of a [*insert relevant controlled drug*]. To make this determination, you must be satisfied of two things. First you must be satisfied the accused was involved in an organised commercial activity that involved repeated trafficking controlled drugs. This requires you to be satisfied that the first three elements occurred on repeated occasions as part of this business. Second, you must be satisfied that a [commercial/marketable] quantity was trafficked over the course of the organised commercial activity.

[*If the controlled drugs are in a mixture add the following shaded section.*]

You will remember you heard evidence that the [*identify relevant controlled drug*] was in a mixture with [*identify other substance*]. You will also remember that you heard evidence that the amount of [*insert relevant controlled drug*] in the mixture was [*insert relevant quantity*]. I direct you as a matter of law that this is a [commercial/marketable] of [*identify relevant controlled drug*]. If you are satisfied that the mixture contained this quantity of pure [*identify relevant controlled drug*], then you may find this element proved.

[*If the prosecution relies on the proportions of multiple controlled drugs, add the following shaded section.*]

The prosecution has argued the accused trafficked more than one kind of controlled drug. Specifically: [*identify relevant controlled drugs and quantities*]. If you are satisfied that NOA trafficked these quantities of controlled drugs, then I direct you as a matter of law that these quantities, combined, form a [commercial/marketable] quantity and so you may find this element proved.

[*If the accused had a mistaken belief about the quantity or identity of the drug, add the following shaded section.*]

The defence has argued that NOA was under a mistaken belief as to the [quantity of [*insert relevant controlled drug*]/identity of [*insert relevant controlled drug*]] s/he was trafficking. The defence argues that NOA mistakenly believed that s/he was trafficking [*insert relevant quantity*] of [*insert relevant controlled drug*]. I direct you as a matter of law that, if NOA held this belief, and if you found all other elements proved, then NOA would be not guilty of trafficking a [commercial/marketable] quantity of a controlled drug, but would be guilty of the lesser offence of [trafficking a marketable quantity of a controlled drug/trafficking a controlled drug].

It is for the accused to prove that they were under this mistaken belief. This is one of the rare situations where the accused must prove an issue. Where the accused must prove a matter, a different standard applies compared to when the prosecution must prove a matter. That is, NOA does not need to prove matters "beyond reasonable doubt". Instead, the accused only needs to establish matters on what is called the "balance of probabilities". That is, such matters only need to be shown to be more likely than not. If you imagine a set a scales, with the evidence for the prosecution on one side and the evidence for the accused on the other, then the accused will prove this matter if the scales tip slightly in his/her favour. This is what the "balance of probabilities" means and you will understand that it is a much lower standard than "beyond reasonable doubt".

In determining whether NOA held this belief, you may consider the reasonableness of the belief and whether NOA turned his/her mind to the quantity of the controlled drug s/he was trafficking.

[*Discuss relevant evidence or arguments.*]

So, if you find on the balance of probabilities, that the accused held a mistaken belief that s/he was trafficking [*insert relevant quantity*] of [*insert relevant controlled drug*], and you satisfied that the first three elements of the offence are proved, then you may find the defendant not guilty of trafficking a [commercial/marketable] quantity and guilty of the lesser offence of [*trafficking a marketable quantity of a controlled drug/trafficking a controlled drug*].

Trafficking marketable quantities of controlled drugs

[*If the accused has been charged with trafficking a commercial quantity of a controlled drug and trafficking a marketable quantity is available as an alternative verdict, add the following shaded section.*]

I must also direct you about the crime of trafficking a marketable quantity of a controlled drug. This is an alternative to the offence of trafficking a commercial quantity of a controlled drug. This means you only need to deliver a verdict to this offence if you are not satisfied that the prosecution has proved the offence of trafficking a commercial quantity of [*insert controlled drug*], beyond reasonable doubt. If you are satisfied NOA is guilty of trafficking a commercial quantity of [*insert controlled drug*], then you do not need to deliver a verdict on this alternative.

The offence of trafficking a marketable quantity of [*insert controlled drug*] is very similar to the offence

of trafficking a commercial quantity of a controlled drug. There is, however, one important difference: the prosecution need only prove that NOA trafficked a marketable quantity, as opposed to commercial quantity, of the controlled drug.

So the four elements of the offence of trafficking a marketable quantity of a controlled drug are:

One – the accused intentionally trafficked in a substance.

Two – the substance trafficked was a controlled drug.

Three – the accused was reckless as to the substance trafficked being a controlled drug.

Four – the accused trafficked a marketable quantity of the controlled drug

You will remember my earlier directions about the first three elements. The difference here lies in the fourth element – you need only be satisfied a marketable, rather than commercial, quantity was trafficked.

I direct you as a matter of law that [*specify relevant quantity*] is a marketable quantity of [*identify relevant controlled drug*]. If you are satisfied that NOA trafficked [*identify relevant quantity and controlled drug alleged*], then you may find this fourth element proved. If you are also satisfied that the prosecution has proved the first three elements, you may find NOA guilty of this alternative offence of trafficking a marketable quantity of a controlled drug.

[*Discuss relevant evidence or arguments.*]

Trafficking controlled drugs

[*If trafficking a controlled drug is available as an alternative verdict, add the following shaded section.*]

I must also direct you about the crime of trafficking a controlled drug. This is an alternative to the offence of trafficking a [commercial/marketable] quantity of a controlled drug. This means you only need to deliver a verdict to this offence if you are not satisfied that the prosecution has proved the offence of trafficking a [commercial/marketable] quantity of [*insert controlled drug*], beyond reasonable doubt. If you are satisfied NOA is guilty of trafficking a [commercial/marketable] quantity of [*insert controlled drug*], then you do not need to deliver a verdict on this alternative.

The offence of trafficking [*insert controlled drug*] is very similar to the offence of trafficking a [commercial/marketable] quantity of [*insert controlled drug*]. There is, however, one important difference: the prosecution does not need to prove that NOA trafficked a particular quantity of the controlled drug.

So the three elements of the offence of trafficking a controlled drugs are:

One – the accused intentionally trafficked in a substance.

Two – the substance trafficked was a controlled drug.

Three – the accused was reckless as to the substance trafficked being a controlled drug.

You will remember my earlier directions about these three elements.

[*Discuss relevant evidence or arguments*].

Defences

[*Insert directions on any relevant 'general' defences under the Criminal Code.*]

[*The following defences specific to Part 9.1 may also be relevant.*]

Reasonable belief that conduct was justified or excused by or under a law

[*If the evidence raises the issue of whether the accused had a reasonable belief that the conduct was justified or excused by or under a law, add the following shaded section.*]

The defence has argued that NOA was under a mistaken but reasonable belief that his/her conduct was [justified/excused] under a law of [the Commonwealth/a State/a Territory].

[*Insert evidence and argument relied on by the accused.*]

Before you may find NOA guilty of [this offence/these offences], the prosecution must prove, beyond reasonable doubt, the accused did not have such a mistaken belief. You must find the defendant not guilty if the prosecution has failed to prove this beyond reasonable doubt.

[*Discuss relevant evidence or arguments.*]

Summary

To summarise before you can find NOA guilty of trafficking a [commercial/marketable] quantity of a controlled drug, the prosecution must prove to you beyond reasonable doubt:

One – the accused intentionally trafficked in a substance.

Two – the substance trafficked was a controlled drug.

Three – the accused was reckless as to the substance trafficked being a controlled drug.

Four – the accused trafficked a [commercial/marketable] quantity of the controlled drug

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of trafficking a [commercial/marketable] quantity of a controlled drug.

Last updated: 1 July 2017

9.1.1.2 Checklist: Trafficking Marketable or Commercial Quantities of Controlled Drugs

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This checklist can be used where it is alleged the accused trafficked a commercial or marketable quantity by selling a controlled drug.

Before you can convict the accused of trafficking a [commercial/marketable] quantity of a controlled drug, there are four elements that the prosecution must prove beyond reasonable doubt:

1. The accused intentionally trafficked in a substance; and

2. The substance trafficked was a controlled drug; and

3. The accused was reckless as to the substance trafficked being a controlled drug; and

4. The accused trafficked a [commercial/marketable] quantity of the controlled drug.

Intentional act of trafficking

1.1. Has the prosecution proved that the accused sold the substance?

If Yes, then go to 1.2

If No, then the accused is not guilty of trafficking a [commercial/marketable] quantity of a controlled drug

1.2. Has the prosecution proved the accused intended to sell the substance?

If Yes, then go to 2

If No, then the accused is not guilty of trafficking a [commercial/marketable] quantity of a controlled drug

Controlled Drug

2. Has the prosecution proved that the substance trafficked was a controlled drug?

Consider: [*Insert relevant controlled drug*] *is a controlled drug.*

If Yes, then go to 3.1

If No, then the accused is not guilty of trafficking a [commercial/marketable] quantity of a controlled drug

Recklessness about nature of substance

3.1. Has the prosecution proved that the accused knew that the substance was [*insert relevant controlled drug*]?

If Yes, then go on to 4

If No, then go to 3.2

3.2. Has the prosecution proved that the accused believed that the substance was [*insert relevant controlled drug*]?

If Yes, then go on to 4

If No, then go to 3.3

3.3. Has the prosecution proved that the accused was aware that there was a substantial risk that the substance was [*insert relevant controlled drug*] and knew that in the circumstances it was not justifiable to do what s/he did?

If Yes, then go on to 4

If No, then the accused is not guilty of trafficking a [commercial/marketable] quantity of a controlled drug

Quantity

4. Has the prosecution proved that the quantity of the controlled drug trafficked was [commercial/marketable]?

Consider: [*Insert relevant quantity*] *is a* [*commercial/marketable*] *quantity of* [*insert name of*

controlled drug].

If Yes then the accused is guilty of trafficking a [commercial/marketable] quantity of a controlled drug (as long as you also answered Yes to Questions 1.1, 1.2, 2 and either 3.1, 3.2 or 3.3)

If No, then the accused is not guilty of trafficking a [commercial/marketable] quantity of a controlled drug

Last updated: 23 March 2015

9.1.1.3 Charge: Trafficking Controlled Drugs

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This charge may be used when the accused is charged with trafficking controlled drugs under s 302.4.

This charge is designed for use where it is alleged the accused trafficked by selling a controlled drug. It must be adapted if the prosecution argues the accused trafficked a controlled drug in one of the other ways listed in 302.1.

The Elements

I must now direct you about the offence of trafficking a controlled drug.

To prove this crime, the prosecution must prove the following three elements beyond reasonable doubt:

One – the accused intentionally trafficked in a substance.

Two – the substance trafficked was a controlled drug.

Three – the accused was reckless as to the substance trafficked being a controlled drug.

I will now explain each of these elements in more detail.

Traffics

The first element that the prosecution must prove is that the accused intentionally trafficked in a substance.

The prosecution has argued that NOA trafficked by selling the substance. In order for this form of trafficking be made out, the prosecution must prove two matters beyond reasonable doubt:

First, the prosecution must prove the accused sold the substance. NOA will have sold the substance if the prosecution proves there was an exchange or agreement to sell. Money does not necessarily have to change hands but giving something away for free does not constitute selling.

Second, the prosecution must prove the accused intended to sell the substance. This means that the accused meant to sell the substance. For this element, you are not required to consider if the accused knew of the nature of the substance. That is the third element.

Intention is a state of mind. To determine the accused's state of mind, the prosecution invites you to draw an inference as to the accused's state of mind from certain facts. You will remember what I told you earlier about drawing inferences.[1232]

[*Set out the facts and discuss relevant evidence or arguments.*]

Controlled drug

The second element the prosecution must prove is that the substance trafficked was a controlled drug.

You have heard evidence from [*identify relevant witness*] that the substance that the accused is alleged to have sold was [*identify relevant controlled drug*]. I direct you as a matter of law that [*identify relevant controlled drug*] is a controlled drug.

The defence has argued that [*identify relevant defence evidence and arguments regarding whether the substance is a controlled drug*].

If you are not satisfied that the substance that the accused is alleged to have sold was [*identify relevant controlled drug*], then you must find the accused not guilty.

[*If the substance is trafficked in a mixture, add the following shaded section.*]

You will remember the evidence that the substance that the accused is alleged to have sold was a mixture of [*identify relevant controlled drug*] and [*identify other substance*]. Provided you are satisfied that the substance contained [*identify relevant controlled drug*], then you may find this element proved.

Recklessness

Warning! As noted in 9.1.1 Trafficking Controlled Drugs, there is very little guidance on the operation of this element. Judges are encouraged to discuss this part of the direction with counsel and seek submissions.

The third element that the prosecution must prove is that the accused was reckless as to the substance trafficked being a controlled drug.

I have already directed you that, as a matter of law, [*insert relevant substance*] is a controlled drug.

This element looks at what NOA knew or believed about the substance s/he is alleged to have sold. The prosecution will prove this element if you are satisfied that NOA knew or believed that the substance was [*insert relevant substance*].

This element will also be established if the prosecution has proved that NOA was aware of a substantial risk that the substance was [*insert relevant substance*] and that in the circumstances as s/he knew them to be, it was unjustifiable to risk trafficking the substance. Whether taking such a risk is unjustifiable is a question of fact for you to determine.

[*If it would be open to the jury to find that the accused knew, believed or was aware of a substantial risk that the substance was a different controlled drug, add the following shaded section.*]

The prosecution will also prove this element if NOA knew, believed or was aware of a substantial risk that the substance was a different controlled drug, such as [*insert any relevant examples*]. This element is made out if you are satisfied NOA was reckless as to whether the substance was a controlled drug of

[1232] Where the prosecution seeks to rely on Kural reasoning to establish the accused's state of mind, this charge will need to be adapted to incorporate this. See *Bahri Kural v R* (1987) 162 CLR 502; *Smith & Afford v R* (2017) 259 CLR 291; [2017] HCA 19.

any kind.

[*Discuss relevant evidence or arguments.*]

Defences

[*Insert directions on any relevant 'general' defences under the Criminal Code.*]

[*The following defences specific to Part 9.1 may also be relevant*].

Reasonable belief that conduct was justified or excused by or under a law

[*If the evidence raises the issue of whether the accused had a reasonable belief that the conduct was justified or excused by or under a law, add the following shaded section.*]

The defence has argued that NOA was under a mistaken but reasonable belief that his/her conduct was [justified/excused] under a law of [the Commonwealth/a State/a Territory].

[*Insert evidence and argument relied on by the accused.*]

Before you may find NOA guilty of [this offence/these offences], the prosecution must prove, beyond reasonable doubt, the accused did not have such a mistaken belief. You must find the defendant not guilty if the prosecution has failed to prove this beyond reasonable doubt.

[*Discuss relevant evidence or arguments.*]

Summary

To summarise before you can find NOA guilty of trafficking a controlled drug, the prosecution must prove to you beyond reasonable doubt:

One – the accused intentionally trafficked in a substance.

Two – the substance trafficked was a controlled drug.

Three – the accused was reckless as to the substance trafficked being a controlled drug.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of trafficking a controlled drug.

Last updated: 1 July 2017

9.1.1.4 Checklist: Trafficking Controlled Drugs

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This checklist can be used where it is alleged the accused trafficked by selling a controlled drug.

Before you can convict the accused of trafficking a controlled drug, there are three elements that the prosecution must prove beyond reasonable doubt:

1. The accused intentionally trafficked in a substance; and

2. The substance trafficked was a controlled drug; and

3. The accused was reckless as to the substance trafficked being a controlled drug.

Intentional act of trafficking

1.1. Has the prosecution proved that the accused sold the substance?

If Yes, then go to 1.2

If No, then the accused is not guilty of trafficking a controlled drug

1.2. Has the prosecution proved the accused intended to sell the substance?

If Yes, then go to 2

If No, then the accused is not guilty of trafficking a controlled drug

Controlled Drug

2. Has the prosecution proved that the substance trafficked was a controlled drug?

Consider: [Insert relevant controlled drug] is a controlled drug.

If Yes, then go to 3.1

If No, then the accused is not guilty of trafficking a controlled drug

Recklessness about nature of substance

3.1. Has the prosecution proved that the accused knew that the substance was [*insert relevant controlled drug*]?

If Yes then the accused is guilty of trafficking a controlled drug (as long as you also answered Yes to Questions 1.1, 1.2 and 2)

If No, then go to 3.2

3.2. Has the prosecution proved that the accused believed that the substance was [*insert relevant controlled drug*]?

If Yes then the accused is guilty of trafficking a controlled drug (as long as you also answered Yes to Questions 1.1, 1.2 and 2)

If No, then go to 3.3

3.3. Has the prosecution proved that the accused was aware that there was a substantial risk that the substance was [*insert relevant controlled drug*] and knew that in the circumstances it was not justifiable to do what s/he did?

If Yes then the accused is guilty of trafficking a controlled drug (as long as you also answered Yes to Questions 1.1, 1.2 and 2)

If No, then the accused is not guilty of trafficking a controlled drug

Last updated: 23 March 2015

9.1.2 Importing/Exporting Border Controlled Drugs and Plants

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Import-Export Offence Overview

1. Division 307 of the *Criminal Code* establishes four subdivisions related to import-export of border controlled drugs, plants and precursors:
    - Subdivision A (ss 307.1–307.4): Importing and exporting border controlled drugs or border controlled plants;
    - Subdivision B (ss 307.5–307.7): Possessing unlawfully imported border controlled drugs or border controlled plants;
    - Subdivision C (ss 307.8–307.10): Possessing border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported;
    - Subdivision D (ss 307.11–307.14): Importing and exporting border controlled precursors.
2. This topic only considers the operation of Subdivision A.
3. For information on trafficking offences under the *Criminal Code* see 9.1.1 Trafficking Controlled Drugs.
4. Unless stated otherwise, all references to sections are to the *Criminal Code.*
5. Import-export offences also exist under the *Customs Act 1901* (Cth). These offences are not covered in this chapter.

Commencement Information and Amendments

6. Division 307 was inserted into the *Criminal Code* by the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth). The division commenced operation 6 December 2005.
7. On 20 February 2010, the definition of 'import' was broadened to include dealing with the substance in connection with its importation as well as bringing the substance into Australia (*Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (Cth) s 9 sch 9 item 1).
8. Commencing 28 May 2013, the words 'other than a determined border controlled drug or determined border controlled plant' were added to the substance requirement for the import/export offence with no defence of lack of commercial intent (see s 307.4; *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act* 2012 (Cth) s 3 sch 1 item 17; see also below [41]–[43]).

Importing and exporting commercial quantities of border controlled drugs or border controlled plants

Overview of offences

9. Subdivision A of Division 307 of the *Criminal Code* establishes four import-export offences.
    - Section 307.1: Importing and exporting commercial quantities of border controlled drugs or border controlled plants.
    - Section 307.2: Importing and exporting marketable quantities of border controlled drugs or border controlled plants.
    - Section 307.3: Importing and exporting border controlled drugs or border controlled plants
    - Section 307.4: Importing and exporting border controlled drugs or border controlled plants – with no defence relating to lack of commercial intent.
10. Any reference to Subdivision A is to *Criminal Code* Division 307, Subdivision A.

Overview of elements

11. The following must be proved by the prosecution beyond reasonable doubt for all offences in subdivision A:
    - The person imports or exports a substance;
    - The person intended to import or export the substance;
    - The substance is a border controlled drug or border controlled plant;
    - The person was reckless as to the substance being a border controlled drug or border controlled plant (ss 307.1(1)–(2), 307.2(1)–(2), 307.3(1)–(2), 307.4(1)–(2)).
12. Where the accused has been charged with one of the aggravated offences, the prosecution must also prove that:
    - The quantity imported or exported was a 'commercial quantity' (s 307.1(c)); or
    - The quantity imported or exported was a 'marketable quantity' (s 307.2(c)).
13. Absolute liability applies to these quantity requirements (ss 307.1(3), 307.2(3)). Unlike for trafficking offences, there is no partial defence where the accused is mistaken regarding the identity or quantity of a drug (Compare 9.1.1 Trafficking Controlled Drugs, [92]–[97]).
14. In *Smith & Afford v R* (2017) 259 CLR 291, [69], the High Court set out twelve points of guidance for directions on this offence. However, the High Court did not refer to the impact of *Jury Directions Act 2015* s 61, and so judges should consider whether that section requires any modification to point (7) of that guidance.

The person imports or exports a substance

15. The first element requires the prosecution to prove that the accused either 'imported' a substance or 'exported' a substance.

A. Import

16. To 'import' a substance includes:
    (a) bringing the substance into Australia; and
    (b) dealing with the substance in connection with its importation (s 300.2).
17. This definition may be viewed as creating a 'primary' and 'extended' definition of 'import' (see *R v Tranter* (2013) 116 SASR 452; *Brown v The Queen* [2020] VSCA 20, [50]). For offences committed before 20 February 2010, the definition of import is restricted to the primary definition of bringing the substance into Australia (see *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (Cth)).
18. Under the primary definition, a person imports a substance when the substance arrives in Australia and is delivered to a point where it will remain in Australia (*Campbell v R* (2008) 73 NSWLR 272; *R v Tranter* (2013) 116 SASR 452; *R v Toe* (2010) 106 SASR 203).
19. This primary definition is limited to the arrival of the goods, and not their subsequent distribution or use (*Campbell v R* (2008) 73 NSWLR 272).
20. Under the extended definition, the act of importing refers to a process of importation, rather than a specific finite act. This aspect of the definition of import is further expanded by the inclusion of the words 'in connection with'. Therefore, the extended definition will cover a broad spectrum of conduct occurring both before and after the time a substance has strictly been 'imported' (*Brar v R* [2016] VSCA 281, [47]–[49]; compare *Campbell v R* (2008) 73 NSWLR 272).

21. The following activities are now likely covered by the extended definition, but would not fall under the primary definition:

    (a) packaging the goods for importation into Australia;

    (b) transporting the goods into Australia;

    (c) recovering the imported goods after landing in Australia;

    (d) making the imported goods available to another person;

    (e) clearing the imported goods;

    (f) transferring the imported goods into storage;

    (g) unpacking the imported goods;

    (h) arranging for payment of those involved in the importation process (see Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2010 (Cth); *R v Tranter* (2013) 116 SASR 452).

22. The extended definition of import in section 300.2 can be broken into two requirements:

    (a) the accused must deal with the substance; and

    (b) the dealings with the substance must be in connection with its importation (*R v Tranter* (2013) 116 SASR 452).

23. Provided the dealing is in connection with the importation, it does not matter whether the dealings occur before, during or after importation (*R v Tranter* (2013) 116 SASR 452).

24. The first requirement is that the accused must have dealt with the substance. While the terms 'deal' and 'in connection with' are not defined in the Criminal Code, they are words of relatively wide meaning (*R v Tranter* (2013) 116 SASR 452; *Brar v R* [2016] VSCA 281, [47]–[49]).

25. In order to have dealt with a substance, the accused must have had possession of the substance, or in a material respect had control of the disposition of the substance (*Zhao v DPP (Cth)* [2021] VSCA 101, [15(3)]).

26. Provision of an address for delivery, or tracking a delivery, is not enough, without more, to constitute possession or the necessary degree of control of the disposition of the substance to constitute dealing with the substance. In a case where this conduct arises, the judge must direct the jury that such conduct cannot, by itself, be sufficient to constitute dealing with the substance (*Chen v The Queen* [2021] VSCA 143, [14], [22]).

27. The requirement of proof that the accused dealt with 'the substance' means that a dealing with something other than the substance which is imported is not sufficient (*Ribbon v The Queen* (2019) 134 SASR 328, [136]–[138]).

28. While dealings can occur before, during or after importation, the subject-matter of the importation must exist at the time of the relevant conduct, otherwise the accused will not have dealt with 'the substance'. Therefore, actions such as asking a third party to send drugs, or telling a third party where drugs should be sent, may not be sufficient to prove a dealing with a substance if there is no evidence that the drugs in question existed at the time of the accused's conduct (*Ribbon v The Queen* (2019) 134 SASR 328, [145]–[147]).

29. Where the substance is fully substituted by police (whether in Australia or overseas), the process of bringing the substance into Australia for the purpose of the primary definition is at an end. An accused cannot be charged on the basis of his or her conduct which post-dates the time when the substance was imported (*Campbell v R* (2008) 73 NSWLR 272, *R v Tranter* (2013) 116 SASR 452; *R v Toe* (2010) 106 SASR 203).

30. Further, a dealing will not be with 'the substance' if it occurs after a full substitution, as the accused's conduct will only be a dealing with the substituted substance. Such a person may, however, have attempted to deal with the substance and so may be charged with attempting to import the prohibited substance (*R v Tranter* (2013) 116 SASR 452, 474 [88]; *Ribbon v The Queen* (2019) 134 SASR 328, [141], [153]; *R v Nolan* (2012) 83 NSWLR 534).

31. The second requirement is that the accused's dealings are 'in connection' with the importation. This is a term of wide meaning which may refer to conduct that occurs before the importation, during the importation or after the importation has concluded. However, there will come a point at which the alleged dealing is so far removed from the actual importation that it is no longer 'in connection with' the importation. In determining whether this point is reached, the court or jury will consider matters such as time, geography and other like matters (*R v Tranter* (2013) 116 SASR 452; *Brar v R* [2016] VSCA 281, [49])

32. Whether conduct is in connection with an importation is a question of fact for the jury in each case (*Brar v R* [2016] VSCA 281, [59]).

33. The answer to whether conduct is in connection with an importation is not assisted by considering whether the dealing took place before, or in connection with, the arrival of the substance at its 'final destination' in Australia. Such a consideration is a distraction from the statutory test and risks the wrong application of that test (*Brar v R* [2016] VSCA 281, [50]).

B. Export

34. To 'export' includes to take from Australia (s 300.2).

35. Unlike the definition of import, the definition of 'export' does not include an extended meaning of dealing with a substance in connection with its exportation.

36. The focus on the definition is likely to be on when the substance leaves Australian territory, rather than when it arrives at its final destination (see *R v Campbell* (2008) 73 NSWLR 272; [2008] NSWCCA 214).

37. The jury must therefore focus on the accused's conduct in taking the substance from Australia. Controlled interception which takes place before the goods are removed from Australia may therefore prevent the offence being completed. In such cases, a charge of attempting to export may be appropriate (see *R v Campbell* (2008) 73 NSWLR 272).

The person intended to import or export the substance

38. The prosecution must also prove that the accused intended to import or export the substance (s 5.6; see also *R v Campbell* (2008) 73 NSWLR 272).

39. A person intends to engage in conduct if he or she means to engage in conduct (s 5.2).

40. Therefore, the prosecution must prove the accused:

    (a) meant to import the substance; or

    (b) meant to export the substance.

41. At common law, it was appropriate to direct the jury that it could infer an intention to import narcotic drugs from finding that the accused held a belief, falling short of actual knowledge, that a package contained narcotic drugs. Similarly, a jury could infer intention from satisfaction that the accused was aware of the likelihood of the existence of the substance and the likelihood that it was a narcotic drug (*Kural v R* (1987) 162 CLR 502). This path of reasoning has been called 'Kural reasoning'.

42. Kural reasoning remains available for this element (*Smith & Afford v R* (2017) 259 CLR 291, [57]–[61]).

43. As the majority in *Smith & Afford v R* (2017) 259 CLR 291 stated at [60]:

> where it is established in cases like this that an accused perceived there to be a real or

significant chance of a substance being present in an object which the accused brought into Australia, it is open to infer on the basis of all the facts and circumstances of the case that the accused intended to import the substance.

44. To use *Kural* reasoning in relation to this element, it is not necessary to show that the accused knew or believed:
    - what the substance was;
    - what the substance looked like;
    - how it was wrapped;
    - what the substance otherwise contained;
    - where it was located or concealed (*Smith & Afford v R* (2017) 259 CLR 291, [63])
45. When directing the jury about *Kural* reasoning, the judge must make clear that:
    - The second and fourth fault elements involve different questions and must be considered separately (*Smith & Afford v R* (2017) 259 CLR 291, [68]);
    - *Kural* reasoning involves a process of inferential reasoning, and that proof of knowledge or belief provides part of the basis for drawing an inference of intent. Knowledge or belief that there is a real or significant chance of the substance being present is not a substitute for, or the equivalent of, proving intent (*Smith & Afford v R* (2017) 259 CLR 291, [65]–[66]).
46. The interaction between this element and the fourth element of recklessness as to importing or exporting a border controlled drug can be complex.
47. This element does not look at whether the accused was aware that the substance was a border controlled drug or border controlled plant. All that is required to establish the intention is proof the accused intended to import or export a package, whatever it contained (see *Campbell v R* (2008) 73 NSWLR 272).
48. However, where the substance is concealed within a larger package (either in a hidden compartment, or through seemingly innocuous wrapping), an intention to import the larger package is not sufficient. Instead, the accused must have intended to import the concealed substance. This may be inferred from evidence that the accused knew or believed there was a real or significant chance that there was a concealed substance in the larger package, and failed to take steps to inspect the package or declare those concerns to Customs officials (see *Smith & Afford v The Queen* (2017) 259 CLR 291, [58]–[59], [63]).

The substance is a border controlled drug or border controlled plant

49. Each offence under Subdivision A requires the accused to have imported or exported a 'border controlled drug' or 'border controlled plant'. These terms are defined exhaustively in ss 301.4 and 301.5 (s 300.2).
50. A border controlled plant is a growing plant which is either:
    (a) listed by a regulation as a border controlled plant; or
    (b) determined by the Minister as a border controlled plant under section 301.13 (s 301.5(1)).
51. A border controlled drug is a substance (other than a growing plant) which is either:

(a) listed by a regulation as a border controlled drug

(b) a drug analogue of a listed border controlled drug

(c) determined by the Minister as a border controlled drug under s 301.13 (s 301.4(1)).

A. Listed by a regulation as a border controlled drug or border controlled plant

52. Listed border controlled drugs and plants are those drugs and plants listed by a regulation made for the purposes of ss 301.4(1)(a) or 301.5(1)(a) (s 300.2).

53. The current listed border controlled drugs are found in the *Criminal Code Regulations 2002* (Cth) Schedule 4 column 1 (*Criminal Code Regulations 2002* (Cth) reg 5D).

54. The current listed border controlled plants are found in the *Criminal Code Regulations 2002* (Cth) reg 5E (*Criminal Code Regulations 2002* (Cth) reg 5E(1)).

B. Determined by the Minister as a border controlled drug or border controlled plant

55. The Minister may determine that a substance is a border controlled drug or border controlled plant via an Emergency Determination (ss 301.13(1)(a), (b)).[1233] The Minister is not permitted to make more than one determination under this section in relation to a particular substance (s 301.13(3)).

56. A determination under s 301.13 operates from the time it is registered for a period of 12 months (or such shorter period specified in the determination) (s 301.16(1)).

57. Where the accused is charged under s 307.4 with importing or exporting a border controlled drug without commercial intent, the border controlled drug or plant must be either a listed drug or plant or a drug analogue of a listed drug and not a determined border control drug or determined border controlled plant (see the definition in s 300.2).

C. A drug analogue of a listed border controlled drug

58. The definition of 'drug analogue' in the *Criminal Code* sets out ways in which a substance can be related to a listed border controlled drug or a 'primary analogue' of the listed border controlled drug (see s 301.9(1)). These conditions relate to similarities in the chemical structure between a substance and a listed controlled drug.

59. If one of the chemical relationships defined in s 301.9(1) exists, then the substance is a drug analogue of a listed border controlled drug. A substance cannot be a 'drug analogue' if it is already a listed controlled drug (s 301.9(2)).

[1233] This system of emergency determination replaces the previous system of listing substances as border controlled drugs or plants temporarily through interim regulations (which were for a maximum period 12 months) or urgently through emergency determinations (which for a maximum period of 56 days). These changes came into force 28 May 2013 under the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) s 3 sch 1 item 16.

60. Section 301.9(1)(d) specifies that a drug is an analogue of a listed controlled drug or a listed border controlled drug if it is "any other homologue, analogue, chemical derivative or substance substantially similar in chemical structure". The words "substantially similar in chemical structure" qualify all previous terms (homologue, analogue and chemical derivative) and are not limited to the immediately preceding word "substance" (*R v AL* [2016] VSCA 156, [26]–[29]).

61. Whether one drug is a chemical derivative of a listed drug is a question of fact for the jury. It will require expert evidence which will examine matters such as whether one drug can be made from another and whether one drug is structurally related to another (see *Daley v Tasmania* (2012) 21 Tas R 247; *Clegg v Western Australia (No 2)* [2017] WASCA 30).

The person was reckless as to the substance being a border controlled drug or border controlled plant

62. The prosecution must prove that the accused was reckless as to the substance being a border controlled drug or border controlled plant (ss 307.1(2), s 307.2(2), s 307.3(2) and 307.4(2)).

63. A person is reckless as to the imported or exported substance being a border controlled drug or border controlled plant if:

    (a) He or she is aware of a substantial risk that the substance is a border controlled drug or border controlled plant; and

    (b) Having regard to the circumstances known to him or her, it is unjustifiable to take the risk (s 5.4(1)).

64. A person is also reckless as to the substance being a border controlled drug or border controlled plant if:

    - he or she believes that the substance is a border controlled drug or border controlled plant; or
    - he or she is aware that the substance is a border controlled drug or border controlled plant or will be a border controlled drug or border controlled plant in the ordinary course of events (ss 5.4(4), 5.2(2), 5.3).

65. The jury must determine whether it is unjustifiable to take a risk on the facts known to the accused (s 5.4(1)(b)). However, the accused does not need to have believed that it was unjustifiable to take the risk. The test is objective not subjective.

66. The question of whether a risk is unjustifiable requires the jury to make a moral or value judgment relating to the accused's advertent disregard of risk (*R v Saengsai-Or* (2004) 61 NSWLR 135).

67. The jury must assess the likelihood of the risk eventuating, and determine whether the risk is one that should not have been taken (*Lustig v R* (2009) 195 A Crim R 310).

68. This element can be proved where the accused was aware that there was a substantial risk that the substance was one kind of border controlled drug or border controlled plant but was in fact a different border controlled drug or border controlled plant. The prosecution does not need to prove that the person was reckless as to the particular identity of the border controlled drug or border controlled plant imported as opposed to the substance being a border controlled drug or border controlled plant (s 300.5; see, e.g. *R v Hill* (2011) 212 A Crim R 359; *Weng v R* (2013) 279 FLR 119).

69. While courts have not directly addressed the issue, the better view appears to be that this element only requires that the accused was reckless as to the identity of the substance in question and the prosecution does not need to prove that the accused was reckless as to its status as a proscribed substance. However, given the lack of caselaw on this point, judges should seek submissions from parties in cases where this issue is relevant.

70. The partial defence of mistake as to identity of drug, plant or precursor under s 313.5 does not apply to offences under Division 307 (compare 9.1.1 Trafficking Controlled Drugs, [92]–[97]).

71. Where the accused is charged with attempting to import or export a border controlled drug or plant, recklessness remains the fault element associated with proof that the substance is a controlled drug or plant. This is an exception to the general rule for attempt charges that the fault element for all physical elements is intention or knowledge (s 300.6; c.f. s 11.1).

Commercial/marketable quantity

72. Where a person is charged under s 307.1 or 307.2 with importing or exporting a commercial or marketable quantity, the prosecution must prove that the quantity imported or exported was commercial or marketable (ss 307.1(1)(c), 307.2(1)(c)).

73. For border controlled plants and border controlled drugs other than a drug analogue, a commercial or marketable quantity is the lesser of:

    (a) The quantity listed in a regulation as a commercial or marketable quantity for these offences (ss 301.10 item 1(a), 301.11 item 1(a)). For the current list see *Criminal Code Regulations 2002* (Cth) s 5E(1) (for plants) and Schedule 3 (for drugs) (*Criminal Code Regulations* s 5D, 5E); and[1234]

    (b) The quantity determined by the Minister under an Emergency Determination in s 301.15 as a commercial or marketable quantity (ss 301.10 item 1(b), 301.11 item 1(b)). Such a determination can only be made if there is no quantity regulation already in force (s 301.15(2)).

74. A commercial or marketable quantity of a drug analogue of a border controlled drug is the commercial or marketable quantity of the listed border controlled drug of which it is an analogue (ss 301.10 item 3(a), 301.11 item 3(a)). If the substance is a drug analogue for two or more listed border controlled drugs, a commercial or marketable quantity is the smallest commercial or marketable quantity of the listed border controlled drugs of which it is an analogue (ss 301.10 item 3(b), 301.11 item 3(b)).

75. The amounts listed in the *Criminal Code Regulations 2002* (Cth) are based on the pure amount of the drug (*Weng v R* (2013) 279 FLR 119; *R v King* [1979] VR 399; see also s 312.1(1)(a)).

76. For guidance as to how to determine quantity in specific circumstances, see Provisions Relevant to Determining Quantity, [61]–[81] below.

Absolute liability as to quantity

77. Absolute liability applies to the quantity requirements. This means that there is no associated fault element (ss 307.1(3), 307.2(3), 307.3(3)).

Provisions relevant to determining quantity

78. The following provisions may be relevant in determining if the quantity requirements are satisfied:

    - Combining different parcels on the same occasion – s 311.1
    - Combining parcels from multiple offences – s 311.8
    - Combining parcels from organised commercial activity – s 311.2
    - Calculating quantity of drugs in mixtures – s 312.1

[1234] In the past, a listing of commercial quantities of controlled drugs was found in s 314.1 of division 314 to the *Criminal Code*. This division has now been repealed, effective 28 May 2013.

- Calculating quantity of several drugs in mixtures – s 312.2

A. Combining quantities of plants or drugs

79. If on a single occasion, a person imports or exports several parcels of border controlled drugs or border controlled plants, the person may be charged with a single offence against Part 9.1 in respect of all or any of those different parcels (s 311.1(1)(f)).

80. The quantity of drugs is the sum of the quantities of drugs in the several parcels (s 311.1(2)).

81. Where different kinds of border controlled drugs or border controlled plants are involved see [78]–[81] below.

82. Despite this method of aggregation, a person may still be charged with separate offences in respect of several parcels of drugs, plants or precursors imported or exported on a single occasion (s 311.1(4)).

B. Combining quantities from multiple offences

83. Under s 311.13, the prosecution can aggregate the quantities imported or exported from multiple occasions into a single offence if the prosecution can prove that:

    (a) The defendant committed several offences against Subdivision A on different occasions;

    (b) Each offence was committed within 30 days from another offence; and

    (c) In total, the relevant quantity of a border controlled drug or border controlled plant or both, or of a combination of border controlled drugs or border controlled plants or both, was imported or exported during the commission of the offences (s 311.13)

84. This provides a means for the prosecution to prove that the accused imported or exported a commercial or marketable quantity on the basis of a series of offences, each of which was less than the relevant threshold quantity.

85. The following general rules apply to combining parcels from multiple offences:

    - The particulars of the individual offences alleged to have been committed on different occasions must be set out in the charge (s 311.22(1)).
    - The same parcel of controlled drugs must not be counted more than once (s 311.22(2)). For example if an accused deals with the substance in connection to its importation one day and then physically brings the substance into Australia the next day, only the quantity imported on one of these occasions can be counted.
    - Despite the ability to combine parcels from multiple offences, there is nothing to prevent a person from being charged with separate offences for each different occasion (s 311.22(3)).

86. Where different kinds of border controlled drugs or border controlled plants are involved see [78]–[81] below (s 311.13 note 1).

C. Combining quantities based on a business of importing or exporting border controlled drugs or border controlled plants

87. A commercial or marketable quantity can be made out if the prosecution proves:

    (a) The defendant was engaged in an organised commercial activity that involved repeated importing or exporting of border controlled drugs or border controlled plants, or both; and

    (b) The relevant quantity of border controlled drug or border controlled plant or both, or a combination of border controlled drugs or border controlled plants or both, was imported or exported in the course of that activity (s 311.4(1)(c)–(d))).

88. The phrase "organised commercial activity", which is used in s 311.4, is not defined in the Code.

89. The prosecution does not need to specify the exact dates of each occasion or the exact quantity imported or exported on each occasion (s 311.4(2)).

90. This provision provides a more flexible basis than s 311.13 for aggregating quantities over a prolonged process of importing or exporting, where it is conducted as a business.

91. For a comparison between establishing quantity under a similar provision of the *Criminal Code* and *Giretti* Trafficking see 9.1.1 Trafficking Controlled Drugs, [70], [77].

92. See also 9.1.1 Trafficking in a Drug of Dependence for discussion of what constitutes a 'business' as it relates to *Giretti* Trafficking. These concepts are potentially transferrable to this provision.

93. Where different kinds of controlled drug are imported, see [76]–[80] below (s 311.4 Note 1).

D. Calculating quantities of drugs in mixtures

94. When a border controlled drug is within a mixture, the prosecution must prove that the mixture contains the relevant quantity of the border controlled drug in pure form (s 312.1(3)(a)).[1235]

E. Calculating quantities where different kinds of substances are involved

95. If the accused is charged with a single offence involving importing or exporting more than one kind of border controlled drug or border controlled plant, then the quantity imported or exported is a marketable or commercial quantity if the sum of the requisite fractions of the marketable or commercial quantity of each of those drugs or plants is equal to or greater than one (s 312.2(2)).

96. The 'requisite fraction' is determined by dividing the actual quantity of the substance by the smallest marketable or commercial quantity of that substance (s 312.2(3)).

97. For example, where a person is accused of importing 9.5kg of Opium and 3kg of Oxycodone, the Code *Criminal Code Regulations 2002* (Cth) Schedule 4 column 2 items 165 and 168 provide that:

    - A commercial quantity of Opium is 20kg;
    - A commercial quantity of Oxycodone is 5kg

    Therefore:

    - The requisite fraction of Opium is 0.475 of a commercial quantity
    - The requisite fraction of Oxycodone is 0.6 of a commercial quantity
    - The combined requisite fractions are 1.075 of a commercial quantity and the person may therefore be charged with importing a commercial quantity of a combination of Opium and Oxycodone.

98. When a border controlled drug is within a mixture of substances, the requisite fraction is calculated on the basis of the quantity of the controlled drug in pure form (s 312.2(5)(a)).[1236]

Defences and alternative verdicts

99. The following defences/alternative verdicts apply to Division 307:

[1235] Section 312.1(1)(b) purports to provide another means by which the prosecution can prove the quantity requirement, however it refers to division 314 which is now repealed (effective 28 May 2013).

[1236] Section 312.2(5)(b) purports to provide another means by which the requisite fraction can be calculated, however it refers to division 314 which is now repealed (effective 28 May 2013).

(a) Lack of commercial intent (ss 307.2(4), 307.3(3));

(b) Reasonable belief that conduct was excused by or under state law (s 313.2);

(c) Proof of alternative offence (s 313.3).

100. The other defences and alternative verdicts under Division 313 are not applicable to Division 307 (compare 9.1.1 Trafficking Controlled Drugs).

A. Lack of Commercial Intent

101. Where the accused is charged with importing or exporting a marketable quantity, or importing or exporting a border controlled drug or plant, the accused has a defence where he or she proves that he or she neither intended, nor believed that another person intended, to sell any of the border controlled drug or border controlled plant or its products (ss 307.2(4), 307.4(3)).

102. 'Sell' is defined as including:

(a) Barter and exchange

(b) Agree to sell (s 300.2)

See 9.1.1 Trafficking Controlled Drugs, [15]–[19] for more detail on the definition of 'sell'.

103. The defendant bears the legal burden of proving a lack of commercial intent on the balance of probabilities (ss 13.4, 13.5).

104. Where the accused proves the defence of lack of commercial intent, the prosecution may seek to rely on the offence under s 307.4, where the defence of lack of commercial intent does not apply, as a factual alternative (s 307.4).

105. The lack of commercial intent defence is not available for the offence of importing or exporting a commercial quantity of a border controlled drug or a border controlled plant (s 307.1).

106. Determined border controlled drugs or determined border controlled plants are explicitly excluded from the operation the import-export offence with no defence of lack of commercial intent (s 307.4(1)(b)). Therefore, no offence under Subdivision A has been committed where:

- The quantity imported or exported was less than commercial (c.f if the quantity is commercial and no defence of lack of commercial intent is available: s 307.1);
- The defendant had no commercial intent (see ss 307.2(4), 307.3(3)); and
- The substance s/he have imported or exported was a determined border controlled drug or determined border controlled plant (s 307.4(1)(b)).

However, the accused may still be liable for a possession offence under Subdivision B or Subdivision C of Division 307 (*Weng v R* (2013) 279 FLR 119).

B. Reasonable Belief that Conduct was Excused by or Under Commonwealth, State or Territory Law

107. No criminal responsibility exists if:

(a) At the time of the conduct constituting the offence, the person was under a mistaken but reasonable belief that the conduct was justified or excused by or under a law of the Commonwealth or of a State or Territory; and

(b) Had the conduct been so justified or excused – the conduct would not have constituted the offence (s 313.2).

108. This defence provides an exception to the general rule under the *Criminal Code* that a person can still be criminally responsibility for an offence even if he or she is mistaken about or ignorant of the law (s 9.3).

109. While there is no case law on the operation of this defence, it appears designed to cover those situations where a person mistakenly believed that they held a valid licence or other authorisation to deal with the border controlled substance (See Explanatory Memoranda, Law Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act (Cth) 2005).

110. The defendant bears the evidential burden of proof in relation to this defence (s 13.3(3); the note in s 313.2). To satisfy this burden, the defendant must adduce or point to evidence that suggests a reasonable possibility that they had a reasonable belief the conduct was justified (s 13.3(6)).

111. The defence under s 313.1 – which absolves the accused of liability where the conduct occurs in a state or territory and the conduct is justified or excused by or under a law of a State or Territory – does not apply to Division 307 offences (compare Division 302 trafficking offences – see 9.1.1 Trafficking Controlled Drugs, [85]–[86]).

112. However, the general defence under s 10.5 does apply to Division 307. This general defence operates so that a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law of the Commonwealth (see s 10.5).

C. Proof of Alternative Offence

113. If the jury is not satisfied that the defendant is guilty of the alleged offence but is satisfied, beyond reasonable doubt, that the defendant is guilty of another offence against Part 9.1, they may find the defendant not guilty of the alleged offence but guilty of the other offence (s 313.3).

114. The maximum penalty of the 'other offence' must not be greater than the maximum penalty for the alleged offence and the defendant must have been accorded procedural fairness in relation to that finding of guilt (s 313.3).

Last updated: 21 July 2021

9.1.2.1 Charge: Importing/Exporting Marketable or Commercial Quantities of Border Controlled Drugs and Border Controlled Plants

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This charge may be used when the accused is charged with the following:

i) Importing or exporting commercial quantities of border controlled drugs or border controlled plants under s 307.1

ii) Importing or exporting marketable quantities of border controlled drugs or border controlled plants under s 307.2

This charge is designed for use where the accused is charged with importing a border controlled substance. It must be adapted if the accused is charged with exporting a border controlled substance.

This charge is designed for use where the border controlled substance is a border controlled drug. It must be adapted if the accused is charged with importing or exporting a border controlled plant.

The Elements

I must now direct you about the offence of importing a [marketable/commercial] quantity of a border controlled drug.

To prove this crime, the prosecution must prove the following five elements beyond reasonable doubt:

One – the accused imported a substance.

Two – the accused intended to import the substance.

Three – the substance imported was a border controlled drug.

Four – the accused was reckless as to the substance imported being a border controlled drug.

Five – the accused imported a [commercial/marketable] quantity of the border controlled drug.

I will now explain each of these elements in more detail.

Import

The first element the prosecution must prove is that the accused imported a substance.

An accused imports a substance if they have:

1. Brought the substance into Australia; or

2. Dealt with the substance in connection with its importation

[*If the accused is alleged to have brought the substance into Australia, add the following shaded section*.]

The prosecution says that the accused brought the substance into Australia. In assessing whether this in fact occurred, you must only look at whether the accused has caused the substance to arrive in Australia to a point where it will remain in the country.

[*If relevant on the facts, add the following darker shaded section.*]

This element is not proved where the accused only used or distributed the substance after it arrived in Australia.

[*If the accused is alleged to have dealt with the substance in connection with its importation, add the following shaded section.*]

The prosecution says that the accused dealt with the substance in connection with its importation. To prove this element, the prosecution must establish the following two matters.

First, that the accused dealt with the substance.

There is no legal definition for what it means to deal with a substance. You must approach this matter as a question of common sense, given your understanding of what it means to deal with a substance.

A person can only deal with a substance if the person has custody or control over the substance, or control over disposal of the substance. The person must also intend to exercise that custody or control over the substance, or the disposal of the substance.

[*If there has been a full police substitution, add the following darker shaded section.*]

The prosecution must prove that the accused dealt with the substance s/he is alleged to have imported. In this case, there is evidence that the police intercepted the [*identify relevant substance*] on [*identify relevant date*] and replaced it with a harmless substitute.

You cannot convict the accused on the basis of his/her conduct after [*identify date of substitution*]. This is

because any such conduct will only have been a dealing with the substituted substance, and not with a prohibited import.[1237]

A person may deal with a substance before, during, or after the substance is imported.

However, if you are considering conduct before the substance was imported, you must also be satisfied that the substance existed at that time. It is not enough if the substance was still to be manufactured or acquired at the time of the accused's actions.

The second matter the prosecution must prove is that the dealings were in connection with the importation of the substance. Importation is an ongoing process, including but not limited to packaging the substance for importation, the transport of the substance to Australia and the transfer of imported goods into storage. However, you must be satisfied, as a matter of common sense, that the conduct is 'in connection with' and not too far removed from the importation.

[*Discuss relevant evidence or arguments.*]

Intention

The second element the prosecution must prove is that the accused intended to import the substance.

This means that the accused meant to import the substance.

Intention is a state of mind. To determine the accused's state of mind, the prosecution invites you to draw an inference as to the accused's state of mind from certain facts. You will remember what I told you earlier about drawing inferences.

[*If the case concerns a substance contained within another object (a container), add the following shaded section. This direction should be adapted and included if the substance consists of or includes the substituted contents of a container.*]

As you have heard, the prosecution seeks to prove that NOA imported [*identify substance*] within [*identify container*]. To prove this element, the prosecution must prove that the accused meant to import the [*identify substance*]. An intent to import [*identify container*] is not sufficient.

There are two matters which might help you reach a conclusion that NOA meant to import [*identify substance*]. First, did NOA know that [*identify substance*] was in [*identify container*]? Second, was NOA aware that there was a significant chance that [*identify substance*] was in [*identify container*]?

If you answer 'yes' to either of these questions, that may help you draw the conclusion that NOA meant to import [*identify substance*]. Remember, you must not look at pieces of evidence in isolation. Instead, you must decide, based on the evidence you accept, whether the prosecution has proved that NOA meant to import [*identify substance*].

[*Set out the facts and discuss relevant evidence or arguments.*]

[1237] If attempted importation is left as an alternative, add the following: Such conduct may, however, be considered as part of the charge of attempting to import a (commercial/marketable quantity of a) border controlled drug. For that charge, you might find that the accused attempted to deal with the [*identify relevant substance*], but failed because it had already been substituted by police.

Border controlled drug/border controlled plant

The third element the prosecution must prove is that the substance imported was a border controlled drug.

You have heard evidence from [*identify relevant witness*] that the imported substance was [*identify relevant border controlled drug*]. I direct you as a matter of law that [*identify relevant border controlled drug*] is a border controlled drug.

The defence has argued that [*identify relevant defence evidence and arguments regarding whether the substance is a border controlled drug*].

If you are not satisfied that the substance was [*identify relevant border controlled drug*], then you must find the accused not guilty.

[*If the substance is imported in a mixture, add the following shaded section.*]

You will remember the evidence that the substance was a mixture of [*identify relevant border controlled drug*] and [*identify other substance*]. Provided you are satisfied that the substance contained [*identify relevant border controlled drug*], then you may find this element proved.

Recklessness

Warning! As noted in 9.1.2 Importing/Exporting Border Controlled Drugs and Plants, there is very little guidance on the operation of this element. Judges are encouraged to discuss this part of the direction with counsel and seek submissions.

The fourth element that the prosecution must prove is that the accused was reckless as to the substance imported being a border controlled drug.[1238]

I have already directed you that, as a matter of law, [*insert relevant substance*] is a controlled drug.

This element looks at what NOA knew or believed about the substance s/he is alleged to have imported. The prosecution will prove this element if you are satisfied that NOA knew or believed that the substance imported was [*insert relevant substance*].

This element will also be established if the prosecution has proved that NOA was aware of a substantial risk that the substance imported was [*insert relevant substance*] and that in the circumstances as s/he knew them to be, it was unjustifiable to risk importing the substance. Whether taking such a risk is unjustifiable is a question of fact for you to determine.

[*If it would be open to the jury to find that the accused was aware of a substantial risk that the substance was a different controlled drug, add the following shaded section.*]

A third way the prosecution can prove this element is to show that NOA was aware of a substantial risk that the substance was a different controlled drug, such as [*insert any relevant examples*]. This element is made out if you are satisfied NOA was reckless as to whether the substance was a controlled drug of any kind.[1239]

[1238] If the prosecution cannot or does not particularise the border controlled drug in question, references to "[*insert relevant substance*]" (apart from in the second paragraph of this part of the charge) should be replaced with "a border controlled drug". See *Nelson v DPP (Cth)* (2014) 44 VR 461; [2014] VSCA 217 and *Weng v R* [2013] VSCA 221.

[1239] Judges should consider whether they need to explain the difference between a "substantial risk" and a "significant chance" to the jury. If such an explanation is considered necessary, judges should discuss their proposed formulation with counsel.

[*Discuss relevant evidence or arguments.*]

Quantity

The fifth element that the prosecution must prove is that NOA imported a [commercial/marketable] quantity of a border controlled drug.

I direct you as a matter of law that [*specify relevant quantity*] is a [commercial/marketable] quantity of [*identify relevant border controlled drug*]. The prosecution does not have to prove that the accused knew of the weight of the substance. So, if you are satisfied that NOA imported [*identify relevant quantity and border controlled drug alleged*], then you may find this element proved.

[*If a number of parcels are imported on a single occasion, add the following shaded section.*]

You have heard evidence that the [*identify relevant border controlled drug*] was contained in [*identify number of parcels*] separate parcels. If you are satisfied that all of these parcels were imported on the one occasion, then you can combine the weight of [*identify relevant border controlled drug*] in each of these parcels, to determine that NOA imported a [commercial/marketable] quantity of [*identify relevant border controlled drug*].

[*If the accused imported drugs at different times, add the following shaded section.*]

In this case, the prosecution alleges that NOA imported [*identify relevant border controlled drug*] on [*identify number of occasions*] occasions. In determining whether NOA imported a [commercial/marketable] quantity, you may add together the quantities imported on these different occasions if you are satisfied the prosecution has proved two matters beyond reasonable doubt. First, that NOA imported [*identify relevant border controlled drug*] on different occasions. This requires you to be satisfied that the first four elements have been proved beyond reasonable doubt by the prosecution in relation to each alleged occasion of importing. Second, that each of these proved import offences occurred within thirty days of at least one other proved import offence.

I have given you a document, [*identify relevant document*] which lists the different times when NOA is alleged to have imported a border controlled drug, and the quantity s/he is alleged to have imported. You will see that each of these occasions are no more than thirty days apart. If the prosecution has proved that NOA imported a controlled drug on each occasion alleged, then you may add the quantities imported on each occasion together. However, if there is one or more occasion where you are not satisfied beyond reasonable doubt that NOA imported a border controlled drug, you must strike those occasions from the list. You can then only add the quantities imported on the remaining occasions together where the remaining occasions occur within thirty days of another offence, which you found proved. [*Judges may wish to explain this point using an example from the case, based on the dates of importing and explain the consequences if the jury finds a particular occasion not proved.*]

[*If the accused is alleged to be in a business of importing, add the following shaded section.*]

In this case, the prosecution alleged that NOA was involved in an organised commercial activity that involved repeated importing of border controlled drugs. If you satisfied that NOA imported [*identify relevant border controlled drug*] on multiple occasions as part this business, and that over the course of this business a [commercial/marketable] quantity was imported, you can find the accused guilty of importing a [commercial/marketable] quantity of a [*insert relevant border controlled drug*]. To make this determination, you must be satisfied of two things. First you must be satisfied the accused was involved in an organised commercial activity that involved repeated importing of border controlled drugs. This requires you to be satisfied that the first four elements occurred on repeated occasions as part of this business. Second, you must be satisfied that a [commercial/marketable] quantity was imported over the course of the organised commercial activity.

[*If the border controlled drugs are in a mixture, add the following shaded section.*]

You will remember you heard evidence that the [*identify relevant border controlled drug*] was in a mixture

with [*identify other substance*]. You will also remember that you heard evidence that the amount of [*insert relevant border controlled drug*] in the mixture was [*insert relevant quantity*]. I direct you as a matter of law that this is a [commercial/marketable] of [*identify relevant border controlled drug*]. If you are satisfied that the mixture contained this quantity of pure [*identify relevant border controlled drug*], then you may find this element proved.

[*If the prosecution relies on the proportions of multiple border controlled drugs, add the following shaded section*.]

The prosecution has argued the accused imported more than one kind of border controlled drug. Specifically: [*identify relevant border controlled drugs and quantities*]. If you are satisfied that NOA imported these quantities of border controlled drugs, then I direct you as a matter of law that these quantities, combined, form a [commercial/marketable] quantity and so you may find this element proved.

Importing marketable quantities of border controlled drugs

[*If the accused has been charged with importing a commercial quantity of a border controlled drug and importing a marketable quantity is available as an alternative verdict, add the following shaded section.*]

I must also direct you about the crime of importing a marketable quantity of a border controlled drug. This is an alternative to the offence of importing a commercial quantity of a border controlled drug. This means you only need to deliver a verdict to this offence if you are not satisfied that the prosecution has proved the offence of importing a commercial quantity of [*insert border controlled drug*], beyond reasonable doubt. If you are satisfied NOA is guilty of importing a commercial quantity of a border controlled drug, then you do not need to deliver a verdict on this alternative.

The offence of importing a marketable quantity of a border controlled drug is very similar to the offence of importing a commercial quantity of a border controlled drug. There is, however, one important difference: the prosecution need only prove that NOA imported a marketable quantity, as opposed to commercial quantity, of a border controlled drug.

So the five elements of importing marketable quantities of border controlled drugs are:

One – the accused imported a substance.

Two – the accused intended to import the substance.

Three – the substance imported was a border controlled drug.

Four – the accused was reckless as to the substance being a border controlled drug.

Five – the accused imported a marketable quantity.

You will remember my earlier directions about the first four elements. The difference here lies in the fifth element – you need only be satisfied that NOA imported a marketable, rather than commercial, quantity.

I direct you as a matter of law that [*specify relevant quantity*] is a marketable quantity of [*identify relevant border controlled drug*]. If you are satisfied that NOA imported [*identify relevant quantity and border controlled drug alleged*], then you may find this fifth element proved. If you are satisfied that the prosecution has proved the first four elements, then you may find NOA guilty of this alternative offence of importing a marketable quantity of a border controlled drug.

[*Discuss relevant evidence or arguments.*]

Importing border controlled drugs

[*If importing a border controlled drug is available as an alternative verdict, add the following shaded section.*]

I must also direct you about the crime of importing a border controlled drug. This is an alternative to the offence of importing a [commercial/marketable] quantity of a border controlled drug. This means you only need to deliver a verdict to this offence if you are not satisfied that the prosecution has proved the offence of importing a [commercial/marketable] quantity of a border controlled drug, beyond reasonable doubt. If you are satisfied NOA is guilty of importing a [commercial/marketable] quantity of a border controlled drug, then you do not need to deliver a verdict on this alternative.

The offence of importing a border controlled drug is very similar to the offence of importing a [commercial/marketable] quantity of a border controlled drug. There is, however, one important difference: the prosecution does not need to prove that NOA imported a particular quantity of a border controlled drug.

So the four elements of importing border controlled drugs are:

One – the accused imported a substance.

Two – the accused intended to import the substance.

Three – the substance imported was a border controlled drug.

Four – the accused was reckless as to the substance being a border controlled drug.

You will remember my earlier directions about these four elements.

[*Discuss relevant evidence or arguments.*]

Defences

[*Insert directions on any relevant 'general' defences under the Criminal Code.*]

[*The following defences specific to Part 9.1 may also be relevant.*]

Lack of commercial intent

[*If the accused has been charged with importing a* marketable quantity *of border controlled drugs, and the evidence raises the issue of whether the defendant lacked a commercial intent, add the following shaded section.*]

NOA has argued s/he neither intended to sell, nor believed that another person intended to sell any of the [*identify relevant border control drug*] or its products.

It is for the accused to prove that s/he did not intend to sell or believed that another person intended to sell any of the [*identify relevant border controlled drug*] or its products.

This is one of the rare situations where the accused must prove an issue. Where the accused must prove a matter, a different standard applies compared to when the prosecution must prove a matter. That is, NOA does not need to prove matters "beyond reasonable doubt". Instead, the accused only needs to establish matters on what is called the "balance of probabilities". That is, such matters only need to be shown to be more likely than not. If you imagine a set a scales, with the evidence for the prosecution on one side and the evidence for the accused on the other, then the accused will prove this matter if the scales tip slightly in his/her favour. This is what the "balance of probabilities" means and you will understand that it is a much lower standard than "beyond reasonable doubt".

So, if you are satisfied, on the balance of probabilities, that the accused did not intend to sell or believe that another person intended to sell any of the [*insert name of border controlled drug*] or its products, then you must find NOA not guilty of importing a marketable quantity a border control drug.

[*Discuss relevant evidence or arguments.*]

However, you may still find the accused guilty of the offence of importing a border controlled drug without commercial intent. This is an alternative to the offence of importing a marketable quantity of a border controlled drug. This means you only need to deliver a verdict on this offence if you are satisfied, on the balance of probabilities, that the defendant neither intended nor believed that another person intended to sell any of the border controlled drug or its products. If you are not satisfied of this, then you do not need to deliver a verdict on this alternative.

The offence of importing a border controlled drug without commercial intent is very similar to the offence of importing a marketable quantity of a border controlled drug. There are, however, two important differences: there is no quantity requirement and it is not open to the accused to argue they did not intend to sell or believe another person intended to sell the border controlled drug or its products.

So, the four elements of importing border controlled drugs without commercial intent are:

One – the accused imported a substance.

Two – the accused intended to import the substance.

Three – the substance imported was a border controlled drug.

Four – the accused was reckless as to the substance being a border controlled drug.

You will remember my earlier directions about these four elements. If you are satisfied that the prosecution has proved these four elements, then you may find NOA guilty of this offence.

[*Discuss relevant evidence or arguments.*]

Reasonable belief that conduct was excused by or under state law

[*If the evidence raises the issue of whether the accused had a reasonable belief that the conduct was justified or excused by or under a law, add the following shaded section.*]

The defence has argued that NOA was under a mistaken but reasonable belief that his/her conduct was [justified/excused] under a law of [the Commonwealth/a State/a Territory].

[*Insert evidence and argument relied on by the accused.*]

Before you may find NOA guilty of [this offence/these offences], the prosecution must prove, beyond reasonable doubt, the accused did not have such a mistaken belief. You must find the defendant not guilty if the prosecution has fails prove this beyond reasonable doubt.

[*Discuss relevant evidence or arguments.*]

Summary

To summarise before you can find NOA guilty of importing a [commercial/marketable] quantity of a border controlled drug, the prosecution must prove to you beyond reasonable doubt:

One – the accused imported a substance.

Two – the accused intended to import the substance.

Three – the substance imported was a border controlled drug.

Four – the accused was reckless as to the substance imported being a border controlled drug.

Five – the accused imported a [commercial/marketable] quantity of the controlled drug.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of importing a [commercial/marketable] quantity of a border controlled drug.

Last updated: 14 May 2021

9.1.2.2 Checklist: Importing Marketable or Commercial Quantities of Border Controlled Drugs

Click here to obtain a Word version of this document for adaptation

This checklist can be used where it is alleged the accused imported a commercial or marketable quantity of a border controlled drug.

Before you can convict the accused of importing a [commercial/marketable] quantity of a border controlled drug, there are five elements that the prosecution must prove beyond reasonable doubt:

1. The accused imported a substance; and

2. The accused intended to import the substance; and

3. The substance imported was a border controlled drug; and

4. The accused was reckless as to the substance imported being a border controlled drug; and

5. The accused imported a [commercial/marketable] quantity of a border controlled drug.

Imported a substance

1. Has the prosecution proved that the accused imported a substance?

Consider: Did the accused either:

a) Bring the substance into Australia; or

b) Deal with the substance in connection with its importation?

If Yes, then go to 2

If No, then the accused is not guilty of importing a [commercial/marketable] quantity of a border controlled drug

Intention to import

2. Has the prosecution proved that the accused intended to import the substance?

If Yes, then go to 3

If No, then the accused is not guilty of importing a [commercial/marketable] quantity of a border controlled drug

Border controlled drug

3. Has the prosecution proved that the substance imported was a border controlled drug?

Consider: [*Insert relevant border controlled drug*] *is a border controlled drug.*

If Yes, then go to 4

If No, then the accused is not guilty of importing a [commercial/marketable] quantity of a border controlled drug

Recklessness about nature of substance

4.1. Has the prosecution proved that the accused knew that the substance was a border controlled drug?

If Yes, then go on to 5

If No, then go to 4.2

4.2. Has the prosecution proved that the accused believed that the substance was a border controlled drug?

If Yes, then go on to 5

If No, then go to 4.3

4.3. Has the prosecution proved that the accused was aware that there was a substantial risk that the substance was a border controlled drug and knew that in the circumstances it was not justifiable to do what s/he did?

If Yes, then go on to 5

If No, then the accused is not guilty of importing a [commercial/marketable] quantity of a border controlled drug

[Commercial/marketable] quantity

5. Has the prosecution proved that the quantity of the controlled drug imported was [commercial/marketable]?

Consider: [*Insert relevant quantity*] *is a* [*commercial/marketable*] *quantity of* [*insert name of border controlled drug*].

If Yes, then the accused is guilty of importing a [commercial/marketable] quantity of a border controlled drug (as long as you also answered Yes to Questions 1, 2, 3 and either 4.1, 4.2 or 4.3)

If No, then the accused is not guilty of importing a [commercial/marketable] quantity of a border controlled drug

Last updated: 23 March 2015

9.1.2.3 Charge: Importing/Exporting Border Controlled Drugs and Border Controlled Plants

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This charge may be used when the accused is charged with the following:

i) Importing or exporting border controlled drugs or border controlled plants under s 307.3

ii) Importing or exporting border controlled drugs or border controlled plants – with no defence of lack of commercial intent under s 307.4

This charge is designed for use where the accused is charged with importing a border controlled substance. It must be adapted if the accused is charged with exporting a border controlled substance.

This charge is designed for use where the border controlled substance is a border controlled drug. It must be adapted if the accused is charged with importing or exporting a border controlled plant.

The Elements

I must now direct you about the offence of importing a border controlled drug.

To prove this crime, the prosecution must prove the following four elements beyond reasonable doubt:

One – the accused imported a substance.

Two – the accused intended to import the substance.

Three – the substance imported was a border controlled drug.

Four – the accused was reckless as to the substance imported being a border controlled drug.

I will now explain each of these elements in more detail.

Import

The first element the prosecution must prove is that the accused imported a substance.

An accused imports a substance if they have:

i) Brought the substance into Australia; or

ii) Dealt with the substance in connection with its importation.

[*If the accused is alleged to have brought the substance into Australia, add the following shaded section.*]

The prosecution says that the accused brought the substance into Australia. In assessing whether this in fact occurred, you must only look at whether the accused has caused the substance to arrive in Australia to a point where it will remain in the country.

[*If relevant on the facts, add the following darker shaded section.*]

This element is not proved where the accused only used or distributed the substance after it arrived in Australia.

[*If the accused is alleged to have dealt with the substance in connection with its importation, add the following shaded section.*]

The prosecution says that the accused dealt with the substance in connection with its importation. To prove this element, the prosecution must establish the following two matters.

First, that the accused dealt with the substance.

There is no legal definition for what it means to deal with a substance. You must approach this matter as a question of common sense, given your understanding of what it means to deal with a substance.

A person can only deal with a substance if the person has custody or control over the substance, or control over disposal of the substance. The person must also intend to exercise that custody or control

over the substance, or the disposal of the substance.

[*If there has been a full police substitution, add the following darker shaded section.*]

The prosecution must prove that the accused dealt with the substance s/he is alleged to have imported. In this case, there is evidence that the police intercepted the [*identify relevant substance*] on [*identify relevant date*] and replaced it with a harmless substitute.

You cannot convict the accused on the basis of his/her conduct after [*identify date of substitution*]. This is because any such conduct will only have been a dealing with the substituted substance, and not with a prohibited import.[1240]

A person may deal with a substance before, during, or after the substance is imported.

However, if you are considering conduct before the substance was imported, you must also be satisfied that the substance existed at that time. It is not enough if the substance was still to be manufactured or acquired at the time of the accused's actions.

The second matter the prosecution must prove is that the dealings were in connection with the importation of the substance. Importation is an ongoing process, including but not limited to packaging the substance for importation, the transport of the substance to Australia and the transfer of imported goods into storage. However, you must be satisfied, as a matter of common sense, that the conduct is 'in connection with' and not too far removed from the importation.

[*Discuss relevant evidence or arguments.*]

Intention

The second element the prosecution must prove is that the accused intended to import the substance.

This means that the accused meant to import the substance.

Intention is a state of mind. To determine the accused's state of mind, the prosecution invites you to draw an inference as to the accused's state of mind from certain facts. You will remember what I told you earlier about drawing inferences.

[*If the case concerns a substance contained within another object (a container), add the following shaded section. This direction should be adapted and included if the substance consists of or includes the substituted contents of a container.*]

As you have heard, the prosecution seeks to prove that NOA imported [*identify substance*] within [*identify container*]. To prove this element, the prosecution must prove that the accused meant to import the [*identify substance*]. An intent to import [*identify container*] is not sufficient.

There are two matters which might help you reach a conclusion that NOA meant to import [*identify substance*]. First, did NOA know that [*identify substance*] was in [*identify container*]? Second, did NOA know or believe that there was a real or significant chance that [*identify substance*] was in [*identify container*]?

[1240] If attempted importation is left as an alternative, add the following: Such conduct may, however, be considered as part of the charge of attempting to import a (commercial/marketable quantity of a) border controlled drug. For that charge, you might find that the accused attempted to deal with the [*identify relevant substance*], but failed because it had already been substituted by police.

If you answer 'yes' to either of these questions, that may help you draw the conclusion that NOA meant to import [*identify substance*]. Remember, you must not look at pieces of evidence in isolation. Instead, you must decide, based on the evidence you accept, whether the prosecution has proved that NOA meant to import [*identify substance*].

[*Set out the facts and discuss relevant evidence or arguments.*]

Border controlled drug/border controlled plant

The third element the prosecution must prove is that the substance imported was a border controlled drug.

You have heard evidence from [*identify relevant witness*] that the imported substance was [*identify relevant border controlled drug*]. I direct you as a matter of law that [*identify relevant border controlled drug*] is a border controlled drug.

The defence has argued that [*identify relevant defence evidence and arguments regarding whether the substance is a border controlled drug*].

If you are not satisfied that the substance was [*identify relevant border controlled drug*], then you must find the accused not guilty.

[*If the substance is imported in a mixture, add the following shaded section.*]

You will remember the evidence that the substance was a mixture of [*identify relevant border controlled drug*] and [*identify other substance*]. Provided you are satisfied that the substance contained [*identify relevant border controlled drug*], then you may find this element proved.

Recklessness

Warning! As noted in 9.1.2 Importing/Exporting Border Controlled Drugs and Plants, there is very little guidance on the operation of this element. Judges are encouraged to discuss this part of the direction with counsel and seek submissions.

The fourth element that the prosecution must prove is that the accused was reckless as to the substance imported being a border controlled drug.[1241]

I have already directed you that, as a matter of law, [*insert relevant substance*] is a controlled drug.

This element looks at what NOA knew or believed about the substance s/he is alleged to have imported. The prosecution will prove this element if you are satisfied that NOA knew or believed that the substance imported was [*insert relevant substance*].

This element will also be established if the prosecution has proved that NOA was aware of a substantial risk that the substance imported was [*insert relevant substance*] and that in the circumstances as s/he knew them to be, it was unjustifiable to risk importing the substance. Whether taking such a risk is unjustifiable is a question of fact for you to determine.

[*If it would be open to the jury to find that the accused knew, believed or was aware of a substantial risk that the substance was a different controlled drug, add the following shaded section.*]

[1241] If the prosecution cannot or does not particularise the border controlled drug in question, references to "[*insert relevant substance*]" (apart from in the second paragraph of this part of the charge) should be replaced with "a border controlled drug". See *Nelson v DPP (Cth)* (2014) 44 VR 461; [2014] VSCA 217 and *Weng v R* [2013] VSCA 221.

A third way the prosecution can prove this element is to show that NOA knew, believed or was aware of a substantial risk that the substance was a different controlled drug, such as [*insert any relevant examples*]. This element is made out if you are satisfied NOA was reckless as to whether the substance was a controlled drug of any kind.[1242]

[*Discuss relevant evidence or arguments.*]

Defences

[*Insert directions on any relevant 'general' defences under the Criminal Code.*]

[*The following defences specific to Part 9.1 may also be relevant.*]

Lack of commercial intent

[*If the accused has been charged with importing border controlled drugs, and the defendant has argued a lack of commercial intent, add the following shaded section.*]

NOA has argued s/he neither intended to sell, nor believed that another person intended to sell any of the [*identify relevant border control drug*] or its products.

It is for the accused to prove that s/he did not intend to sell or believed that another person intended to sell any of the [*identify relevant border controlled drug*] or its products.

This is one of the rare situations where the accused must prove an issue. Where the accused must prove a matter, a different standard applies compared to when the prosecution must prove a matter. That is, NOA does not need to prove matters "beyond reasonable doubt". Instead, the accused only needs to establish matters on what is called the "balance of probabilities". That is, such matters only need to be shown to be more likely than not. If you imagine a set a scales, with the evidence for the prosecution on one side and the evidence for the accused on the other, then the accused will prove this matter if the scales tip slightly in his/her favour. This is what the "balance of probabilities" means and you will understand that it is a much lower standard than "beyond reasonable doubt".

So, if you are satisfied, on the balance of probabilities, that the accused did not intend to sell or believe that another person intended to sell any of the [*insert name of border controlled drug*] or its products, then you must find NOA not guilty of importing a border control drug.

[*Discuss relevant evidence or arguments.*]

However, you may still find the defendant guilty of the offence of importing a border controlled drug without commercial intent. This is an alternative to the offence of importing a border controlled drug. This means you only need to deliver a verdict on this offence if you are satisfied, on the balance of probabilities, that the defendant neither intended nor believed that another person intended to sell any of the border controlled drug or its products. If you are not satisfied of this, then you do not need to deliver a verdict on this alternative.

The offence of importing a border controlled drug without commercial intent is very similar to the offence of importing a border controlled drug. The only difference is that it is not open to the accused to argue they did not intend to sell or believe another person intended to sell the border controlled drug or its products.

[1242] Judges should consider whether they need to explain the difference between a "substantial risk" and a "significant chance" to the jury. If such an explanation is considered necessary, judges should discuss their proposed formulation with counsel.

So, the four elements of importing border controlled drugs without commercial intent are:

One – the accused imported a substance.

Two – the accused intended to import the substance.

Three – the substance imported was a border controlled drug.

Four – the accused was reckless as to the substance imported being a border controlled drug.

You will remember my earlier directions about these four elements. If you are satisfied that the prosecution has proved these four elements, then you may find NOA guilty of this offence.

[*Discuss relevant evidence or arguments.*]

Reasonable belief that conduct was excused by or under state law

[*If the evidence raises the issue of whether the accused had a reasonable belief that the conduct was justified or excused by or under a law, add the following shaded section.*]

The defence has argued that NOA was under a mistaken but reasonable belief that his/her conduct was [justified/excused] under a law of [the Commonwealth/a State/a Territory].

[*Insert evidence and argument relied on by the accused.*]

Before you may find NOA guilty of [this offence/these offences], the prosecution must prove, beyond reasonable doubt, the accused did not have such a mistaken belief. You must find the defendant not guilty if the prosecution fail to prove this beyond reasonable doubt.

[*Discuss relevant evidence or arguments.*]

Summary

To summarise before you can find NOA guilty of [*importing a border controlled drug/importing a border controlled drug with no defence of lack of commercial intent*], the prosecution must prove to you beyond reasonable doubt:

One – the accused imported a substance.

Two – the accused intended to import the substance.

Three – the substance imported was a border controlled drug.

Four – the accused was reckless as to the substance imported being a border controlled drug.

If you find that any of these elements have not been proven beyond reasonable doubt, then you must find NOA not guilty of [importing a border controlled drug/importing a border controlled drug with no defence of lack of commercial intent].

Last updated: 14 May 2021

9.1.2.4 Checklist: Importing Border Controlled Drugs

Click here to obtain a Word version of this document for adaptation

This checklist can be used where it is alleged the accused imported a border controlled drug.

Before you can convict the accused of importing a border controlled drug, there are four elements that the prosecution must prove beyond reasonable doubt:

1. The accused imported a substance; and

2. The accused intended to import the substance; and

3. The substance imported was a border controlled drug; and

4. The accused was reckless as to the substance imported being a border controlled drug.

Imported a substance

1. Has the prosecution proved that the accused imported a substance?

Consider: Did the accused either:

a) Bring the substance into Australia; or

b) Deal with the substance in connection with its importation?

If Yes, then go to 2

If No, then the accused is not guilty of importing a border controlled drug

Intention to import

2. Has the prosecution proved that the accused intended to import the substance?

If Yes, then go to 3

If No, then the accused is not guilty of importing a border controlled drug

Border controlled drug

3. Has the prosecution proved that the substance imported was a border controlled drug?

Consider: [*Insert relevant border controlled drug*] *is a border controlled drug.*

If Yes, then go to 4

If No, then the accused is not guilty of importing a border controlled drug

Recklessness about nature of substance

4.1. Has the prosecution proved that the accused knew that the substance was [*insert relevant border controlled drug*]?

If Yes, then the accused is guilty of importing a border controlled drug (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then go to 4.2

4.2. Has the prosecution proved that the accused believed that the substance was [*insert relevant border controlled drug*]?

If Yes, then the accused is guilty of importing a border controlled drug (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then go to 4.3

4.3. Has the prosecution proved that the accused was aware that there was a substantial risk that the substance was [*insert relevant border controlled drug*] and knew that in the circumstances it was not justifiable to do what s/he did?

If Yes, then the accused is guilty of importing a border controlled drug (as long as you also answered Yes to Questions 1, 2 and 3)

If No, then the accused is not guilty of importing a border controlled drug

Last updated: 23 March 2015

9.2 People Smuggling (Basic Offence)

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Overview

1. The *Migration Act 1958* (Cth)[1243] contains the following four people smuggling offences, which commenced operation on 1 June 2010:
    - People smuggling (s 233A);
    - Aggravated people smuggling (exploitation or danger) (s 233B);
    - Aggravated people smuggling (5 or more people) (s 233C);
    - Supporting people smuggling (s 233D).
2. This topic examines the basic people smuggling offence.

Elements

3. The offence of people smuggling has the following 5 elements:
    i) The accused organised or facilitated the bringing or coming to Australia of a second person, or the entry or proposed entry of a second person into Australia;

    ii) The accused did so intentionally;

    iii) The second person was a non-citizen;

    iv) The second person had no lawful right to come to Australia;

    v) The accused was reckless about the second person's lack of a lawful right of entry (*Migration Act 1958* s 233A).
4. Section 233A creates one offence which may be committed in a number of different ways. It does not create a number of separate offences (*R v Ahmad* (2012) 31 NTLR 38).

[1243] Unless otherwise stated, all references to legislation are to Commonwealth legislation.

Organising or facilitating entry to Australia

5. The first element the prosecution must prove is that the accused organised or facilitated:
    - The bringing or coming to Australia of a second person; or
    - The entry or proposed entry of a second person into Australia (*Migration Act 1958* s 233A).
6. "Australia" is defined to include the coastal sea of Australia, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but not any other external Territory (*Acts Interpretation Act 1901* s 2B, 15B).
7. This is a physical element which consists of "conduct" (*PJ v R* (2012) 36 VR 402; *Criminal Code Act 1995* s 4.1(a)).[1244]
8. The words "organise" and "facilitate" carry their ordinary meanings:
    - "Organise" means "arrange personally; take responsibility for providing (something)" (*PJ v R* (2012) 36 VR 402. See also *R v Bahar* (2011) 45 WAR 100).
    - "Facilitate" means "make easy or easier; promote; help forward (an action result etc)" (*PJ v R* (2012) 36 VR 402. See also *R v Mahendra* [2011] NTSC 57; *R v Bahar* (2011) 45 WAR 100).
9. The words "organise" and "facilitate" are active verbs, describing conduct directed at producing a result or outcome. They require the accused's conduct to have been directed at the purpose of bringing about the arrival of the relevant passengers at, or their entry into, Australia (*PJ v R* (2012) 36 VR 402).
10. This element is not met simply because the accused provided food, accommodation, medical or other humanitarian assistance to refugees or asylum seekers, if that conduct was not connected with organising or facilitating entry to Australia (*Ahmadi v R* [2011] WASCA 237).
11. The expression "coming to Australia" refers to the journey to Australia, rather than the actual entry into Australia (*R v Ahmad* (2012) 31 NTLR 38).
12. This element is completed once the relevant act of organisation or facilitation has occurred. The journey to Australia does not need to have been undertaken, and the second person does not need to have arrived at or entered Australian territory (*R v Ahmad* (2012) 31 NTLR 38; *R v Mahendra* [2011] NTSC 57).[1245]

Intentionally organising or facilitating entry

13. The second element the prosecution must prove is that the accused intentionally organised or facilitated the bringing or coming to Australia of a second person, or their entry or proposed entry into Australia (*PJ v R* (2012) 36 VR 402; *Bahar v R* (2011) 45 WAR 100; *Criminal Code Act 1995* s 5.6(1)).
14. A person "intends" to engage in conduct if he or she means to engage in that conduct (*Criminal Code Act 1995* s 5.2(1)).
15. For this element to be met, the accused must have been aware of the purpose and destination of the voyage (*Bahar v R* (2011) 45 WAR 100).

[1244] Consequently, the appropriate fault element is intention: *Criminal Code Act 1995* s 5.6(1). See the discussion of the second element below for further information.

[1245] While successful entry into Australia is not an element of the crime, it may be relevant to sentencing: *R v Ahmad* (2012) 31 NTLR 38.

16. This requires the prosecution to prove that the accused intended to organise or facilitate entry to *a place known to the accused as Australia*. It is not enough to show that he or she intended to organise or facilitate entry to a place that the law defines to be Australia (*PJ v R* (2012) 36 VR 402; *Bahar v R* (2011) 45 WAR 100).

17. The relevant point in time to examine the accused's intention is the moment when he or she engaged in the relevant conduct (*Bahar v R* (2011) 45 WAR 100).

18. Thus, if it is alleged that the accused facilitated entry to Australia by conduct performed during the voyage to Australia, the prosecution must prove that he or she intended to facilitate entry when he or she committed the relevant conduct. They do not need to prove that the accused intended to facilitate entry at the time he or she boarded the vessel (*Bahar v R* (2011) 45 WAR 100).

The second person is a non-citizen

19. The third element the prosecution must prove is that the second person is a non-citizen (*Migration Act 1958* s 233A).

20. A non-citizen is defined as a person who is not an Australian citizen (*Migration Act 1958* s 5).

21. This is an element of absolute liability (*Migration Act 1958* s 233A(2)). Consequently:

    - The prosecution does not need to prove that the accused was aware that the second person was a non-citizen; and
    - The defence of mistake of fact is not available (*Criminal Code Act 1995* s 6.2; *PJ v R* (2012) 36 VR 402).

No lawful right of entry

22. The fourth element the prosecution must prove is that the second person had no lawful right to come to Australia (*Migration Act 1958* s 233A).

23. This is a physical element which consists of a "circumstance in which conduct … occurs" (*PJ v R* (2012) 36 VR 402; *Criminal Code Act 1995* s 4.1(c)).[1246]

24. A non-citizen has no lawful right to come to Australia if he or she:

    - Does not hold a visa permitting entry;
    - Is not covered by a relevant exemption; and
    - Is not permitted by regulations to travel to Australia without a visa permitting entry (*Migration Act 1958* s 228B(1)).[1247]

[1246] Consequently, the appropriate fault element is recklessness: *Criminal Code Act 1995* s 5.6(2). See the discussion of the fifth element below for further information.

[1247] This section was amended by the *Anti–People Smuggling and Other Measures Act 2010*, which commenced operation on 1 June 2010.

25. A person who fails to meet these entry requirements has no lawful right to come to Australia, even if he or she is seeking protection or asylum. This is the case regardless of any protection obligations Australia owes non-citizens under the Refugees Convention or for any other reason (*Migration Act 1958* s 228B(2); *R v Baco* (2011) 29 NTLR 221; *SZ v Minister for Immigration and Cultural Affairs* (2000) 101 FCR 342).[1248]

Recklessness about the lack of lawful right of entry

26. The fifth element the prosecution must prove is that the accused was reckless about the second person's lack of lawful right to come to Australia (*Criminal Code Act 1995* s 5.6; *PJ v R* (2012) 36 VR 402).

27. This requires the prosecution to prove that the accused:

    - Was aware of a substantial risk that the second person had no lawful right to enter Australia; and
    - Having regard to the circumstances known to the accused, it was unjustifiable to take that risk (*Criminal Code Act 1995* s 5.4; *PJ v R* (2012) 36 VR 402).

28. Proof of intention or knowledge is also sufficient to prove this element (*Criminal Code Act 1995* s 5.4(4)).

29. A person will have intention in relation to this element if he or she believes that the second person has no lawful right to come to Australia (*Criminal Code Act 1995* s 5.2).

30. A person will have knowledge in relation to this element if he or she is aware that the second person has no lawful right to come to Australia (*Criminal Code Act 1995* s 5.3)

31. It is not sufficient to show that the accused was reckless about the second person's right to enter their ultimate destination (which happened to be Australia). The element requires proof that the accused turned his or her mind to the risk that the second person had no lawful right to enter *a place known to the accused as Australia*, and decided (unjustifiably) to take the risk (*PJ v R* (2012) 36 VR 402).

32. It is for the jury to determine whether or not it was unjustifiable to take the risk (*Criminal Code Act 1995* s 5.4(3)). This requires them to make a moral or value judgment concerning the accused's advertent disregard of the risk (*R v Saengsai-Or* (2004) 61 NSWLR 135).

33. The jury must assess the likelihood of the risk eventuating, and determine whether the risk is one which should have been taken (*Lustig v R* [2009] NSWCCA 143).

34. The unjustifiability of the risk must be assessed on the facts as the accused perceived them (*Criminal Code Act 1995* s 5.4(1)(b)). However, the accused does not need to have believed that it was unjustifiable to take the risk. The test is objective not subjective.

Defences

35. Section 4A of the *Migration Act 1958* states that Chapter 2 of the *Criminal Code Act 1995* applies to all offences against that Act.[1249] Consequently, any of the defences set out in Part 2.3 of the *Criminal Code Act 1958* may be relevant to a charge of people smuggling.

[1248] This section was added by the *Deterring People Smuggling Act 2011*. It has retrospective operation, and is taken to have commenced operation on 16 December 1999.

[1249] This section commenced operation on 19 September 2001.

36. One commonly raised defence is sudden or extraordinary emergency (see, e.g. *Warnakulasuriya v R* [2012] WASCA 10; *Tran v The Commonwealth* (2010) 187 FCR 54). See Sudden or Extraordinary Emergency (Topic Not Yet Complete) for information concerning the scope of this defence.

Extra-Territoriality

37. Section 233A operates extra-territorially. The offence may be complete before the other person arrives at or enters Australian territory (*Migration Act 1958* s 228A; *R v Ahmad* (2012) 31 NTLR 38; *R v Mahendra* [2011] NTSC 57).

Last updated: 18 September 2013

9.2.1 Charge: People Smuggling (Basic Offence)

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This charge is designed for use where the accused is charged with the basic offence of people smuggling (*Migration Act 1958* s 233A).

If the accused is charged with the aggravated offence under *Migration Act 1958 s 233C*, use 9.3.1 Charge: Aggravated People Smuggling (5 or more people) instead.

This charge is designed for use in cases where it is alleged that the accused facilitated a person's entry into Australia. If a different form of smuggling is in issue, the Charge will need to be modified accordingly.

This charge is designed for use in cases where there is no issue regarding whether the person smuggled is a non-citizen who had no lawful right to come to Australia. Where those elements are in dispute, the Charge will need to be modified accordingly.

I must now direct you about the crime of people smuggling. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused facilitated a person's entry into Australia;

Two – the accused intended to facilitate that person's entry into Australia;

Three – the person was a non-citizen;

Four – the person had no lawful right to come into Australia; and

Five – the accused was reckless about the person's lack of a lawful right to come into Australia.

I will now explain each of these elements in more detail.

Facilitating entry

The first element that the prosecution must prove is the accused facilitated a person's entry into Australia.[1250]

In this case, it is alleged that NOA facilitated NOP's entry into Australia by [*describe alleged acts of facilitation*].

[*Discuss relevant evidence and/or arguments*.]

[1250] If a different form of smuggling is in issue, this element will need to be modified accordingly. See 9.2 People Smuggling (Basic Offence) for information concerning the other ways in which this element may be satisfied.

Intention

The second element that the prosecution must prove is that when NOA [*identify conduct*], s/he intended to facilitate NOP's entry into Australia.[1251]

For this element to be met, you must be satisfied that NOA knew that it was Australia that NOP was entering, and meant to help him/her to enter.

[*Where the prosecution seeks to rely on* Kural *reasoning, add the following shaded section.*]

One matter which might help you decide whether NOA intended to facilitate the group's entry into Australia is whether NOA was aware that there was a significant chance that s/he was helping the group enter Australia.

If you accept that NOA was aware that there was a significant chance that s/he was helping the group enter Australia, that may help you draw the conclusion that NOA intended to facilitate the group's entry into Australia. Remember, you must not look at pieces of evidence in isolation. Instead, you must decide, based on the evidence you accept, whether the prosecution has proved that NOA knew it was Australia that the group was entering and meant to help him/her to enter.

[*Discuss relevant evidence and/or arguments.*]

Non-citizen

The third element the prosecution must prove is that NOP was not a citizen of Australia when NOA facilitated his/her entry.

In this case, there is no dispute that NOP was a non-citizen.

No lawful right to come to Australia

The fourth element that the prosecution must prove is that NOP had no lawful right to come into Australia. As a matter of law, NOP did not have a lawful right to come into Australia.

[*Judges may add the following section to address possible misconceptions about this element*.]

A person only has a lawful right to come to Australia if he or she holds a visa permitting entry, is covered by a relevant exemption, or is permitted by regulations to travel to Australia without a visa permitting entry.

This element is not in dispute.

Recklessness about lack of lawful right

The fifth element the prosecution must prove is that NOA was reckless about NOP's lack of a lawful right to come into Australia.

[1251] If a different form of smuggling is in issue, this element will need to be modified accordingly.

This element looks at what NOA knew or believed about the immigration status of NOP. The prosecution will prove this element if NOA knew or believed that NOP did not have a lawful right to enter Australia. This element will also be proved if NOA was aware that there was a substantial risk that NOP did not have a lawful right to come into Australia and that in the circumstances as known to him/her, it was not justifiable to do what s/he did. In this case, it is difficult to think of circumstances in which it would be justifiable to ignore a substantial risk that the person had no lawful right to come into Australia.[1252] The focus of this element is therefore whether NOA was aware that there was a substantial risk that NOP did not have a lawful right to come into Australia.

[*Judges may add the following section to address possible misconceptions about this element.*]

It is not justifiable to take a risk that NOP had no lawful right to come to this country because NOA wanted to help NOP seek asylum, or because of any sympathy you might have for asylum seekers. Such matters are irrelevant to this element and you must put them out of your mind. You must instead look at the circumstances known to the accused and determine whether it was justifiable to take the risk that NOP had no lawful right to enter Australia.

[*If relevant, add the following shaded section.*]

It is not enough for the prosecution to prove that NOA was aware of a substantial risk that NOP did not have a lawful right to come into [*describe relevant destination, e.g. Christmas Island*]. S/he must have been aware of a significant risk that NOP had no lawful right to come into Australia.

[*Discuss relevant evidence and/or arguments.*]

Defences

[*Insert directions on any relevant defences, such as Sudden or Extraordinary Emergency, here.*]

Summary

To summarise, before you can find NOA guilty of people smuggling the prosecution must prove to you beyond reasonable doubt:

One – that NOA facilitated NOP's entry into Australia; and

Two – that NOA intended to facilitate NOP's entry; and

Three – that NOP was a non-citizen; and

Four – that NOP had no lawful right to come into Australia; and

Five – that NOA was reckless about NOP's lack of a lawful right to come into Australia.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of people smuggling.

Last updated: 1 July 2017

9.2.2 Checklist: People Smuggling (Basic Offence)

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Before you can convict the accused of people smuggling, there are five elements that the prosecution must prove beyond reasonable doubt:

[1252] If justification is open on the evidence, then this passage will need to be modified.

1. The accused facilitated a person's entry into Australia; and

2. The accused intended to facilitate that person's entry into Australia; and

3. The person was a non-citizen; and

4. The person had no lawful right to come into Australia; and

5. The accused was reckless about the person's lack of a lawful right to come into Australia.

Facilitated a person's entry

1. Has the prosecution proved that the accused facilitated a person's entry into Australia?

Consider – What did the accused do to help the person enter Australia?

If Yes then go to 2

If No, then the accused is not guilty of People Smuggling

Intention

2. Has the prosecution proved that NOA intended to facilitate a person's entry into Australia?

If Yes then go to 3

If No, then the accused is not guilty of People Smuggling

Non-Citizen

3. Has the prosecution proved that the person was not a citizen of Australia when the accused facilitated his or her entry?

If Yes then go to 4

If No, then the accused is not guilty of People Smuggling

No lawful right to come to Australia

4. Has the prosecution proved that the person did not have a lawful right to come into Australia?

If Yes then go to 5

If No, then the accused is not guilty of People Smuggling

Recklessness about lack of lawful right

5.1. Has the prosecution proved that the accused knew that the person did not have a lawful right to enter Australia?

If Yes then the accused is guilty of People Smuggling (as long as you also answered Yes to Questions 1, 2, 3 and 4)

If No, then go to 5.2

5.2 Has the prosecution proved that the accused believed that the person did not have a lawful right to enter Australia?

If Yes then the accused is guilty of People Smuggling (as long as you also answered Yes to Questions 1, 2, 3 and 4)

If No, then go to 5.3

5.3. Has the prosecution proved that the accused was aware that there was a substantial risk that the person did not have a lawful right to come into Australia and knew that in the circumstances it was not justifiable to do what s/he did?

If Yes then the accused is guilty of People Smuggling (as long as you also answered Yes to Questions 1, 2, 3 and 4)

If No, then the accused is not guilty of People Smuggling

Last updated: 18 September 2013

9.3 People Smuggling (5 or More People)

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Overview

1. The *Migration Act 1958* (Cth) contains the following four people smuggling offences, which commenced operation on 1 June 2010:
    - People smuggling (s 233A);
    - Aggravated people smuggling (exploitation or danger) (s 233B);
    - Aggravated people smuggling (5 or more people) (s 233C);
    - Supporting people smuggling (s 233D).
2. This topic examines the offence of aggravated people smuggling (5 or more people).

Availability of offence

3. Following a direction by the Attorney-General under section 8(1) of the *Director of Public Prosecutions 1983* (Cth), the Commonwealth Director of Public Prosecutions must not commence proceedings for this offence unless:
    - the accused commits a repeat offence or may be convicted of a repeat offence in the same proceeding;
    - the accused's role extended beyond that of a crew member;
    - a death occurred in relation to the people smuggling venture (*Director of Public Prosecutions – Attorney-General's Direction 2012*).

Elements

4. The offence of aggravated people smuggling (5 or more people) has the following 5 elements:

    i) The accused organised or facilitated the bringing or coming to Australia of a group of at least 5 people, or the entry or proposed entry of a group of at least 5 people into Australia;

    ii) The accused did so intentionally;

    iii) At least 5 people in the group were non-citizens;

iv) The non-citizens had no lawful right to come to Australia;

v) The accused was reckless as to the non-citizens' lack of a lawful right of entry (*Migration Act 1958* s 233C).

5. These elements only differ from the elements of the basic people smuggling offence (s 233A) in one way: they involve a group of five or more people rather than a single person.
6. See 9.2 People Smuggling (Basic Offence) for further information concerning the elements of this offence.

Last updated: 18 September 2013

9.3.1 Charge: Aggravated People Smuggling (5 or More People)

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This charge is designed for use where the accused is charged with aggravated people smuggling (5 or more people) (*Migration Act 1958* s 233C).

If the accused is charged with the basic people smuggling offence under *Migration Act 1958* s 233A, use 9.2.1 Charge: People Smuggling (Basic Offence) instead.

This charge is designed for use in cases where it is alleged that the accused facilitated entry into Australia. If a different form of smuggling is in issue, the Charge will need to be modified accordingly.

This charge is designed for use in cases where there is no issue regarding whether the people smuggled are non-citizens who had no lawful right to come to Australia. Where those elements are in dispute, the Charge will need to be modified accordingly.

I must now direct you about the crime of aggravated people smuggling. To prove this crime, the prosecution must prove the following 5 elements beyond reasonable doubt:

One – the accused facilitated the entry of a group of 5 or more people into Australia;

Two – the accused intended to facilitate the group's entry into Australia;

Three – at least 5 of the people in the group were non-citizens;

Four – at least 5 of the non-citizens had no lawful right to come into Australia; and

Five – the accused was reckless about those non-citizens' lack of a lawful right to come into Australia.

I will now explain each of these elements in more detail.

Facilitating entry

The first element that the prosecution must prove is the accused facilitated the entry of a group of 5 or more people into Australia.[1253]

In this case, it is alleged that NOA facilitated the entry of [*identify group*] into Australia by [*describe alleged acts of facilitation*].

[*Discuss relevant evidence and/or arguments.*]

[1253] If a different form of smuggling is in issue, this element will need to be modified accordingly. See 9.2 People Smuggling (Basic Offence) for information concerning the other ways in which this element may be satisfied.

Intention

The second element that the prosecution must prove is that when NOA [*identify conduct*], s/he intended to facilitate the entry of a group of 5 or more people into Australia.[1254]

For this element to be met, you must be satisfied that NOA knew that it was Australia that the group were entering, and meant to help them to enter.

[*Where the prosecution seeks to rely on* Kural *reasoning, add the following shaded section.*]

One matter which might help you decide whether NOA intended to facilitate the group's entry into Australia is whether NOA was aware that there was a significant chance that s/he was helping the group enter Australia.

If you accept that NOA was aware that there was a significant chance that s/he was helping the group enter Australia, that may help you draw the conclusion that NOA intended to facilitate the group's entry into Australia. Remember, you must not look at pieces of evidence in isolation. Instead, you must decide, based on the evidence you accept, whether the prosecution has proved that NOA knew it was Australia that the group was entering and meant to help him/her to enter.

[*Discuss relevant evidence and/or arguments.*]

Non-citizen

The third element the prosecution must prove is that at least 5 people in the group were not citizens of Australia when NOA facilitated their entry.

In this case, there is no dispute that [*identify people*] were non-citizens.

No lawful right to come to Australia

The fourth element that the prosecution must prove is that at least 5 of the non-citizens had no lawful right to come into Australia. As a matter of law, NOP did not have a lawful right to come into Australia.

[*Judges may add the following section to address possible misconceptions about this element.*]

A person only has a lawful right to come to Australia if he or she holds a visa permitting entry, is covered by a relevant exemption, or is permitted by regulations to travel to Australia without a visa permitting entry. None of these categories apply to NOP.

This element is not in dispute.

Recklessness about lack of lawful right

The fifth element the prosecution must prove is that NOA was reckless about those non-citizens' lack of a lawful right to come into Australia.

[1254] If a different form of smuggling is in issue, this element will need to be modified accordingly.

This element looks at what NOA knew or believed about the immigration status of those non-citizens. The prosecution will prove this element if NOA knew or believed that NOP did not have a lawful right to enter Australia. This element will also be proved if NOA was aware that there was a substantial risk that the non-citizens did not have a lawful right to come into Australia and that in the circumstances as known to him/her, it was not justifiable to do what s/he did. In the circumstances of this case, it is difficult to think of circumstances in which it would be justifiable to ignore a substantial risk that the non-citizens had no lawful right to come into Australia.[1255] The focus of this element is therefore whether NOA was aware that there was a substantial risk that NOP did not have a lawful right to come into Australia.

[*Judges may add the following section to address possible misconceptions about this element*.]

It is not justifiable to take a risk that a group of non-citizens have no lawful right to come to this country because NOA wanted to help them seek asylum, or because of any sympathy you might have for asylum seekers. Such matters are irrelevant to this element and you must put them out of your mind. You must instead look at the circumstances known to the accused and determine whether it was justifiable to take the risk that the group of non-citizens had no lawful right to enter Australia.

[*If relevant, add the following shaded section*.]

It is not enough for the prosecution to prove that NOA was aware of a substantial risk that those non-citizens did not have a lawful right to come into [*describe relevant destination, e.g.* "Christmas Island"]. S/he must have been aware of a significant risk that they had no lawful right to come into Australia.

[*Discuss relevant evidence and/or arguments.*]

Defences

[*Insert directions on any relevant defences, such as Sudden or Extraordinary Emergency, here.*]

Summary

To summarise, before you can find NOA guilty of aggravated people smuggling the prosecution must prove to you beyond reasonable doubt:

One – that NOA facilitated the entry of a group of 5 or more people into Australia; and

Two – that NOA intended to facilitate the group's entry; and

Three – that at least 5 people in the group were non-citizens; and

Four – that at least 5 of the non-citizens had no lawful right to come into Australia; and

Five – that NOA was reckless about those non-citizens' lack of a lawful right to come into Australia.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of aggravated people smuggling.

Last updated: 1 July 2017

9.3.2 Checklist: People Smuggling (5 or More People)

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Before you can convict the accused of aggravated people smuggling, there are five elements that the prosecution must prove beyond reasonable doubt:

[1255] If justification is open on the evidence, then this passage will need to be modified.

1. The accused facilitated the entry of a group of 5 or more people into Australia; and

2. The accused intended to facilitate the group's entry into Australia; and

3. At least 5 of the people in the group were non-citizens; and

4. At least 5 of the non-citizens had no lawful right to come into Australia; and

5. The accused was reckless about those non-citizens' lack of a lawful right to come into Australia.

Facilitated a person's entry

1. Has the prosecution proved that the accused facilitated the entry of a group of 5 or more people into Australia?

Consider – What did the accused do to help the group enter Australia?

If Yes then go to 2

If No, then the accused is not guilty of Aggravated People Smuggling

Intention

2. Has the prosecution proved that NOA intended to facilitate the group's entry into Australia?

If Yes then go to 3

If No, then the accused is not guilty of Aggravated People Smuggling

Non-Citizens

3. Has the prosecution proved that at least 5 members of the group were not citizens of Australia when the accused facilitated their entry?

If Yes then go to 4

If No, then the accused is not guilty of Aggravated People Smuggling

No lawful right to come to Australia

4. Has the prosecution proved that at least 5 members of the group did not have a lawful right to come into Australia?

Consider – The 5 members of the group for this element must be the same as for the third element

Consider –The jury must be unanimous about the identity of the 5 members of the group.

If Yes then go to 5

If No, then the accused is not guilty of Aggravated People Smuggling

Recklessness about lack of lawful right

5.1. Has the prosecution proved that the accused knew that the non-citizens did not have a lawful right to enter Australia?

If Yes then the accused is guilty of Aggravated People Smuggling (as long as you also answered Yes to Questions 1, 2, 3 and 4)

If No, then go to 5.2

5.2 Has the prosecution proved that the accused believed that the non-citizens did not have a lawful right to enter Australia?

If Yes then the accused is guilty of Aggravated People Smuggling (as long as you also answered Yes to Questions 1, 2, 3 and 4)

If No, then go to 5.3

5.3. Has the prosecution proved that the accused was aware that there was a substantial risk that the non-citizens did not have a lawful right to come into Australia and knew that in the circumstances it was not justifiable to do what s/he did?

If Yes then the accused is guilty of Aggravated People Smuggling (as long as you also answered Yes to Questions 1, 2, 3 and 4)

If No, then the accused is not guilty of Aggravated People Smuggling

Last updated: 18 September 2013

9.4 Use of Carriage Service for Child Abuse Material

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1. Section 474.22 of the *Criminal Code* creates the statutory offence of using a carriage service for child abuse material.

Commencement Information

2. Section 474.22 of the Code came into operation on 1 March 2005 and was inserted into the Act by Schedule 1(1) of the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004*. Its field of operation was expanded with the commencement on 21 September 2019 of clause 29 of Schedule 7 of the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019*, which amalgamated the definition of child pornography material into the existing definition of child abuse material (which had previously only dealt with depictions of children as victims of torture, cruelty or physical abuse).
3. The purpose of this change was described in the explanatory memorandum to the Combating Child Sexual Exploitation Legislation Amendment Bill 2019 as being "to reflect changes in international language norms and the seriousness of harm associated with material that depicts child sexual abuse" (page 57).
4. Following the amalgamation of the definitions, the definition of child pornography, and the child pornography specific offences, were repealed. The result is that for conduct committed between 1 March 2005 and 20 September 2019, sexual depictions of children were dealt with s 474.19 of the *Criminal Code*, while violent depictions were dealt with by s 474.22 of the *Criminal Code*. Then from 21 September 2019 onwards, both sexual and violent depictions of children are dealt with by s 474.22 of the *Criminal Code*.

Overview of Elements

5. A person is guilty of the offence if:
   (a) the person intentionally:

i) accesses material; or

ii) causes material to be transmitted to himself or herself; or

iii) transmits, makes available, publishes, distributes, advertises or promotes material; or

iv) solicits material; and

(b) the person does so using a carriage service;

(c) the material is child abuse material; and

(d) the person is reckless as to the material being child abuse material.

Intentionally engaged in conduct

6. The first element the prosecution must prove is that the accused intentionally engaged in one of the forms of conduct listed in s 474.22(1)(a).

7. The Code proscribes four distinct forms of conduct. These are:

   (a) Accessing material;

   (b) Causing material to be transmitted to him or herself;

   (c) Transmitting, making available, publishing, distributing, advertising or promoting material; or

   (d) Soliciting material (Criminal Code s 474.22(1)(a)).

8. Access is defined to include:

   (a) the display of the material by a computer or any other output of the material from a computer; or

   (b) the copying or moving of the material to any place in a computer or to a data storage device; or

   (c) in the case of material that is a program—the execution of the program (*Criminal Code* s 473.1).

9. Given the structure of s 474.22, it is likely that the section creates a single offence with multiple available conduct elements. As each form of conduct involves different factual issues, the jury must unanimously agree that the prosecution has proved a single form of conduct (see *R v Walsh* (2002) 131 A Crim R 299).

10. The fault element for engaging in conduct is intention (*Criminal Code* s 474.2(2)(a)).

11. As this physical element involves conduct, proof of intention requires proof that the accused meant to engage in that conduct (*Criminal Code* s 5.2).

Use of a carriage service

12. The second element is that the accused engaged in the conduct constituting the first element using a carriage service (*Criminal Code* s 474.22(1)(aa)).

13. Under the Dictionary to the Code, "carriage service" has the same meaning as in the *Telecommunications Act 1997* (Cth).

14. Under section 7 of the *Telecommunications Act 1997* (Cth), "carriage service" means a service for carrying communications by means of guided and/or unguided electromagnetic energy.

15. This draws attention to the means by which a communication is delivered, rather than the content of the communication itself.

16. The explanatory memorandum to the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004, which introduced this provision, states that use of a carriage service includes "making a telephone call, sending a message by facsimile, sending an SMS message, or sending a message by email or some other means using the Internet" (see also R *v McDonald and Deblaquiere* [2013] ACTSC 122. But c.f. *Hale v R* [2011] NSWDC 97).

17. Under s 473.5 of the *Criminal Code*, a person is taken not to use a carriage service by engaging in particular conduct if:

    (a) The person is a carrier and, in engaging in that conduct, is acting solely in that person's capacity as a carrier; or

    (b) The person is a carriage service provider and, in engaging in that conduct, is acting solely in the person's capacity as a carriage service provider; or

    (c) The person is an internet service provider and, in engaging in that conduct, is acting solely in the person's capacity as an internet service provider; or

    (d) The person is an internet content host and, in engaging in that conduct, is acting solely in the person's capacity as an internet content host.

18. Absolute liability applies to this element and so there is no associated fault element (*Criminal Code* s 474.22(2A)).

Child abuse material

19. The third element is that the material in question is "child abuse material".

20. "Child abuse material" is defined as:

(a) material that depicts a person, or a representation of a person, who:

(i) is, or appears to be, under 18 years of age; and

(ii) is, or appears to be, a victim of torture, cruelty or physical abuse;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(b) material that describes a person who:

(i) is, or is implied to be, under 18 years of age; and

(ii) is, or is implied to be, a victim of torture, cruelty or physical abuse;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(c) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:

(i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or

(ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(d) material the dominant characteristic of which is the depiction, for a sexual purpose, of:

(i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or

(ii) a representation of such a sexual organ or anal region; or

(iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;

in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(e) material that describes a person who is, or is implied to be, under 18 years of age and who:

(i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or

(ii) is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(f) material that describes:

(i) a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or

(ii) the breasts of a female person who is, or is implied to be, under 18 years of age;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(g) material that is a doll or other object that resembles:

(i) a person who is, or appears to be, under 18 years of age; or

(ii) a part of the body of such a person;

if a reasonable person would consider it likely that the material is intended to be used by a person to simulate sexual intercourse (*Criminal Code* s 473.1).

21. The definition of "a sexual pose" used in (c) and (e) is of uncertain scope, because Australian society permits certain activity which involves the sexualisation of young children, particularly in a commercial context. In addition, modern society treats certain child-like activity by adults as sexually suggestive. This does not mean that the same activity by children takes on a sexual quality, unless the child has been encouraged to adopt that activity for the purpose of providing sexual gratification to observers (see *R v Silva* [2009] ACTSC 108, [26]–[28]).
22. A sexual pose is a deliberately-struck attitude that draws attention to the sexual aspects of the subject's identity or personality. It is not necessary that the child subjectively understand the sexual connotations of the pose being adopted. Nor does it require that the child be nude (*R v Silva* [2009] ACTSC 108, [29]).
23. Each of the definitions of child abuse material under s 473.1 of the *Criminal Code* (except for the child sex doll provisions in paragraph (g)) contains a requirement that the material "does this in a way that reasonable persons would regard as being, in all the circumstances, offensive". The Code provides that the matters to be taken into account in deciding whether reasonable persons would regard particular material as being, in all the circumstances, offensive include:
    (a) The standards of morality, decency and propriety generally accepted by reasonable adults; and
    (b) The literary, artistic or educational merit (if any) of the material; and
    (c) The general character of the material (including whether it is of a medical, legal or scientific character (Criminal Code s 473.4).
24. In cases where it is disputed that the material is child abuse material, the judge must direct the jury that it must take these matters into account.
25. These matters require attention to the standards of the community at large, including in art, literature, advertising and mass media, rather than the personal sexual morality of individual members of the jury (*R v Silva* [2009] ACTSC 108, [33]).

Recklessness

26. The fourth element is that the accused is reckless as to the material being child abuse material.
27. For the purpose of this offence, a person is reckless if:
    (a) He or she is aware of a substantial risk that the material will be child abuse material; and
    (b) Having regard to the circumstances known to him or her, it is unjustifiable to take the risk (see Criminal Code s 5.4).
28. Proof that the accused knew or intended that the material be child abuse material will also prove this element (*Criminal Code* s 5.4(4)).

29. A person will intend that material be child abuse material if he or she believes that it is or will be child abuse material (*Criminal Code* s 5.2(2)).

30. A person will know that material is child abuse material if he or she is aware that it is child abuse material or will be child abuse material in the ordinary course of events (*Criminal Code* s 5.3).

Defences

31. As well as the general defences provided for in Part 2.3 of the *Criminal Code*, four specific defences to s 474.22 are provided for in s 474.24.

32. For each defence under s 474.24, the accused carries the evidential burden to raise the defence (see *Criminal Code* s 13.3).

33. The explanatory memorandum to the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004 (Cth) indicates that most of the defences in s 474.21 are similar in application to the general defence of lawful authority in section 10.5 of the *Criminal Code*. However, that defence is not specific to the circumstances covered by these defences and does not sufficiently cover all the types of people that would be legitimately entitled to a defence for the child pornography material (or as the Code is now structured, child abuse material) offences.

Public benefit defence

34. A person is not criminally responsible for an offence against section 474.22 because of engaging in particular conduct if the conduct:

    (a) is of public benefit; and

    (b) does not extend beyond what is of public benefit (Criminal Code s 474.24(1)).

35. In determining whether this defence applies, the question whether the conduct is of public benefit is a question of fact and the person's motives in engaging in the conduct are irrelevant (*Criminal Code* s 474.24(1)).

36. Conduct is of public benefit if, and only if, the conduct is necessary for, or of assistance in:

    (a) enforcing a law of the Commonwealth, a State or a Territory; or

    (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or

    (c) the administration of justice; or

    (d) conducting scientific, medical or educational research that has been approved by the AFP Minister in writing for the purposes of this section (Criminal Code s 474.24(2)).

37. The conduct discussed in s 474.24(2)(a) is targeted at persons who may be required to engage in the offending conduct as part of their duties in connection with law enforcement, but who are not covered by the defence for law enforcement officers in subsection 474.24(3). An example is where a criminologist assists law enforcement agencies in the identification of victims of child abuse (Explanatory memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004 (Cth)).

38. The defence in s 474.24(2)(b) is targeted at officers of government agencies involved in the monitoring and investigation of online material in accordance with regulatory schemes that they administer. This includes organisations such as the Australian Broadcasting Authority (ABA), the Australian Communications Authority (ACA) and the Office of Film and Literature Classification (OFLC) (Explanatory memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004 (Cth)).

39. The types of people likely to be covered by s 474.24(2)(c) include judicial officers and court staff hearing a proceeding involving child pornography, legal representatives of a party to the proceedings, and witnesses in the proceedings (Explanatory memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004 (Cth)).

40. Finally, s 474.24(2)(d) protects legitimate research dealing with child pornography on the Internet, provided the authorisation of the AFP Minister is received. Persons who are caught with Internet child abuse material and who argue that they were involved in 'personal research' will not have a defence available to them unless they have received approval for their research from the Minister. Likewise, if a person who has received approval for particular research engages in conduct that falls outside what is 'necessary for or of assistance in' conducting that research, the defence will not be available to them. (Explanatory memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004 (Cth)).

Law enforcement defence

41. A person is not criminally responsible for an offence against section 474.22 if:

    (a) the person is, at the time of the offence, a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; and

    (b) the conduct of the person is reasonable in the circumstances for the purpose of performing that duty (Criminal Code s 474.24(3)).

Defence for those assisting Children's eSafety Commissioner

42. A person is not criminally responsible for an offence against section 474.22 if the person engaged in the conduct in good faith for the sole purpose of assisting the Children's eSafety Commissioner to perform the functions, or exercise the powers, conferred on the eSafety Commissioner by Part 9 of the *Online Safety Act 2021* (*Criminal Code* s 474.24(4)(a)).

Defence for those manufacturing or developing, or updating, Content Filtering Technology

43. A person is not criminally responsible for an offence against section 474.22 if the person engages in the conduct in good faith for the sole purpose of manufacturing or developing, or updating, content filtering technology (including software) in accordance with:

    (i) an industry code registered under Division 7 of Part 9 of the *Online Safety Act 2021*; or

    (ii) an industry standard registered under Division 7 of Part 9 of the *Online Safety Act 2021* (*Criminal Code* s 474.24(4)(b)).

Last updated: 4 March 2024

9.4.1 Charge: Use of Carriage Service to Access Child Abuse Material

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This charge may be used when the accused is charged with using a carriage service to access child abuse material under s 474.22(1)(a)(i). Where other forms of conduct under s 474.22(1)(a) are alleged, such as transmitting or soliciting child abuse material, the charge must be adapted.

I must now direct you about the offence of using a carriage service to access child abuse material. To prove this crime, the prosecution must prove the following four elements beyond reasonable doubt:

One – the accused intentionally accessed material.[1256]

Two – the accused used a carriage service to access this material.

Three – the material is child abuse material.

Four – the accused was reckless as to the material being child abuse material.

I will now explain each of these elements in more detail.

Conduct

The first element the prosecution must prove is that NOA intentionally accessed material.[1257]

In order to prove this part of the offence, the prosecution must prove two matters beyond reasonable doubt:

First, the prosecution must prove that NOA accessed the material.

Second, the prosecution must prove that NOA did so intentionally. This means [she/he] meant to access this material.

The prosecution argue that [*refer to relevant prosecution evidence and arguments*].

The defence disputes this, and say [*refer to relevant defence evidence and arguments*].

Carriage Service

The second element that the prosecution must prove is that NOA accessed the material using a carriage service.

[*Identify relevant service*] is a carriage service. To prove this element, the prosecution must prove that NOA accessed the material using [*identify relevant service*].

[*Discuss relevant evidence or arguments.*]

Child abuse material

The third element that the prosecution must prove is that the material is child abuse material.

The law provides many definitions of child abuse material. In this case, only one definition applies. You must consider these three questions.

One – Does it show a person under the age of 18 years?

Two – Is the person under the age of 18 in a sexual pose or engaging in sexual activity?

Three – Would a reasonable person regard the image as offensive, given all the circumstances?[1258]

If you answer yes to each question, then the material is child abuse material.

[1256] If the prosecution relies on a different form of conduct, this element must be modified accordingly.

[1257] If the prosecution relies on a different form of conduct, this element must be modified accordingly.

[1258] This direction must be modified in cases where other aspects of the definition apply. See 9.4 Use of Carriage Service for Child Abuse Material for guidance.

To decide whether a reasonable person would consider something to be offensive, you must consider current community standards and values. Is it offensive when measured against the standards of morality, decency and propriety generally accepted by reasonable adults?

You must also consider the literary, artistic or educational merit, if any, of the material and the general character of the material. For example a photograph of a naked child in a medical journal may not be offensive, even though the same photograph may be considered offensive if it was in a pornographic magazine.

Age

[*If the age of the person depicted is in issue, add the following shaded section.*]

As you have heard, the defence disputes that [*identify relevant person*] is or appears to be under 18.

Determining whether a person appears to be under 18 requires no special skill. For example, in your everyday life, you may look at a person and, based on their physical characteristics, estimate that they are over 50, or under 20. It is the same exercise here. The difference is that this is an element of the offence. You can only find this element proved if you are satisfied beyond reasonable doubt that the person is or appears to be under the age of 18.

The prosecution says that you can find that [*insert relevant person*] was under the age of 18, or appeared to be under 18 at the time the [*insert relevant material*] was created. [*Refer to relevant prosecution evidence and arguments.*]

The defence dispute this, and say [*refer to relevant defence evidence and arguments*].

Recklessness

The fourth element relates to NOA's state of mind.

The prosecution alleges that NOA was reckless as to whether the material [he/she] accessed was child abuse material. This means it must prove that NOA was aware of a substantial risk that the material was child abuse material and in the circumstances as s/he knew them to be, it was unjustifiable to risk accessing the materials.

[*If the prosecution also alleges the accused knew or believed the material was child abuse material, add the following shaded section.*]

The prosecution will also prove this element if you are satisfied the accused knew or believed the material [he/she] accessed was child abuse material.

[*Discuss relevant evidence or arguments.*]

Defences

[*If any of the defences in s 474.24 are relevant, insert appropriate directions on that defence here.*]

Summary

To summarise, before you can find the accused guilty, you must be satisfied that the prosecution has proved the following four elements beyond reasonable doubt:

One – the accused intentionally accessed material.

Two – the accused used a carriage service to access this material.

Three – the material is child abuse material.

Four – the accused was reckless as to the material being child abuse material.

If you find that any of these elements have not been proved beyond reasonable doubt, then you must find NOA not guilty of using a carriage service to access child abuse material.

Last updated: 4 March 2024

10 Unfitness to Stand Trial

10.1 Investigations into Unfitness to Stand Trial

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Overview

1. People cannot be tried for criminal offences unless they are fit to stand trial (*R v Dashwood* [1943] KB 1; *R v Benyon* [1957] 2 QB 111; *Eastman v The Queen* (2000) 203 CLR 1).
2. The issue of fitness to stand trial relates to the accused's condition at the time of the *trial*. This is in contrast to the defence of mental impairment, which relates to the accused's condition at the time of the *offence* (see 8.4 Mental Impairment) (*R v Dennison* NSWCCA 3/3/1988; *Ngatayi v The Queen* (1980) 147 CLR 1; *R v Presser* [1958] VR 45).
3. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (the Act)[1259] sets out the procedure for determining a person's fitness to stand trial. This procedure applies to all trials, regardless of when the alleged offences were committed (Schedule 3).
4. According to the Act, when a real and substantial question is raised concerning a person's fitness to stand trial, an investigation must be held to determine whether s/he is unfit (ss 8, 9). The outcome of that investigation must be determined by the judge (s 14C). These investigations are the focus of this Chapter.
5. Prior to amendments introduced by the *COVID–19 Omnibus (Emergency Measures) Act 2020* and the *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021*, fitness to stand trial was determined by a specially empanelled jury. The sections which provide for jury determination of fitness remain in force in the Act, but are temporarily suspended while the judge–alone determination provisions are in force (s 5C).
6. If the judge finds the person unfit to stand trial, the judge must determine whether it is likely that s/he will become fit to stand trial within 12 months. If it is likely that s/he will recover within that time, the judge must adjourn the matter. If it is not likely, a special hearing must be held to determine whether that person committed the offence charged (ss 14F, 15). These special hearings are examined in 10.2 Special Hearings.

When must an Investigation into the Accused's Fitness be Held?

7. A judge must order an investigation into the accused's fitness to stand trial if it appears that there is a "real and substantial question" about that issue (s 9).
8. A "real and substantial question" will exist whenever it would be open to a properly instructed jury to conclude that the accused was not fit to stand trial (*Eastman v The Queen* (2000) 203 CLR 1; *R v Alford* [2005] VSC 404; *Kesavarajah v The Queen* (1994) 181 CLR 230).

[1259] All references to legislative sections and schedules refer to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

9. To order an investigation, a judge does not need to have formed a *prima facie* view that the accused is unfit to be tried. When the question of fitness was to be determined by a jury, courts held that where there is a reason to doubt the accused's fitness, it must be left to the jury unless no reasonable jury could conclude that the accused was unfit (s 7(3); *Kesavarajah v The Queen* (1994) 181 CLR 230; *R v Khallouf* [1981] VR 360).

10. It is not necessary to call admissible evidence to raise a real and substantial question of the accused's fitness to be tried. Assertions from the bar table setting out a reasonable basis for concerns about fitness can be sufficient to raise the question, or at least warrant an adjournment to gather further evidence. Similarly, abnormal or eccentric behaviour by the accused during a trial may raise the question of the accused's fitness to be tried (*SM v R* (2011) 33 VR 393; [2011] VSCA 332; *Eastman v R* (2000) 203 CLR 1; [2000] HCA 29 (Callinan J); c.f. *R v Coffee*, Unreported, NSW SC, 20 November 1992).

11. The obligation to order an investigation is part of the judge's duty to ensure a fair trial. Where the accused is unrepresented, or has previously been found unfit to be tried, the judge must be particularly careful to ensure that the trial is not unfair (*Heffernan v The Queen* (2005) 194 FLR 370; *Eastman v The Queen* (2000) 203 CLR 1).

12. Failing to order an investigation where there is a real and substantial question about the accused's fitness to stand trial will constitute a fundamental defect in the trial procedure, rendering the trial a nullity (*Eastman v The Queen* (2000) 203 CLR 1).

13. It is not clear whether the change from the jury determining fitness to the judge determining fitness affects when it will be appropriate to refer fitness to an investigation.

14. In *R v Young*, the trial judge was found to have erred by giving significant weight to the impact of planned adjustments to trial procedure in deciding whether there remained a real question about fitness after receiving expert evidence which contended that the accused was unfit. The Queensland Court of Appeal held that such reasoning engaged with the merits of the fitness question, rather than focusing on the threshold question of whether the jury needed to consider the accused's fitness (*R v Young* (2021) 8 QR 68, [207]).

Procedure for Ordering an Investigation

15. The issue of the accused's fitness to stand trial may be raised at any stage of the proceedings by the prosecution, the defence or the judge (s 9; *Eastman v The Queen* (2000) 203 CLR 1; *R v Presser* [1958] VR 45).

16. The procedure for ordering an investigation differs, depending on when the issue of fitness arises. If it arises during a committal hearing:

    - The committal must proceed in accordance with the normal procedure;
    - If the accused is committed for trial, the magistrate must reserve the question of fitness for consideration by the trial judge;
    - The trial judge must then determine whether there is a real and substantial question about the accused's fitness; and
    - If the judge decides that there is a real and substantial question about the accused's fitness, an investigation into his/her fitness must commence within 3 months of the committal (with scope for extension) (s 8).

17. If the question of fitness arises during a trial, the trial must be adjourned or discontinued to allow an investigation to be conducted (s 9).

18. The potential obligation to order an investigation into the accused's fitness continues until the jury's verdict has been delivered. A judge may therefore be required to adjourn a trial and order an investigation after the close of the prosecution case, or even after final addresses to the jury – because the accused must be able to make a defence (see below), and so may be unfit if s/he is not able to respond to jury questions (especially if s/he is unrepresented) (*Kesavarajah v The Queen* (1994) 181 CLR 230).

19. As the issue of the accused's fitness to stand trial may be raised more than once in the same proceedings, the fact that an investigation has previously been held does not prevent a judge from ordering another investigation (s 9(3)).

20. A judge may vacate an order for an investigation prior to empanelling a jury. This may be suitable where the order was made in error, or if the question about the accused's fitness has been resolved (*R v Demicoli* [2006] VSCA 69).

Nature of an Investigation

Role of the Judge

21. The question of the accused's fitness to stand trial is a question of fact (s 7(3)).

22. It is presumed that every person is fit to stand trial. The judge's role in an investigation is to determine, on the balance of probabilities, whether that "presumption of fitness" has been rebutted (s 7).

Evidence

23. The court must hear any relevant evidence and submissions put by the prosecution or the defence (s 14D(1)(a)).

24. The trial judge may also call evidence on his/her own initiative, if s/he is of the opinion that it is in the interests of justice to do so (s 14D(1)(b)(i)).

25. The trial judge may require the accused to undergo a medical examination, and require the results of that examination to be put before the court (s 14D(1)(b)(ii)–(iii)).

Onus of Proof

26. The standard of proof in an unfitness investigation is the civil standard of the balance of probabilities (s 14C).

27. Which party will bear the onus of proof depends on who raises the issue:

    - If it is raised by the prosecution, it will be for the prosecution to prove;
    - If it is raised by the defence, it will be for the defence to prove;
    - If it is raised by the judge, neither party bears the onus of proof (although the prosecution has carriage of the matter) (ss 7(4), 7(5)).[1260]

Test for Determining the Accused's Fitness

Statutory Test

28. According to section 6(1) of the Act, to find a person unfit to stand trial the judge must be satisfied, on the balance of probabilities, that because his/her mental processes are disordered or impaired, s/he is (or will be at some time during the trial):

    i) Unable to understand the nature of the charge; or

[1260] In such cases, the jury must still determine, on the balance of probabilities, whether the presumption of fitness has been rebutted.

ii) Unable to enter a plea; or

iii) Unable to exercise the right to challenge jurors or the jury pool; or

iv) Unable to understand the nature of a trial as an inquiry into whether the accused committed the offence; or

v) Unable to follow the course of the trial; or

vi) Unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or

vii) Unable to instruct counsel.

29. There are two parts to this test. The judge must find that:

i) The accused currently suffers from at least one of the abovementioned incapacities, or will at some time during the trial; and

ii) That incapacity is caused by the accused's impaired or disordered mental processes.

Relevance of Common Law Authorities

30. The statutory test is largely derived from the common law test for fitness to stand trial. Common law authorities will therefore be relevant when interpreting the statutory test.

31. Under the common law, a person would be unfit to stand trial if s/he was:

i) Unable to understand the nature of the charge; or

ii) Unable to plead to the charge or exercise the right of challenge; or

iii) Unable to understand the nature of the proceedings as an inquiry into whether s/he committed the offence charged; or

iv) Unable to follow the course of the proceedings so as to understand what is going on in court in a general sense, even though s/he need not understand the purpose of all the various court formalities; or

v) Unable to understand the substantial effect of any evidence that may be given against him/her; or

vi) Unable to decide what defence s/he will rely upon or make his/her defence or version of facts known to the court or to counsel (*R v Presser* [1958] VR 45; *Eastman v The Queen* (2000) 203 CLR 1).

Determining the Accused's Capacities

32. The judge should determine whether the accused is unfit to stand trial in a common sense fashion – because if the test is applied too literally, it may incorrectly set a threshold for fitness that can only be met by a person of very high intelligence (*Sinclair v The King* (1946) 73 CLR 316; *R v Presser* [1958] VR 45).

33. The fact that the accused could perform better against some of the specified requirements if s/he had greater intelligence, or received additional treatment, is not determinative. The critical question is whether the accused meets the minimum requirements for fitness specified in the Act (*R v Rivkin* (2004) 59 NSWLR 284; *Clarkson v The Queen* [2007] NSWCCA 70).

34. The ability of an accused to follow the course of the trial, and to understand the substantial effect of the evidence, may depend on the complexity of the trial. For example, a greater degree of understanding and capacity may be required for a complex fraud trial than for a trial in which the issues are narrow and well defined (*R v Wahlstedt* [2003] SADC 172; *R v Gillard* [2006] SASC 46).

35. Where counsel will aid the accused during the trial, the jury should take this assistance into account in determining whether s/he is, or will be, able to understand and follow its processes (*Ngatayi v The Queen* (1980) 147 CLR 1; *R v Miller* [*No 2*] [2000] SASC 152).

36. Poor forensic choices, or counter-productive behaviour, will not, of themselves, render a person unfit to be tried. While the accused must be able to make forensic choices, and instruct counsel on the nature of his/her defence, s/he is not required to make an *able* defence (*Heffernan v The Queen* (2005) 194 FLR 370; *Eastman v The Queen* (2000) 203 CLR 1; *Kesavarajah v The Queen* (1994) 181 CLR 230; *R v Taylor* (1992) 77 CCC (3d) 551; *R v Presser* [1958] VR 45).

37. A person will not be unfit to stand trial simply because s/he is suffering from memory loss (e.g. s/he cannot remember the facts surrounding the alleged offending) (s 6(2); *R v Dennison* NSWCCA 3/3/1988).

38. Bizarre or disruptive behaviour does not, of itself, render a person unfit to be tried (*Eastman v The Queen* (2000) 203 CLR 1; *R v Taylor* (1992) 77 CCC (3d) 551).

39. The mere fact that a person refuses to rely on the defence of mental impairment, which may be open on the evidence, does not mean that s/he is unfit to stand trial. A person may rationally reject such an option out of concern for the consequences of a finding of not guilty by reason of mental impairment (*R v Bridge* [2005] NSWCCA 122).

Future Unfitness

40. In assessing whether an accused is fit to be tried, the judge is required to consider both his/her present condition and his/her likely condition during the trial (s 6(1)).

41. The expected length of the trial may affect the jury's assessment of the accused's likely future condition. They may take into account the possibility of deterioration over the course of the trial, as well as the risks associated with the disruption of a longer trial (*Kesavarajah v The Queen* (1994) 181 CLR 230; *R v Miller* [*No 2*] [2000] SASC 152).

42. In cases where the accused's condition is sensitive to stress, the jury may also take into account the fact that as a trial continues, his/her stress is likely to progressively accumulate. This may be of particular relevance in lengthy trials (*R v Wilson* [2000] NSWSC 1104).

Unfitness and Mental Impairment

43. The fitness of the accused to be tried addresses different issues to the defence of mental impairment. An accused may be unfit to be tried even if s/he is not insane (in either the colloquial sense or the M'Naughten sense) (*Ngatayi v The Queen* (1980) 147 CLR 1; *R v Presser* [1958] VR 45).

44. Similarly, the mere existence of a mental disorder will not mean that the accused is unfit to be tried. There must be some link between the mental disorder and the ability of the accused to understand and participate in the trial process (*Heffernan v The Queen* (2005) 194 FLR 370; *Eastman v The Queen* (2000) 203 CLR 1; *R v Taylor* (1992) 77 CCC (3d) 551).

45. A mental disorder may produce delusions related to the subject matter of the case, or affect the accused's ability to have a trusting relationship with his/her counsel, without affecting his/her fitness to be tried (*Heffernan v The Queen* (2005) 194 FLR 370; *Eastman v The Queen* (2000) 203 CLR 1; *R v Taylor* (1992) 77 CCC (3d) 551).

Impaired or Disordered Mental Processes

46. While the accused does not need to be insane to be considered unfit to stand trial, his/her incapacity must be caused by impaired or disordered mental processes (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 6(1)).

47. This does not mean that the accused must suffer from a mental illness. A person's mental processes may be impaired or disordered due to other factors, such as an intellectual impairment, a learning disability or acquired brain injury (*R v Miller* [*No 2*] [2000] SASC 152; *R v Gillespie* (1987) 30 A Crim R 14).

48. A person's "mental processes" may also be "impaired or disordered" where impairment impedes the *reception* rather than the *processing* of information (*R v Abdulla* (2005) 93 SASR 208). This means that in some circumstances, a physical impairment such as deafness or a language barrier may fall within s 6(1).

Last updated: 22 March 2023

10.2 Special Hearings

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Overview

1. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (the Act)[1261] sets out the procedure to be followed if a person may be unfit to stand trial. This procedure applies to all trials, regardless of when the alleged offences were committed (Schedule 3).

2. According to the Act, when a real and substantial question is raised concerning a person's fitness to stand trial, an investigation must be held to determine whether s/he is unfit (ss 8, 9). The outcome of that investigation must be determined by a specially convened jury (s 11). These investigations are examined in 10.1 Investigations into Unfitness to Stand Trial.

3. If that jury finds the person unfit to stand trial, it may be necessary to hold a special hearing to determine whether s/he committed the offences charged (ss 12, 15). These special hearings are the focus of this Chapter.

When Must a Special Hearing be Held?

4. There are three stages at which a judge may be required to order a special hearing:

   i) At the conclusion of an investigation into the accused's fitness to stand trial;

   ii) At the end of an adjournment period following a finding of unfitness; or

   iii) Upon application by the defence or the Director of Public Prosecutions.

Purpose of a Special Hearing

5. The purpose of a special hearing is to determine whether, on the evidence available, the accused:

   - Is not guilty of the offence charged;
   - Is not guilty of the offence charged because of mental impairment; or
   - Committed the offence charged or an available alternative offence (s 15).

6. The jury's role is to make one of the abovementioned findings (s 18(1)).

[1261] All references to legislative sections or schedules refer to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

7. A finding that the accused "committed the offence charged" (or an available alternative) is not the same as a verdict of guilty. It is a qualified finding of guilt, and does not constitute a basis in law for any conviction for the offence to which the finding relates (s 18(3)(a)).
8. Where the jury makes such a finding, the judge must declare that the accused is liable to supervision, or order that s/he be released unconditionally (s 18(4)).
9. A finding that the accused committed the offence charged constitutes a bar to further prosecution in respect of the same circumstances, and is subject to appeal in the same manner as if the accused had been convicted of the offence in a criminal trial (ss 18(3)(b), (c)).
10. Jury findings of "not guilty" and "not guilty because of mental impairment" are to be taken for all purposes as if they were findings made at a criminal trial (ss 18(1), (2)).

Onus of Proof

11. To find that the accused committed the offence charged, or an available alternative offence, the jury must be satisfied of that fact beyond reasonable doubt (s 17(2)).
12. To find the accused not guilty because of mental impairment, the jury must be satisfied by defence argument on the balance of probabilities (s 21(2); 8.4 Mental Impairment).

Procedure

13. At a special hearing, the accused is taken to have pleaded not guilty (s 16(2)(a)).
14. Special hearings should be conducted as nearly as possible as if they were criminal trials. To that end:
    - The *Juries Act 2000* applies;
    - The rules of evidence apply;
    - *Criminal Procedure Act 2009* ss 197 and 232A apply;
    - The accused's legal representative may exercise the accused's rights to challenge jurors or the jury;
    - All defences that would be available in a criminal trial are available (including the defence of mental impairment); and
    - Any alternative verdicts that would be available in a criminal trial are available (s 16).

Special Hearings and Mental Impairments

15. The "consent mental impairment" provisions of Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 s 21(4) do not apply to special hearings (*SM v R* (2013) 46 VR 464).
16. This means that, where a person is found unfit to be tried, the question of mental impairment must be resolved by a jury and cannot be determined through the judge–alone process (*SM v R* (2013) 46 VR 464. Compare s 21(4)).
17. See 8.4 Mental Impairment (on page 628) for further information concerning *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 21.

Mandatory Directions

18. At the start of a special hearing, the judge must explain to the jury:
    - That the defendant is unfit to be tried in accordance with the usual procedures of a criminal trial;

- The meaning of being unfit to stand trial;
- The purpose of the special hearing;
- The findings that are available; and
- The standard of proof required for those findings (s 16(3)).[1262]

19. These directions must be given at the commencement of a special hearing. It is not sufficient to give them in running, or at the end of proceedings (*Subramaniam v The Queen* (2004) 211 ALR 1).
20. A judge cannot avoid giving these directions on the basis that counsel have already covered the relevant matters in their addresses to the jury (*Subramaniam v The Queen* (2004) 211 ALR 1).

Other Directions

21. As special hearings must be conducted (as far as possible) as if they were criminal trials, judges must give any other directions which must ordinarily be given in a criminal trial. See Directions Under Jury Directions Act 2015 for information on when directions are required.
22. Judges must be alert to ensure that there is not a miscarriage of justice. For example, if the accused's mental impairment leads him/her to behave in a way that is prejudicial to his/her own interests, the jury should be given a suitable warning to counter the prejudice (*R v Smith* [1999] NSWCCA 126).
23. The jury do not need to be told why the accused is unfit to be tried. A special hearing may proceed without any information being led concerning the accused's mental impairment (*Subramaniam v The Queen* (2004) 211 ALR 1).
24. Confession evidence given by a person suffering from a mental impairment carries special risks (*R v Parker* (1990) 19 NSWLR 177).

Last updated: 20 May 2022

10.2.1 Charge: Special Hearing

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This charge addresses the directions which *must* be given at the beginning of a special hearing (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 16). It has been designed to be used instead of 1.5.1 *Charge: The Role of Judge and Jury* and 1.7.1 *Charge: Onus and Standard of Proof*.

Many other charges contained in the Charge Book will also be relevant to special hearings. If these charges are used, appropriate changes should be made to reflect the differences between special hearings and criminal trials (e.g. the available findings).

Introduction

Serving on a jury may be a completely new experience for some, if not all, of you. To help you perform that role properly, I will now describe your duties as jurors and the procedures that we will follow. I will also explain to you some of the principles of law that apply in this case.

During and at the end of this hearing, I will give you further instructions about the law that applies to this case. You must listen closely to all of these instructions and follow them carefully.

[1262] As these directions are required by law, Part 3 of the *Jury Directions Act 2015* does not apply (*Jury Directions Act 2015* s 10).

If at any time you have a question about anything I say, please feel free to ask me. It would be best if you did this by writing it down, and passing it to my tipstaff, [*insert name*], who will hand it to me.

Fitness to Stand Trial

Members of the jury, you represent one of the most important institutions in our community – the institution of the jury. Our legal system guarantees any individual charged with a criminal offence the right to have the case presented against him or her determined at a trial by twelve independent and open-minded members of the community, in accordance with the law.

However, the law recognises that it would be unfair and unjust for a trial to take place if the person charged is unable to understand the case against him or her, or to meaningfully participate in the trial. According to the law, a person must be fit to stand trial before he or she can be convicted of an offence.

To be fit to stand trial, a person must be capable of meeting the minimum standards of mental capacity specified by the law. If a jury determines that s/he is unable to meet all of these standards, s/he will be unfit to be tried in accordance with the usual procedures of a criminal trial.

That is what has happened in this case. A question was raised about NOA's fitness to stand trial, and a jury found that s/he is not fit to stand trial in the usual way. Special procedures must therefore be used instead.

Reasons for Unfitness

The accused's unfitness for a normal trial may or may not be apparent to you as this hearing proceeds. That is because there are several reasons why a person may be unfit to stand trial.

S/he may not, for example, understand the nature of the charge against him/her, or be able to decide whether s/he has a defence to it. S/he may not be able to make a rational decision about whether s/he is guilty or not guilty of the offence[s] charged, or about how to plead to the charge[s]. S/he may not be able to understand the nature of the criminal proceedings and what their course and outcome may mean to him/her, or to involve himself/herself in these proceedings in an informed or constructive way.

His/her unfitness to stand trial may relate to his/her ability to give instructions to his/her lawyer. For example, s/he may not be able to adequately tell his/her lawyer what his/her defence is, or in what respects the prosecution evidence is wrong or should be questioned and tested.

None of these matters may be apparent to you in relation to NOA. But whether or not they are apparent, you must accept that s/he is unable to meet all of the minimum standards required for a person to receive a fair trial.

Purpose of a Special Hearing

The fact that a person is not fit to stand trial does not prevent a jury from determining whether or not s/he committed a crime. It simply means that the matter may not be determined in accordance with the usual procedures of a criminal trial. Instead, it must be determined at what is called a "special hearing". That is what is happening here today.

The purpose of a special hearing is to see that justice is done to both the accused person and the prosecution, in light of the accused's inability to be tried in the normal way. In particular, it allows a jury to determine whether or not an accused who is unfit to stand trial committed the offence[s] charged. The accused and the prosecution both have an interest in resolving this matter.

In this case, it has been alleged by the prosecution that NOA committed the offence[s] of [*insert offences*]. This is a special hearing for you to determine whether s/he did commit [that offence/those offences].

I note that, when referring to the crime[s] that the accused has been charged with, I will sometimes use the words "offence", "count" or "charge" – they all mean the same thing.

Differences between Special Hearings and Criminal Trials

Available Findings

The verdicts that you may give in a special hearing differ from those that you may give in a criminal trial. In a criminal trial, if you are satisfied beyond reasonable doubt that the accused committed an offence, you must give a verdict of "guilty". By contrast, in a special hearing, your verdict in that circumstance must be that the accused "committed the offence".

This reflects the fact that, while the parties to this case have an interest in determining whether the accused committed the relevant offence[s], it would be unjust to find him/her guilty when s/he is not fit to be tried in the normal way. While in such circumstances it would be unfair for the accused to receive a criminal conviction, it would not be unjust to find the accused not guilty of the offence.

At the end of the hearing, the other verdicts available to you will therefore be "not guilty" or "not guilty because of mental impairment". I will explain the difference between these two verdicts later.

Accused's Role

A special hearing may also differ from a normal criminal trial in the way in which the accused contributes to his/her defence. For example, in a criminal trial, the accused may or may not choose to give evidence. In a special hearing, while the accused is entitled to contribute to his/her defence, his/her unfitness may make him/her incapable of making rational decisions about what to do. S/he may therefore not be as involved in the hearing as s/he might be in a criminal trial.

Although there are some differences between a special hearing and a normal criminal trial, the law aims to ensure that a special hearing does not prejudice the accused any more than his/her unfitness already may do. S/he may therefore raise, or have raised on his/her behalf, any defences a fit person could raise in a normal trial.

Roles of Judge, Jury and Counsel

In all hearings of this type, the court consists of a judge and jury. We are going to be assisted in this case by counsel for the prosecution, [*insert prosecutor's name*], and defence counsel, [*insert defence counsel's name*].[1263] Each of us has a different role to play.

Role of the Jury

It is your role, as the jury, to decide what the facts are in this case. You are the only ones in this court who can make a decision about the facts. You make that decision from all of the evidence given during the hearing.

It is also your task to apply the law to the facts that you have found, and by doing that decide whether the offence[s] charged [has/have] been proven against the accused.

To find that the accused committed the offence[s] charged, you must be satisfied that s/he committed [it/them] beyond reasonable doubt. In contrast, to find the accused not guilty because of mental impairment, you must be satisfied of that fact on the balance of probabilities. If you are not able to make either of those findings, then you will find the accused not guilty. I will give you more directions about these two standards of proof later.

[1263] This sentence will need to be modified if the accused is unrepresented.

Role of the Judge

It is my role, as the judge, to ensure that this hearing is fair and conducted in accordance with the law. I will also explain to you the principles of law that you must apply to make your decision. You must accept and follow all of those directions.

I want to emphasise that it is not my responsibility to decide this case. The verdict that you return has absolutely nothing to do with me. So while you must follow any directions I give you about the law, you are not bound by any comments I may make about the facts.

It is unlikely that I will make any comments about the evidence. If you disagree with my comments, you must disregard them. Do not give them any extra weight because I, as the judge, have made them. It is your view of the facts which matters, not mine. You are the judges of facts – you alone.

Role of Counsel

The role of counsel is to present the case for the side for which they appear. [*Insert name of prosecutor*] presents the charge[s] in the name of the State. [*Insert name of defence counsel*] appears for the accused, and will represent him/her throughout the hearing.[1264]

You do not need to accept any comments that counsel may make during their addresses. Of course, if you agree with an argument they present, you can adopt it – in effect, it becomes your own argument. But if you do not agree with their view, you must put it aside. As I have told you, you alone are the judges of the facts.

Similarly, you are not bound by what counsel says about the law. I am the judge of the law, and it is what I tell you about the law that matters. If counsel says something different from what I say about the law, you must ignore it and follow my directions.

[*Insert directions from* 1.5.1 Charge: Decide Solely on the Evidence *and* 1.6.1 Charge: Assessing Witnesses]

Onus and Standard of Proof

I'm now going to give you directions about the standards of proof. The starting point is that in our justice system people are presumed to be innocent, unless and until they are proved guilty. This principle applies in this special hearing just as it does in a regular trial.

As the prosecution brings the charge[s] against the accused, it is for the prosecution to prove that/those charge[s].

The prosecution must prove the accused committed the offence[s] charged beyond reasonable doubt. You have probably heard these words before, and they mean exactly what they say – proof beyond reasonable doubt.

This is the highest standard of proof that our law demands. It is not enough for the prosecution to prove that the accused probably, or very likely, committed the offence[s] charged. That is enough to prove something on the balance of probabilities, but it is not enough to prove something beyond reasonable doubt.

In deciding whether the prosecution has proved its case beyond reasonable doubt, you should remember that it is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so. A reasonable doubt is not an imaginary or fanciful doubt, or an unrealistic possibility.

[1264] This section will need to be modified if the accused is unrepresented.

Unless I tell you otherwise, when I say that the prosecution must "prove" or "establish" a matter, or that you must be "satisfied" about a matter, I mean the prosecution must prove or establish a matter, or you must be satisfied of that matter, beyond reasonable doubt.

The prosecution does not need to prove every fact that they allege to this standard. It is the essential ingredients or "elements" of the charge[s] that they must prove to this standard. In this case, that means that the prosecution must prove, beyond reasonable doubt, that [*list elements of the primary offence. Repeat for any other offences*].[1265]

I will explain these elements to you in detail, and relate them to the evidence in this case, after you have heard all of the evidence.

However, for now you should know that it is only if you find that the prosecution has proven all of the elements of a charge beyond reasonable doubt that you may find that the accused committed the offence[s] charged. If you are not satisfied that the prosecution has done this, your verdict in relation to that charge must be "Not Guilty".

As I mentioned before, the third verdict you can return is "not guilty because of mental impairment", and the accused must establish this on the balance of probabilities. This is one of those rare situations in which a matter must be proved by the defence. The prosecution must still prove [*identify matters the prosecution must prove*] before you need to consider the issue of mental impairment. However, if you are satisfied that those matters have all been proven, it is defence counsel who must prove the requirements of this defence if you are to find the accused not guilty because of mental impairment.

Unlike the elements of the offence – which the prosecution must prove beyond reasonable doubt – the defence only needs to prove these requirements on what is called the "balance of probabilities". This is a much lower standard than that required of the prosecution when proving an offence. It only requires the defence to prove that it is more probable than not that NOA was mentally impaired to the necessary degree. I will have more to say about this at the end of the trial.

Last updated: 4 March 2024

11 Factual Questions and Integrated Directions

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Understanding factual question directions

1. *Jury Directions Act 2015* s 67 permits a judge to give directions in the form of factual questions which address the matters the jury must consider in order to reach a verdict. When combined with evidentiary directions, references to how the prosecution and defence have put their case and any necessary references to the evidence, the result is described as an 'integrated direction'.
2. Factual question directions are sometimes called:
    - Question trails
    - Decision trees
    - Route to verdict
    - Stepped verdict
3. For the sake of clarity, this Charge book uses the following terminology:

[1265] See Mental Impairment and Proof of Elements in 8.4 Mental Impairment for information on which elements should be identified for this purpose.

- A question trail is the jury handout which contains a statement of the matters the jury must determine in the form of factual questions
- Factual question directions are the oral directions provided by the judge which instruct on how to use the question trail
- Integrated directions are a form of factual question direction which includes directions about the evidence and how the parties put their case as part of directing the jury about each individual factual question.

4. Juror comprehension researchers have described factual question directions in the following manner:

> [J]udges determine the elements of the offence that must be proved, as well as those of any relevant defences. These elements are converted into the form of questions relating directly to the facts of the case, and are then placed in their most logical order. The questions are presented in writing in the form of a "question trail", and may be accompanied by relevant evidentiary directions and arguments in summary form.
>
> Such an approach largely removes the need for jurors to learn and understand the law, since the judge has already performed the task of identifying relevant legal principles and their application in the particular case. This should theoretically reduce the intrinsic cognitive load associated with standard instructions, leading to improved application.[1266]

5. Factual question directions and question trails are also thought to improve deliberative processes. By providing the jury with a clear framework for decision making, jurors appear to be able to structure their discussions in a way that maximises the performance of all jurors on the jury. It also assists jurors to identify what they need to do, and to focus their discussions on the facts in issue.[1267]

6. The difference between question trails and the checklists presented earlier in this Charge Book lies in the degree of specificity of the written material. Spivak and others described the distinction as follows:

> Unlike question trails, which utilize a sequence of concrete questions that make explicit reference to the facts of the case; checklists typically utilize a sequence of abstract questions of law that reflect the elements of the case.[1268]

7. Directing a jury by reference to factual questions is not new. In 1973, Lucas J in a murder prosecution arising out a fire lit at a nightclub, framed the questions for the jury as:

> (1) Did Finch light the fire?
>
> (2) Did Stuart counsel Finch to light the fire, in the sense which I have tried to explain it to you?
>
> (3) Did the fire cause the death of Jennifer Davie?

[1266] Jonathan Clough et al, 'The Judge as Cartographer and Guide: The Role of Fact-based Directions in Improving Juror Comprehension' (2018) 42 *Crim LJ* 278, 293, 295-6.

[1267] Jonathan Clough et al, 'The Judge as Cartographer and Guide: The Role of Fact-based Directions in Improving Juror Comprehension' (2018) 42 *Crim LJ* 278, 283; Benjamin Spivak, James RP Ogloff and Jonathan Clough, 'Asking the Right Questions: Examining the Efficacy of Question Trails as a Method of Improving Lay Comprehension and Application of Legal Concepts' (2019) 26(3) *Psychiatry, Psychology and Law* 441, 452.

[1268] Benjamin Spivak et al, 'The Impact of Fact-Based Instructions on Juror Application of the Law: Results from a Trans-Tasman Field Study', (2020) 101(1) *Social Science Quarterly* 346.

> (4) Did Finch light the fire in the prosecution of the unlawful purpose of extortion carried on in conjunction with Stuart?
> (5) Was Finch's act in lighting the fire an act of such a nature as to be likely to endanger human life?
> (6) Was the offence constituted by the unlawful killing of Jennifer Davie a probable consequence of carrying out Stuart's counsel?[1269]

8. More recently, in *Clayton v The Queen*, the High Court considered the way in which a jury should be directed when the prosecution put forward three separate bases for accessorial liability in proof of murder. Noting that the three different forms of accessorial liability gave rise to a degree of repetition, the majority judgment observed that:

> The real issues in the case which the jury had to decide were issues of fact. It was for the trial judge to determine what those real issues were and to instruct the jury about only so much of the law as must guide them to a decision on those issues. It may have been possible to instruct the jury in a way that avoided repetition of what, in the end, were relatively few issues for their consideration (*Clayton v The Queen* [2006] 81 ALJR 439, [24]).

9. Similarly, the Court of Appeal in *MG v The Queen* observed that a factual question of whether the accused was awake at the time of offending would have addressed whether the act was conscious, voluntary and deliberate, but that the trial judge's attempt to subsume voluntariness within a question of intention was not appropriate.[1270]

10. Factual question directions provide ones means of giving effect to the guidance from *Alford v Magee*, where the High Court endorsed the approach of Sir Leo Cussen:

> He held that the only law which it was necessary for them to know was SO much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are. If the case were a criminal case, and the charge were of larceny, and the only real issue were as to the asportavit, probably no judge would dream of instructing the jury on the general law of larceny. He would simply tell them that if the accused did a particular act, he was guilty of larceny, and that, if he did not do that particular act, he was not guilty of larceny.[1271]

11. In the United Kingdom, factual questions (called Routes to Verdict or RTVs) have been enthusiastically endorsed by their Court of Appeal (Criminal Division), which relies on them in the following ways:

> First, the RTV enables the CACD to express confidence about how, even if not why, the jury reached its verdict. Second, by analysing the verdict and the RTV the CACD has enhanced confidence in rejecting arguments that verdicts were inconsistent. Third, in some case the RTV has been used to contextualise jury questions and allay concerns about any potential jury confusion. Fourth, RTVs help validate the way disputed evidence was left to the jury.
> ...
> The Court has, of course, also repeatedly relied on the RTV as confirmation of a failing at trial rendering the conviction unsafe—as where the elements of the offence were wrong in law, or when dealing with post-*Jogee* challenges to old joint enterprise

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[1269] *Stuart v The Queen* (1974) 134 CLR 426, 431.

[1270] *MG v The Queen* (2010) 29 VR 305.

[1271] *Alford v Magee* (1952) 85 CLR 437, 466. See also *R v AJS* (2005) 12 VR 563, 577 [54]-[56].

directions.[1272]

12. Ormerod and Thomas, however, warn of risks inherent in using Routes to Verdict:

> By reducing everything to a series of questions presented concisely and simply the subtleties of legal definitions might be lost or the law "glossed" for convenience. For example, in multi-handed murders, following *Jogee*, D2 must be shown, inter alia, to have intended that D1 intentionally kill or do GBH. The Supreme Court recognised that in some cases there will be no practical distinction between that test and whether D2 himself intended that V be killed or suffer GBH, but underlined that strictly speaking the former test is sufficient to render D2 a murderer. When crafting an RTV, judges may well be tempted by pragmatism to invite the jury to consider simply whether D2 intended death or GBH. That allows for the same RTV question on mens rea for both principals and accessories. But is this interpretation driven by the convenience of the RTV? There may well be many other instances in which RTVs risk putting a gloss on the law in a similar way.[1273]

13. A factual question style of directing the jury on particular issues has been upheld from time to time by appellate courts in Victoria, including in:

- *Quail v The Queen* [2014] VSCA 336 – Where self defence was replaced with a direction to determine whether the accused was the aggressor by bringing the gun to the scene[1274]
- *Farquharson v The Queen* (2012) 36 VR 538 – Where voluntariness was expanded through a direction that the prosecution must prove beyond reasonable doubt that the accused did not suffer from a particular medical condition which would have been inconsistent with causing death by a conscious, voluntary and deliberate act
- *White v The Queen* [2011] VSCA 441 – Where proof of the identity of the offender was expanded through a direction that the prosecution must prove beyond reasonable doubt that a different person did not shoot the deceased.

14. In *Star v The Queen*, the trial judge gave the jury a document which was described on appeal as "a series of 'integrated directions' (commonly described as a 'question trail'), as authorised by s 67 of the *Jury Directions Act 2015*". This document contained a statement of the element, the particulars of the element by reference to each charge, and a summary of the prosecution and defence case on that element for each charge.[1275] The practice of including a summary of the case as part of the question trail document is commonly followed in New Zealand, but is not proposed in the sample question trails in this Charge Book, for several reasons:

- It some cases, the final position of the parties is not known until final addresses, and there is insufficient time for the judge to prepare the summary after final addresses and before the judge's directions

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[1272] David Ormerod and Cheryl Thomas, 'Routes to verdict – what we know and what we need to know', 2021 8 *Crim LR* 615, 617 (citations omitted). See also *R v Kay* [2017] EWCA Crim 2214, [34]; *R v Atta-Dankwa* [2018] EWCA Crim 320, [29]-[32].

[1273] David Ormerod and Cheryl Thomas, 'Routes to verdict – what we know and what we need to know', 2021 8 *Crim LR* 615, 618.

[1274] But note that Priest JA, in dissent found that while simplification of issues is desirable, it must not obscure the essential issues for the jury's determination.

[1275] *Star v The Queen* [2020] VSCA 331, [42].

- Including summaries risks exacerbating the appearance that the charge is not balanced between the prosecution and defence, if the summaries are not of similar length
- Some lawyers and judges have concerns that reducing the case to writing in that way will cause the jury to pay disproportionate attention to the summary, compared to their own recollection of the evidence

15. Despite these considerations, it is worth noting that the Court of Appeal in *Star* observed that the document was likely to be of great assistance to the jury "by integrated the elements of the offences with the facts of the case in the form of easily comprehensible questions".[1276]

16. Different judges have different views on which trials are most suited to a question trail approach. On one view, question trails are best used in the most complex cases, where there is often a high degree of case management, and a need to maximise the assistance for the jury. Another view is that question trails are suitable for all cases, but the degree of difference between the question trail and the conventional checklist varies, depending on what issues are in dispute and whether there is a difference between the legal and factual issues.

Preparing factual question directions

17. The following topics in this Charge Book provide examples of factual question directions and checklists.

18. In developing these samples, the authors of the Charge Book adopted the following sequence:

    (a) Develop a hypothetical model for the trial which identifies the facts and issues in dispute

    (b) Revise the standard offence checklist to transform the elemental questions of the checklist into factual questions, based on the hypothetical model

    (c) Revise the standard offence directions to align with the factual question checklist and the issues in the hypothetical model.

19. *Jury Directions Act 2015* s 11 states:

[1276] *Star v The Queen* [2020] VSCA 331, [43].

After the close of all evidence and before the closing address of the prosecution—

(a) the prosecution must inform the trial judge whether it considers that the following matters are open on the evidence and, if so, whether it relies on them—

(i) any alternative offence, including an element of any alternative offence;

(ii) any alternative basis of complicity in the commission of the offence charged and any alternative offence; and

(b) defence counsel must then inform the trial judge whether he or she considers that the following matters are or are not in issue—

(i) each element of the offence charged;

(ii) any defence;

(iii) any alternative offence, including an element of any alternative offence;

(iv) any alternative basis of complicity in the commission of the offence charged and any alternative offence.

20. This process will provide the judge with the information required to identify what elements, defences, alternative offences and alternative bases of complicity must be considered in the form of factual questions.

21. As Maxwell P and Tate JA noted in *Quail v The Queen*:

> It is not always necessary to put before a jury matters such as self-defence or accident, or even those that are elemental, if they are not raised as an issue by the evidence.[1277]

22. The sample question trails, factual question directions and integrated directions are designed for a specific hypothetical scenario. Like all materials in this charge book, they must be adapted to address the real issues in any given case, based on the evidence and issues.

23. After preparing the proposed question trail and factual question directions, the judge should cautiously consider the following questions:

(a) Do the directions accurately reflect the factual questions which the jury must determine in the circumstances of the case?

(b) Do the directions erroneously omit any necessary elements?

(c) Are the factual questions and hence the directions organised in a logical sequence, based on the issues in the case?

(d) Where there are alternative offences, how do the answers to particular questions affect the need to consider alternative verdicts? For example, if there are issues of both identity and intention, then the jury will only need to consider alternative offences involving lesser states of intention if the prosecution proves the attacker was the accused in relation to the primary charge. For this reason, the sample factual question checklists invite the judge to identify which offence the jury should consider next, after reaching a verdict of guilty or not guilty.

[1277] *Quail v The Queen* [2014] VSCA 336, [43], citing *R v Getachew* (2012) 248 CLR 22, 27 [10], 32-3 [25].

24. While the parties are not responsible for settling the judge's charge, it is often good practice when giving factual question directions to ensure the parties know, understand and agree that all matters in dispute are covered by the proposed factual questions.

Timing of factual question directions

25. Judicial experience with factual question directions has shown some success in providing the directions before closing addresses.[1278] This may be termed the 'split charge' approach.[1279]

26. The purpose of a split charge is to ensure the jury knows and is focused on the precise questions they will need to decide before hearing the final addresses of the parties. It also reduces the incentive for parties to pre-empt some of the judge's legal directions about the offences and how the offences interact, because the jury will already have heard that information.[1280] Finally, it allows the parties to refer the jury to the question trail, and structure their addresses by reference to the questions the jury will need to decide.

27. Despite noting these benefits, split charges can also come with drawbacks. First, a split charge requires that the question trail is ready before final addresses. Depending on how the trial has progressed, it may not have been possible to prepare the factual questions in advance. This creates the risk of delay (if the judge needs time to prepare the factual question), disruption (if the judge abandons plans to use a split charge at the last moment) or confusion (if the question trail does not match the final positions of the parties and needs to be amended after final addresses). Second, the split charge remains novel, and counsel may fail to adapt their final addresses based on the jury having already received certain information from the judge. Third, there is some risk of the split charge adding to the total length of final directions and final addresses, if the judge decides it is necessary to repeat parts of the pre-address charge after addresses are complete.

28. A sample set of final directions which uses the split charge approach is provided in the following subtopics. The sample question trail directions are designed to be used with the split charge approach.

29. One consequence of the split charge approach is that the judge will not give the jury evidentiary directions or remind the jury of the evidence of arguments at the time of giving the offence-specific directions. Instead, the judge will fulfil their obligations under *Jury Directions Act 2015* ss 65 and 66 in the second part of the split charge, under the heading Judge's Summary of Issues and Evidence. As part of this summary, the judge will also provide any necessary evidentiary directions when reminding the jury about evidence to which that direction applies.

[1278] See, e.g., Sir Brian Leveson, 'Review of Efficiency in Criminal Proceedings', (2015) 78-9 [302]-[303].

[1279] This approach was adopted in the UK Criminal Practice Directions following amendments made on 30 March 2016. However, this language is no longer part of the current UK practice direction, following the comprehensive rewrite of the directions in 2023. The latest edition of the UK Crown Court Compendium, issued after the changes to the practice direction states "Proceeding by way of a split summing up – legal directions (or at least the principal ones) followed by advocate's closing address and then the reminder of the evidence – has become prevalent if not the norm in many courts" (at 1-7).

[1280] See also *UK Criminal Practice Directions 2015* 26K.16 (revoked), which states that "the provision of appropriate directions prior to the closing speeches may avoid repetitious explanations of the law by the advocates".

30. It is possible to give factual question directions without adopting a split charge approach. If a judge adopts the traditional sequence, then the factual question directions are given at the same time as they would be when giving traditional offence-specific directions. This will be, in the language of the Jury Directions Act 2015 and the terminology explained at the start of this commentary, an integrated direction if it incorporates references to the evidence and how each party puts its case into the discussion of each question in the question trail.

31. Regardless of whether the judge adopts a split charge or a traditional charge, it is important to ensure that the judge fulfils the obligation under *Jury Directions Act 2015* ss 65 and 66 by referring to the evidence and the way the parties have put their case.

11.1 Consolidated final directions – Split charge

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Note: This document replicates the directions in 3.2 – 3.9, 3.11, 3.12 and 3.15. If the case involves an intermediary, the direction in 3.14 should be added at an appropriate point.

Overview of Final Directions

Members of the jury, you have now heard all the evidence that will be called in this trial. I will soon invite counsel to address you and put arguments to you about how to approach the evidence and issues in this trial. But before that, I will first give you a question trail. This document identifies the matters you must decide to reach your verdicts in this case.

[*Associate / Tipstaff*], please give the jury the question trails.

The question trail numbers match the charge numbers on the indictment. Question trail one relates to charge one, question trail 2 relates to charge 2, and so on. The differences relate to what NOA allegedly did on each occasion, and when s/he did it. As I directed you at the start of the trial, and I will remind you again after counsel's addresses, you must consider each charge separately, using only the evidence that is relevant to that charge. It is wrong to say that simply because you find the accused guilty or not guilty of one charge, s/he must be guilty or not guilty of another charge.

[*Insert question trail offence directions*]

Using the question trails - Alternative Charges on the Indictment

[*If there are alternative charges on the indictment, add the following shaded section*]

In this case, charges [*insert principal charge*] and [*insert alternative charge*] relate to the same alleged event, and are alternatives. The prosecution does not say that NOA is guilty of both of these charges, but of one or the other.

When you are delivering your verdict[s], you will first be asked for your verdict on charge [*number*], which is the more serious charge.[1281] If you reach a verdict of guilty in relation to that charge, you will not be asked for a verdict on [*insert alternative charge*].

It is only if find NOA not guilty of charge [*number*] that you will be asked to deliver a verdict on charge [*number*].

[1281] This charge is based on the assumption that the charges are of differing gravity. If the charges are of the same gravity, it will need to be modified accordingly.

The question trails help you remember this in two ways. First, the question trail for charge [*number*] states it is an alternative to charge [*number*]. Second, the instructions in charge [*number*] direct you to go to either charge [*number*] or charge [*number*], depending on your answers.

I remind you that the accused is entitled to a separate trial of each charge, and that you must not reach your verdict by compromising between them.

Using the question trails - Alternative Charges Not on the Indictment

[*If there are alternative charges not on the indictment, add the following shaded section*]

In this case, the accused has been charged with [insert principal offence]. The law says that when a person is charged with this offence, you are entitled to find him/her guilty of the offence of [*insert alternative offence*] instead.

When you are delivering your verdict[s], you will first be asked for your verdict on charge [number], which is the more serious charge.[1282] If you reach a verdict of guilty in relation to that charge, you will not be asked for a verdict on [*insert alternative charge*].

It is only if find NOA not guilty of charge [number] that you will be asked to deliver a verdict on charge [number].

The question trails help you remember this in two ways. First, the question trail for charge [*number*] states it is an alternative to charge [*number*]. Second, the instructions in charge [*number*] direct you to go to either charge [*number*] or charge [*number*], depending on your answers.

I remind you that the accused is entitled to a separate trial of each charge, and that you must not reach your verdict by compromising between them.

Closing addresses of counsel

[Prosecuting counsel], you may now address the jury.

[*Prosecution counsel's final address*]

Thank you [prosecuting counsel]. [Defence counsel], you may now address the jury.

[*Defence counsel's final address*]

Thank you [defence counsel].

[1282] This charge is based on the assumption that the charges are of differing gravity. If the charges are of the same gravity, it will need to be modified accordingly.

Final directions

Before you leave to consider your verdict, I must remind you the principles of law you must apply when you decide the case. While I have already told you some of these principles at different times during the trial, it is important that I both remind you of what I said earlier, and place those principles in the context of the trial which has now taken place. You must apply these instructions carefully. I will also explain how the evidence and the arguments of the parties relate to the questions in your question trails. In doing this, I will have to be selective. The mere fact that I don't mention certain evidence does not mean that that evidence is not important. Similarly, the fact that I include certain evidence does not make that evidence more important than other evidence. You must consider all of the evidence, not just the parts of it that I mention. Which parts of that evidence are important or not important is a matter for you to determine. I will then explain what verdicts you may return and what happens when you have reached your verdicts.

Remember, if at any time you have a question about anything I say, you are free to ask me by passing a note to my tipstaff.

Review of the Role of the Jury

In this case, the prosecution alleges that NOA committed the offence[s] of [*insert offences*].[1283] These are the offences stated in the indictment and on your question trails. The accused has pleaded "not guilty", and so it is for you, and you alone, to decide whether s/he is guilty or not guilty of [this/these] crime[s].

You do that by answering the questions on each question trail. Your answers will depend on what you make of the evidence that has been given during the trial.

Review of the Role of the Judge

It is my role, as the judge, to explain to you the principles of law that you must apply when you are answering the questions on the question trails. You must accept and follow all of those directions.

I want to emphasise again that it is not my responsibility to decide this case – that is your role. The verdict that you return has absolutely nothing to do with me. So while you must follow any directions I give you about the law, you are not bound by any comments I may make about the facts.

As I told you at the start of the trial, it is unlikely that I will make any comments about the evidence. If I do make a comment about the evidence, you must not give it any extra weight because I, as the judge, have made that comment. You must disregard any comment I make about the evidence, unless you agree with that view after making own independent assessment of the evidence. That is what I mean when I say that you alone are the judges of the facts in this case.

Review of the Role of Counsel

Throughout the trial, counsel have presented the prosecution and defence cases. While their comments and arguments have been designed to assist you to reach your decision, you also do not need to accept what they have said. Of course, if you agree with an argument they have presented, you can adopt it. But if you do not agree with their view, you must put it aside.

[1283] This charge is drafted for cases involving one accused. If the case involves multiple accused, it will need to be modified accordingly.

Review of the Need to Decide Solely on the Evidence

I have told you that it is your task to determine the facts in this case. In determining the facts, you must consider all of the evidence that you heard from the witness box. Remember, it is the answers the witnesses gave that are the evidence, not the questions they were asked.

You must also take into account the exhibits that were tendered. These include [*insert examples*]. When you go to the jury room to decide this case, [most of/some of] the exhibits will go with you, where you may examine them. Consider them along with the rest of the evidence and in exactly the same way.[1284] [However, the following exhibits will not go with you to the jury room [*insert exhibits*]].

[*If any formal admissions were put to the jury, add the following shaded section*.]

In addition, in this case the following admissions were made: [insert admissions]. You must accept these admissions as established facts.

Nothing else is evidence in this case. As I have told you, this includes any comments counsel make about the facts.[1285] It also includes:

[*Identify other relevant matters which do not constitute evidence in the case, such as transcripts.*

It may be appropriate to insert charges relating to these matters here.]

It your duty to decide this case only on the basis of the witnesses' testimony, [the admissions] and the exhibits. You should consider the evidence which is relevant to a particular matter in its individual parts and as a whole, and come to a decision one way or another about the facts.

As I have told you, in doing this you must ignore all other considerations, such as any feelings of sympathy or prejudice you may have for anyone involved in the case. You should not, for example, be influenced by [*insert case specific examples*].[1286] Such emotions have no part to play in your decision.

Remember, you are the judges of the facts. That means that in relation to all of the issues in this case, you must act like judges. You must dispassionately weigh the evidence logically and with an open-mind, not according to your passion or feelings.

[1284] Depending on the nature of the evidence, it may be necessary to warn the jury of the possible dangers of conducting experiments in the jury room: see Decide Solely on the Evidence for further information.

[1285] If the accused is unrepresented, the jury should be told that what s/he said in his/her addresses, or when questioning witnesses, is also not evidence.

[1286] Some matters which it may be appropriate to point out (as they could conceivably give rise to prejudice or sympathy) include:

- The nature of the injuries suffered by the complainant;
- The race or ethnicity of the accused or the complainant;
- The sexual orientation of the accused or the complainant;
- The fact that the accused or the complainant are drug users.

In some cases, it may be appropriate to point out that although a party's behaviour does not accord with what the jury might think is morally acceptable, the jury is not a court of morals. Everyone has the right to be treated equally before the law.

Outside Information

At the start of the trial I also told you that you must not base your decision on any information you may have obtained outside this courtroom. For example, you must completely ignore anything that you have seen or heard in the media about this case, or about the people involved in it. You must consider only the evidence that has been presented to you here in court.[1287]

Circumstantial Evidence and Inferences

I will now give you some directions about how you approach the evidence in this case.

Evidence comes in many forms. It can be evidence about what someone saw or heard. It can be an exhibit admitted into evidence. It can be someone's opinion.

Some evidence can prove a fact directly. For example, if a witness said that s/he saw or heard it raining outside, that would be direct evidence of the fact that it was raining.

Other evidence can prove a fact indirectly. For example, if a witness said that s/he saw someone enter the courthouse wearing a raincoat and carrying an umbrella, both dripping wet, that would be indirect or 'circumstantial' evidence of the fact that it was raining outside. You can conclude from the witness's evidence that it was raining, even though s/he didn't actually see or hear the rain.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. Although people often believe that indirect or circumstantial evidence is weaker than direct evidence, that is not true. It can be just as strong or even stronger. What matters is how strong or weak the particular evidence is, not whether it is direct or indirect.

However, you must take care when drawing conclusions from indirect evidence. You should consider all of the evidence in the case, and only draw reasonable conclusions based on the evidence that you accept. Do not guess. While we might be willing to act on the basis of guesses in our daily lives, it is not safe to do that in a criminal trial.

[*In cases involving a significant amount of circumstantial evidence, add the following shaded section.]*

In determining whether a conclusion is reasonable, you should look at all of the evidence together. It may help you to consider the pieces of evidence to be like the pieces of a jigsaw puzzle. While one piece may not be very helpful by itself, when all the pieces are put together the picture may become clear.

However, when putting all the pieces together, you must take care not to jump to conclusions. It is sometimes easy for people to be too readily persuaded of a fact, on the basis of insufficient evidence or evidence that turns out to be truly coincidental. Once convinced of that fact, they may then seek support for it in the other evidence, perhaps distorting that evidence to fit their theory or disregarding 'inconvenient' facts. You must make sure that you do not do this. You must keep an open mind, and be prepared to change your views.

You may only convict the accused if you are satisfied that his/her guilt is the only reasonable conclusion to be drawn from the whole of the evidence, both direct and indirect. If there is another reasonable view of the facts which is consistent with the accused's innocence, then the prosecution will not have proved his/her guilt beyond reasonable doubt, and you must acquit him/her.

[1287] If there has been significant publicity about the case or the parties involved, it may be necessary to give a more detailed warning.

Review of the Assessment of Witnesses

You have now listened to what each witness has said, and watched how they presented their evidence and answered the questions under cross-examination. No further evidence will be given.

To decide what the facts are in this case, you now need to assess the evidence. It is up to you to decide how much or how little of the testimony of any witness you will believe or rely on. You may believe all, some or none of a witness's evidence. No one can tell you how to approach any particular witness's evidence in this regard.

It is also for you to decide what weight should be attached to any particular evidence – that is, the extent to which the evidence helps you to determine the relevant issues.

As I mentioned at the start of the trial, in assessing witnesses' evidence, some matters which may concern you include their credibility and reliability. It is for you to judge whether the witnesses told the truth, and whether they correctly recalled the facts about which they gave evidence. This is something you do all the time in your daily lives. There is no special skill involved – you just need to use your common sense.

While you may take into account the witness's manner when he or she gave evidence, you should be careful when doing so. As I noted at the start of the case, giving evidence in a trial is not common, and may be a stressful experience. People react and appear differently. Witnesses come from different backgrounds, and have different abilities, values and life experiences. There are too many variables to make the manner in which a witness gives evidence the only, or even the most important, factor in your decision.

In making your decision, do not consider only the witnesses' testimony. Also take into account the exhibits [and admissions]. Consider all of the evidence in the case, use what you believe is true and reject what you disbelieve. Give each part of it the importance which you – as the judge of the facts – think it should be given, and then determine what, in your judgment, are the true facts.

Review of the Onus and Standard of Proof

I want to emphasise again that under our justice system people are presumed to be innocent, unless and until they are proved guilty. So before you may return a verdict of guilty, the prosecution must satisfy you that [each of] the accused is guilty of the charge[s] in question. The accused does/do not have to prove anything.

The prosecution must do this by proving [each of] the accused's guilt of the charge[s] beyond reasonable doubt.

Beyond reasonable doubt is the highest standard of proof that our law demands. It is not enough for the prosecution to prove that the accused is probably guilty, or very likely to be guilty.

As I have told you, it is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so. A reasonable doubt is not an imaginary or fanciful doubt, or an unrealistic possibility.

You cannot be satisfied the accused is guilty if you have a reasonable doubt about whether the accused is guilty.

As I have told you, these words mean exactly what they say – proof beyond reasonable doubt.

The prosecution does not need to prove every fact that they allege to this standard. It is the essential ingredients or "elements" of the charge[s] that they must prove beyond reasonable doubt. To help you in your deliberations, the question trails identify each element in the form of a question. By answering the questions in a question trail, and following the instructions after each question, you will decide whether the accused is guilty or not guilty of that charge.

Judge's Summary of Issues and Evidence

I am now going to remind you of some of the evidence and arguments you have heard. Before doing so, I want to remind you again that the mere fact that I may leave out a part of a particular witness' evidence does not mean that that evidence is not important.

Similarly, the fact that I include evidence from a particular witness does not make that evidence more important than the evidence of other witnesses. You must consider all of the evidence and not just the parts of it that I mention. Which parts of the evidence are important or not important is a matter for you to determine.

I'll do this by reference to the question trails. So please turn to the first question trail.

I also want to emphasise again that it is not my responsibility to decide this case – that is your role. So while you must follow any directions I give you about the law, you are not bound by any comments I may make about the facts. If I happen to express any views upon questions of fact, you must disregard those views, unless they happen to agree with your own assessment of the evidence.

[Note – *When describing the evidence on each element, add any necessary evidentiary directions, including any from chapter 4 of this charge book, when first discussing that type of evidence*.]

Sole Evidence Direction

[*If there is a single piece of evidence relied on to prove one or more elements, add the following shaded section*.]

In this case, the only evidence that [*identify relevant elements or facts in issue*] is the evidence that [describe relevant single piece of evidence, e.g., NOA confessed to NOW]. It follows that you cannot be satisfied beyond reasonable doubt that [*identify relevant elements or facts in issue*] unless you are satisfied, beyond reasonable doubt, that the evidence of [*describe relevant single piece of evidence*] is true and proves [*identify relevant elements or facts in issue*].

Liberato Direction

[*If the case turns on a conflict between the evidence of a prosecution witness and a defence witness, and there is a reasonable likelihood that the jury will think that they must believe the defence evidence to be true before they can acquit the accused, add the following shaded section*].

In this case, there is a clear conflict between the evidence of [prosecution witness] and the evidence of [*defence witness*].

It is not necessary for you to accept [*defence witness's*] evidence in order to find the accused "not guilty". In keeping with the requirement that the prosecution must prove their case beyond reasonable doubt, you must acquit NOA if [*defence witness's*] evidence gives rise to a reasonable doubt.

This is the case even if you prefer the evidence of [*prosecution witness*] to the evidence of [*defence witness*]. It is not sufficient for you merely to find the prosecution case to be preferable to the defence case. Before you can convict NOA, you must be satisfied that the prosecution have proven their case beyond reasonable doubt.

So even if you do not think [*defence witness*] is telling the truth, but are unsure where the truth lies, you must find the accused "not guilty".

In fact, even if you are convinced that [defence witness's] evidence is not true, it is not the case that you must convict NOA. In such circumstances, you should put [defence witness's] evidence to one side, and ask yourself whether the prosecution have proved the accused's guilt beyond reasonable doubt on the basis of the evidence you do accept.

Review of Separate Consideration - Multiple Accused

[*If the case involves multiple accused, add the following shaded section*].

I now want to remind you of the significance that there are [number] separate accused. As I told you at the start of the trial, there are really [*insert number*] trials [all] being heard together for convenience.

You must be careful not to allow convenience to override justice. The accused and the prosecution are entitled to have the case against each accused considered separately.

You must consider the case against each accused separately, in light only of the evidence which applies to that accused. You must ask yourselves, in relation to each accused, whether the evidence relating to that accused has satisfied you, beyond reasonable doubt, that s/he is guilty of the offence s/he has been charged with. If the answer is yes, then you should find him/her guilty. If the answer is no, then you should find him/her not guilty.

You will note that I said you must consider the case against each accused "in light only of the evidence which applies to that accused". This is because some of the evidence you have heard in this case is only relevant to the case against one accused or another. If a particular piece of evidence is only relevant to one accused, you may only use it when deciding whether or not that accused is guilty. You must not consider it in relation to [any of] the other accused.

As part of explaining the case in relation to each charge, I highlighted the main evidence relevant to each question. I am now going to highlight the evidence which you might mistakenly think is relevant for certain charges or particular accused. [*Identify any evidence which is not admissible against particular accused*].

Review of Separate Consideration – Multiple Charges

[*If the case involves multiple charges, add the following shaded section*].

I now want to remind you of the significance that there are [*number*] separate charges.

I want to remind you that you must be careful not to allow the convenience of one jury deciding all these charges to override justice. Both the prosecution and the accused are entitled to have you consider each charge separately.

It would therefore be wrong to say that simply because you find the accused guilty or not guilty of one charge, that s/he must be guilty or not guilty, as the case may be, of another.

[*If logic dictates that a finding in relation to one charge is material to another charge, this should be clearly explained to the jury here. For example, the jury should be told if an acquittal on one charge would require an acquittal on another*.]

You must consider each charge separately, in light only of the evidence which applies to it. You must ask yourselves, in relation to each charge, whether the evidence relating to that charge has satisfied you, beyond reasonable doubt, that the accused is guilty of that particular crime. If the answer is yes, then you should find the accused guilty of that charge. If the answer is no, then you should find the accused not guilty of it.

You will note that I said you must consider each charge "in light only of the evidence which applies to it". This is because some of the evidence you have heard in this case is only relevant to one charge or another. If a particular piece of evidence is only relevant to one charge, you may only use it when deciding whether or not the accused is guilty of that charge. You must not consider it in relation to [any of] the other charge[s].

As part of explaining each question trail, I highlighted the main evidence relevant to each question. I

am now going to highlight the evidence which you might mistakenly think is relevant for certain charges. [*Identify any evidence which is not admissible against particular accused*].

Unanimous and Majority Verdicts

I will now explain the verdicts you can return and how you reach them.

In almost all criminal cases, a verdict of guilty or not guilty must be unanimous. That is, whatever decision you make, you must all agree on it.

So if, for example, you are to find NOA guilty of [insert charge 1], then you must all agree that [he/she] is guilty of that offence. In exactly the same way, if you are to find NOA not guilty of [insert charge 1], then you must all agree that [he/she] is not guilty of that offence.

However, this requirement does not mean that you must all reach your verdict for the same reasons. Indeed, you may each rely on quite different reasons for making your decision. For example, you may each rely upon different parts of the evidence, or you may each emphasise different aspects of the evidence.

You also might reach your verdict by reference to different questions on the question trail. For example, for a verdict of not guilty, some of you might find the accused not guilty at question [*number*], while others might find the accused not guilty at question [*number*].

[*If the question trail provides several different paths to guilt, and extended unanimity is not required, add the following shaded section*]

Similarly, for charge [*number*], some of you might find the accused guilty at question [*number*], while others find the accused guilty at question [*number*].

What is important is that, no matter how you reach your verdict, you all agree. Your verdict of guilty or not guilty [in relation to each charge / for each person charged] must be unanimous, the agreed decision of you all.

You may have noted that I said that a verdict must be unanimous in "almost all" criminal cases. There are some circumstances in which a jury is allowed to give a majority verdict instead of a unanimous verdict. However, this is not yet one of those cases and may never be. I will tell you if the situation changes. Until I do, you should consider that your verdict[s] of guilty or not guilty must be unanimous.[1288]

Using the question trails - Materially Different Issues or Consequences

[*The following shaded section may be added if evidence has been presented which shows possible alternative bases of responsibility for a particular offence, and the bases involve materially different issues or consequences. For example, culpable driving causing death due to gross negligence or culpable driving causing death due to intoxication: See Unanimous and Majority Verdicts*.]

I now need to mention an exception to the general rule I just explained, that you only need to agree on your verdict, and not your reasons for the verdict.

Charge(s) [*number*] contains alternative pathways to guilt and a verdict of guilt requires special unanimity. Special unanimity means you agree on a verdict of guilt due to the same question on the

[1288] This paragraph should be excluded in cases of murder, treason, offences against sections 71 or 72 of the *Drugs, Poisons and Controlled Substances Act 1981*, or offences against a law of the Commonwealth, as majority verdicts are not permitted in relation to such offences (*Juries Act 2000* s 46).

question trail.

[*Identify the questions which allow conviction through materially different findings*].

You can only find NOA guilty of this/those charge(s) if you all agree on the same pathway. For example, this might mean that all of you answer yes to question [number]. Or it might mean that all of you answer yes to question [*different number*].

If some of you find NOA guilty by answering yes to question [number] and others find [him/her] guilty by answering yes to question [*different number*], then you do not have the kind of special unanimity the law requires for this charge. If that happens, there are three ways forward. First, those of you who reached a verdict at question [number] could go on to consider the remaining questions, and decide whether they would also reach the same verdict if they did not stop at question [*number*]. Second, you could discuss the case further as a jury, each of you putting forward your views and listening to the opinions of your fellow jurors, to see whether anyone's views change. But you must always reach your own decision, according to your personal view of the evidence. You must not change your mind merely to reach a unanimous verdict. Third, you could let me know that you are unable to agree on a verdict, and I can give you further directions.

Importantly, special unanimity only applies to [*identify relevant charges*] and only to a finding a guilt. There is no equivalent principle for finding NOA not guilty. You could have 12 different ways of finding NOA not guilty, and that would still be unanimous.

Using the question trails - Multiple Discrete Acts

[*The following shaded section may be added if evidence has been presented of multiple acts on the basis of which guilt can be found, but there must be unanimity as to at least one [or a specified number] of those acts having been committed.*

This requirement has mostly arisen in relation to a charge of maintaining a sexual relationship with a child under 16, under which the jury must agree on (at least) the same three acts having been committed from amongst all of the acts presented by the prosecution. For this reason, this charge has been drafted in relation to the requirement for agreement on three acts. If necessary, this can be amended to instead require agreement on a different number of acts.]

I now need to mention an exception to the general rule I just explained, that you only need to agree on your verdict, and not your reasons for the verdict.

If you turn to page [*number*] of your question trails, you will see that question [number] asks whether the prosecution has proved beyond reasonable doubt that NOA committed at least three of the following acts.

A verdict of guilty on this charge requires a special form of unanimity. You can only find NOA guilty of this charge if you all agree on the same three acts. If half of you thought [*identify group of acts*] were proved, and half thought [*identify different group of acts*], then even though you have all answered yes to question [*number*], you are not unanimous about the same acts and so do not have a unanimous verdict. If that happens, then you should give the tipstaff note saying that you cannot agree on one of the charges, and I can give you further directions. In the note, do not tell me which charge, or why you cannot agree.

Importantly, this special form of unanimity only applies to question [number] on [*identify relevant charges*] and only to a finding a guilt. There is no equivalent principle for finding NOA not guilty. You could have 12 different ways of finding NOA not guilty, and that would still be unanimous.

Taking a Unanimous Verdict

Once you have reached a unanimous verdict on [all of] the charge[s], you should push the buzzer in the jury room and tell my tipstaff. [He/she] will then arrange for us all to return to court.

When you have taken your places in the jury box, my associate will ask you whether you have agreed on a verdict, and what your verdict is [in relation to each charge in turn]. Your foreperson will answer "guilty" or "not guilty", according to the decision the jury has reached.

My associate will then read your verdict back to you, to confirm that what [he/she] has recorded is correct. If any of you think that what my associate has recorded is wrong in any way, you should say so immediately. The record of your verdict[s] can then be corrected.

Concluding Remarks

Questions

If, at any stage of your discussions, you would like me to repeat or explain any directions of law I have given you, please do not hesitate to ask. It is fundamental that you understand the principles you are required to apply. If you have any doubt about those principles, then you are not only entitled to ask for further assistance, but you should ask for it.

You should do this by handing a note to my tipstaff indicating what your question is. S/he will pass it to me, and after discussing the matter with counsel, we will reassemble in court to assist you.

There is really only one thing that you must not include on any note, and that is the numbers involved in any part of your discussions such as any vote within the jury. That matter must remain completely confidential to you and that includes even telling me about it in a note. Please in any note leave the numbers out.[1289]

Transcripts

[If the jury has not been provided with a transcript, add the following shaded section.]

I also want to remind you that all of the evidence in this trial has been tape-recorded and transcribed. If at any time during your discussions you wish to have a certain section of the evidence replayed to you, or have a section of the transcript [read back/provided] to you, please let me know. You can do this by providing a note to my tipstaff, outlining the part of the evidence you wish to hear.

Conclusion

I have now completed my summing-up. With a final reminder that any verdict[s] you reach must be unanimous, I ask you to go to the jury room to consider your verdict[s]. When you have reached a verdict or if you have a question, please send a note to the court through the tipstaff.

Last updated: 17 April 2024

11.2 Rape (2015) sample question trail and charge

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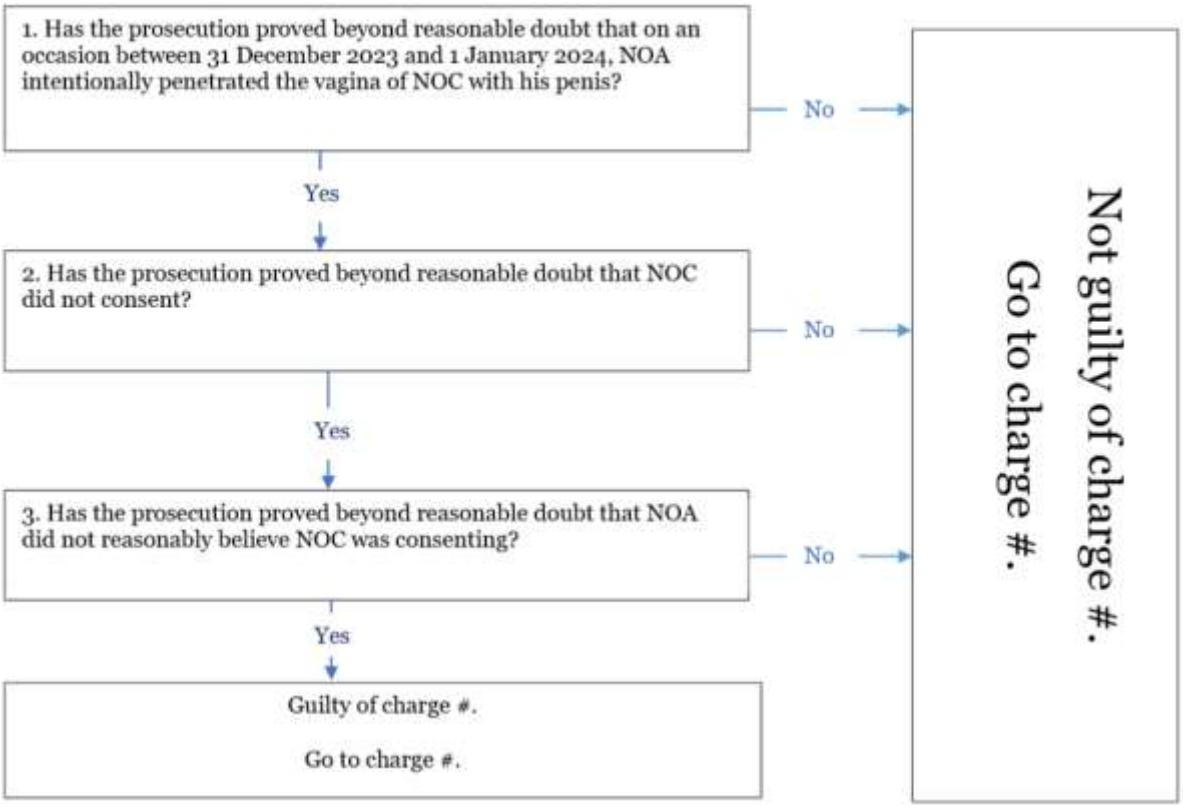
[1289] In *MRJ v R* [2011] VSCA 374, the Court of Appeal stated that jurors should be instructed to omit any information on the outcome of discussions when asking for further directions or assistance.

Charge # – Rape


1. Has the prosecution proved beyond reasonable doubt that on an occasion between 31 December 2023 and 1 January 2024, NOA intentionally penetrated the vagina of NOC with his penis?
No
Yes
2. Has the prosecution proved beyond reasonable doubt that NOC did not consent?
No
Yes
3. Has the prosecution proved beyond reasonable doubt that NOA did not reasonably believe NOC was consenting?
No
Yes
Guilty of charge #.
Go to charge #.
Not guilty of charge #.
Go to charge #.

Question Trail Charge: Rape (2015)

The first / next question trail is for charge # on the indictment, which is a charge of rape. This charge relates to what NOA allegedly did to NOC on New Years' Eve, 2020, at her house. There are three questions in this question trail.[1290]

Intentional Sexual Penetration

The first question is "Has the prosecution proved beyond reasonable doubt that on an occasion between 31 December 2020 and 1 January 2021, NOA intentionally penetrated the vagina of NOC with his penis?"[1291]

It does not matter whether the conduct occurred before or after midnight on New Years' Eve.

Lack of consent

The second question is "Has the prosecution proved beyond reasonable doubt that NOC did not consent to that act?"

Consent means free agreement. So the prosecution must prove that NOC did not freely agree to NOA penetrating her vagina at the time.[1292]

A person can consent to an act only if they are capable of consenting, and free to choose whether or not to engage in or to allow the act.

Where a person has given their consent to an act, they may withdraw that consent before the act happens or at any time while it is happening.

Remember, the question asks whether the prosecution has proved that NOC did not consent. The accused does not need to prove the complainant did consent.

No reasonable belief in consent

The third question is "Has the prosecution proved beyond reasonable doubt that NOA did not reasonably believe NOC was consenting to that act of sexual penetration?"

This question requires you to consider the accused's state of mind about the complainant's consent.

A belief will only be reasonable if there are reasonable grounds for a person in the position of the accused to hold that belief. You must consider all the circumstances when deciding whether a belief in consent was reasonable.

In looking at the evidence, you should consider whether the accused took any steps to find out whether the complainant was consenting or might not be consenting and, if so, the nature of those steps.

[1290] If you have already directed the jury about this offence, then you should modify the following directions minimise repetition and highlight charge-specific differences.

[1291] The question must be modified for other forms of sexual penetration.

[1292] If this element is not in issue, it will generally be sufficient to state that conclusion at this point and elaborate no further.

When you are considering whether a belief in consent is unreasonable, you must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent. As members of the community, you have the best idea of what the community would reasonably expect of NOA in the circumstances in forming a reasonable belief in consent.

If you find that NOA was intoxicated at the relevant time, you must not take this into account when assessing whether he/she reasonably believed that NOC was consenting.

The law requires you to consider whether his/her belief in NOC's consent would have been reasonable to a person who was not intoxicated at the relevant time.[1293]

Summary

In summary, as you can see on the question trail, if you answer no to any question, then you must find NOA not guilty of this charge. It is only if you answer yes to each question that you can find NOA guilty of this charge.

Last updated: 17 April 2024

11.3 Incest (2015) sample question trail and charge

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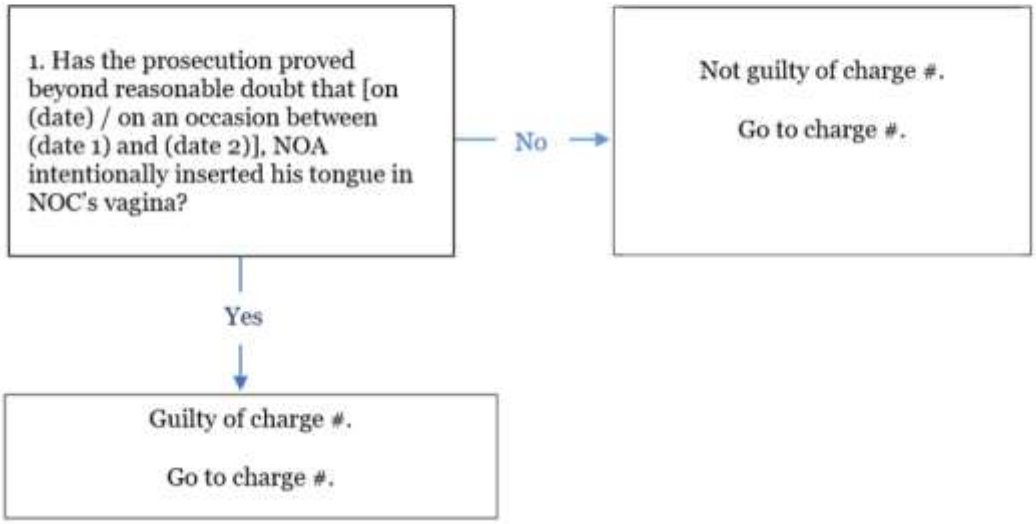
Charge # – Incest

Note: The parties have agreed that NOC is NOA's daughter, and NOA knew that NOC was his daughter.



[1293] This direction will need to be modified if the intoxication is not self-induced. See *Jury Directions Act 2015* s 47(3)(b)(ii) and Charge: Statutory Intoxication (Self-induced) for guidance.

Question Trail Charge: Incest

The first / next question trail is for charge # on the indictment, which is a charge of incest. This charge relates to what NOA allegedly did to [*identify complainant, date and any relevant information about the occasion*].[1294]

I explained to you at the start of the trial that, speaking generally, incest is a crime that involves sexual activity with a close relative. In this trial, everyone accepts that NOC is NOA's daughter, and he knew that she was his daughter. The only issue the prosecution still needs to prove is whether NOA performed a sexual act on NOC. This question trail therefore only has one question.

Sexual penetration

The question is "Has the prosecution proved beyond reasonable doubt that [on (date) / On an occasion between (date 1) and (date 2)], NOA intentionally inserted his tongue in NOC's vagina?"[1295]

For the purpose of this question, there are several principles of law you must follow.

- First, the law says that the vagina includes the external genitalia – that is the outer or external lips of the vagina. So the prosecution can prove this element by proving that NOA introduced his tongue to any extent between the outer lips of NOC's vagina.
- Second, NOA's tongue does not need to have gone all the way into NOC's vagina. Even slight penetration is enough.
- Third, there must have been actual penetration. Mere touching of the tongue to the outer surface of the external lips of the vagina is not enough.

If you answer this question yes, then you can find NOA guilty of this charge. If your answer is no, then you must NOA not guilty of this charge.

Last updated: 17 April 2024

11.4 Intentional murder sample question trail and charge

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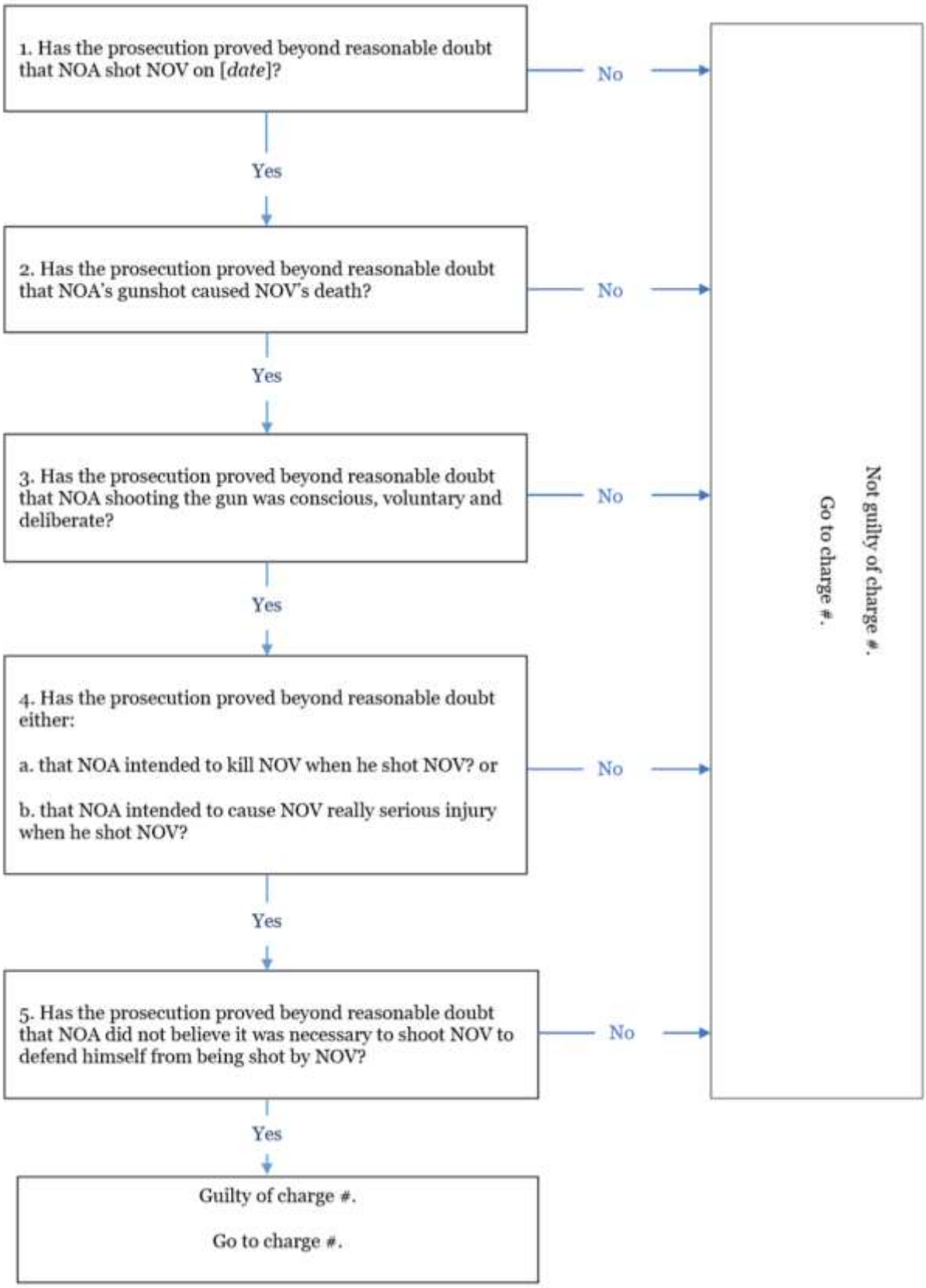
[1294] If you have already directed the jury about this offence, then you should modify the following directions minimise repetition and highlight charge-specific differences.

[1295] If the case raises the issue of medical or hygienic procedures, the question trail and directions should be modified to provide an additional question which addresses that issue – "Has the prosecution proved beyond reasonable doubt that NOA's act of inserting his tongue in NOC's vagina was not for a medical or hygienic purpose?"

Charge # - Murder



Question Trail Charge: Intentional Murder

The first/next question trail is for charge # on the indictment, which is a charge of murder. This charge relates to the allegation that NOA killed NOV by shooting him on [date].

I'm now going to take you through the 5 steps on that question trail.

Actions of accused

The first question is "Has the prosecution proved beyond reasonable doubt that NOA shot NOV on [*date*]?"

This is a question of fact you must decide. You have heard all the evidence about NOV and NOA's movements on [*date*], and we will soon hear what [*prosecution counsel*] and [*defence counsel*] say about that evidence.

Causation

The second question is "Has the prosecution proved beyond reasonable doubt that NOA's gunshot was a cause of NOV's death?"

The most relevant evidence on this question will be the medical evidence you heard from NOW.

In this case you have heard evidence that there were several people who shot at NOV, and it is uncertain who fired which bullet.

For this question, you do not need to determine who fired which bullet, or which bullet was fatal. The law says that a person does not need to be only cause of a death, or the direct or immediate cause. Instead, you may find that NOA's gunshot caused NOV's death if you are satisfied that the shot was a substantial or significant cause of NOV's death.

You must approach this question in a common sense manner, bearing in mind that your answer affects whether or not the accused is held criminally responsible for his/her actions.

Voluntariness

The third question is "Has the prosecution proved beyond reasonable doubt that NOA shooting the gun was conscious, voluntary and deliberate?" These words each have a special meaning in law, which I will briefly explain.

The term "conscious" excludes the acts of an unconscious person, such as a sleepwalker, or a person rolling over in bed.

The term "voluntary" directs you to the requirement that the shooting must have been a "willed" act, that is, one resulting from the control by the accused of his/her own actions. This excludes the acts of a person operating in one of a number of rare mental states where the mind loses control of the body's actions.

The term "deliberate" excludes accidental acts, such as the consequences of falling over or fumbling an item.

I am not going to say anything more about this question until you've heard from [*prosecution counsel*] and [*defence counsel*].

State of Mind of the Accused

The fourth question is "Has the prosecution proved beyond reasonable doubt either:

(a) that NOA intended to kill NOV when he shot NOV? or

(b) that NOA intended to cause NOV really serious injury when he shot NOV?"

When I say "really serious injury", I am not using a technical legal phrase. These are ordinary English words, and it is for you to determine what this phrase means to you as jurors.

Deciding whether NOA intended to kill or cause NOV really serious injury will require you to draw a conclusion from all the evidence. You will need to look at all of NOA's proven actions before, at the time of, and after the alleged shooting. All of these things may help you to determine what NOA intended, if you find that NOA was one of the shooters.

Remember, you can only convict the accused if you are satisfied that his/her guilt is the only reasonable conclusion to be drawn from the evidence. If there is another reasonable view of the facts which is consistent with the accused's innocence, then the prosecution has not proved the accused's guilt beyond reasonable doubt.

Self-defence

The fifth question is "Has the prosecution proved beyond reasonable doubt that NOA did not believe it was necessary to shoot NOV to defend himself from being shot by NOV?"

As I understand the defence case, one argument you will hear is that even if you are satisfied that NOD shot NOV, then NOD only did this in order to protect himself from NOV, who was otherwise going to shoot him first.

The law recognises that a person faced with a threat of death or really serious injury can defend themselves, even to the point of killing their attacker.

This question requires you to consider NOA's state of mind at the time of the shooting and what motivated his/her actions. You must consider the issue from the accused's perspective. If NOA personally believed that NOV was going to shoot him/her, then you answer this question on that basis. Even if you find that NOA was mistaken about that belief.

In answering this question, you must look at all the circumstances. You must take into account the emergency of the situation and not judge NOA's actions with the benefit of hindsight. You may also need to consider whether NOA was the original aggressor, and whether any threat posed by NOV was itself an act of self-defence against NOA's aggression.

I will have more to say about those circumstances after you have heard from the prosecution and defence. But one key principle to remember when answering this question is that the prosecution must prove NOD *did not* act in self-defence. The accused does not need to prove that s/he *did* act in self-defence.

Summary

In summary, as you can see on the question trail, if you answer no to any question then you must find NOA not guilty of this charge. It is only if you answer yes to each question that you can find NOA guilty of this charge.

Last updated: 17 April 2024